**IN THE CIRCUIT COURT OF COLE COUNTY MISSOURI**

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| CLAY COUNTY COMMISSION, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | No. 19AC-CC00055 |
| v. | ) | |
| | ) | |
| NICOLE GALLOWAY, AUDITOR OF THE STATE OF MISSOURI, | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | |

**DEFENDANT STATE AUDITOR'S OFFICE SUGGESTIONS IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

This case arises from an audit being conducted in Clay County, Missouri (the County) that was demanded by thousands of its citizens under Missouri law (§29.230) which allows citizens to submit a petition when they believe they need the State Auditor, an auditor from outside their local government, to look into matters about the use of public resources. This audit was announced in August 2018 and commenced in December.

This action for a preliminary injunction[1] (Motion) rests upon a very broad request seeking declaratory judgments that the State Auditor's Office (SAO) has no legal authority to perform any audit that looks at anything other than county government "accounts" that contain public funds. The foundation for this sweeping proposition rests upon a single sentence in a Missouri constitutional provision, a sentence that is inapplicable to the case at bar by its very terms. The Commission ignores terms in the remaining provisions of that section that are directly applicable to the case at bar. Combined with a disregard for the statute that explicitly

[1] The permanent injunctive relief is almost identical.

authorizes the very audit from which the Commission attempts to escape, the Commission adds a cursory survey of old case law that has been limited or superseded by statutory law and more recent Missouri Supreme Court opinions.

The Commission's motion for a preliminary injunction represents an extension of this erroneous reasoning to a series of proposed judicial commands that are vague (unenforceable), illogical, and unnecessary. Far from preserving the *status quo*, the proper role of a preliminary injunction, the Commission seeks to place itself and this Court as ongoing, real-time arbiters of what the State Auditor may review in this audit, thereby acting as managers and supervisors of the audit. The Commission seeks to accomplish this through prohibiting the Auditor from even *attempting* to obtain information without first making a case to the Commission or this Court. But the underlying case involves records that are entirely under the control of the Commission and beyond the reach of the SAO without a court order. Nevertheless, the Commission represents that it needs this injunction to prevent access to such information.

Although the State Auditor is fully entitled to inspect records and solicit testimony that is related to any lawful audit, the SAO has no authority to *compel* production of any such evidence independently--and in fact can only do so after proving its case to a court on an action to enforce a subpoena. No such action has been filed--and even if such an action is reasonably certain to occur, the specifics of what records or information would be sought is, at this time, purely speculative. Accordingly, there is no present controversy with respect to the Commission meeting minutes at issue in this litigation. Preliminary injunctive relief with

respect to these records--or any records--is not necessary.[2] Moreover, as the principal assertion of the Commission is that the State Auditor is without authority to do more than examine the "accounts" of the County, the underlying claim is without merit. Because there is no action before this Court to enforce a subpoena, the case is not ripe.

**STANDARD OF REVIEW**

The decision whether to grant preliminary injunctive relief is subject to a four-part inquiry. *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996). The court must consider: (1) the likelihood of success on the merits of the underlying claim; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) whether others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Id*. at 839-40. Plaintiff "must make some showing of probability of success on the merits before a preliminary injunction will be issued." *Id*.

**FACTUAL BACKGROUND**

The following background facts are offered here to assist with an analysis of the argument. These are facts found in the Commission's pleadings, including attachments:[3]

[2] The Commission also offers a conclusory allegation that an unconstitutional "performance audit" is being conducted. The Commission does not define this term or refer to the statute authorizing such audits. Most importantly, the Commission pleads no facts in support of this contention. The absence of pleaded facts on this issue is consistent with the SAO's argument that the entire matter is, at this time, nonjusticiable and advisory in nature.

[3] These facts are set forth in the First Amended Petition. The inclusion herein is not intended to denote an admission by the Auditor because the Auditor has not yet filed an answer.

The citizens of Clay County, Missouri successfully gathered over 9,000 signatures to request an audit of their county by the State Auditor, almost 8,000 of which were certified by the Clay County Board of Election Commissioners. This total was sufficient to meet the requirements of §29.230. The County was informed of the impending audit on or about August 27, 2018. FAP, ¶5, Exhibit A to FAP.

By the correspondence of December 18, 2018, the Commission was informed that the audit was commencing. Such correspondence included the audit objectives and procedures and the responsibilities of management. FAP, ¶6, Exhibit B to FAP.

On January 24, 2019, in a letter from the SAO General Counsel to the Commission and its administrator, the Commission was informed that audit staff had requested meeting minutes, including those that were closed, on several occasions, but the only response after approximately one month, was that the County staff was consulting with legal counsel about "opening" the requested records. Exhibit C to FAP.

The Commission's response came from trial counsel, inquiring about the relevance of attorney-client communications and personnel matters--and stating directly that the Commission did not consider that the State Auditor had any authority beyond the financial post-auditing of the County's accounts. Exhibit D to FAP.

A subpoena was served for production of the minutes on the same day the present action was filed. FAP ¶15, Exhibit F to FAP.

To avoid the necessity of an additional hearing on a temporary restraining order, the SAO suggested, and Commission counsel agreed, to a joint, agreed-upon order suspending the

administrative subpoena, the date for performance of which had not yet arrived. That order remains in effect.

## ARGUMENT

In the underlying case, the Commission seeks the extraordinary remedy of a declaratory judgment and injunctive relief against the State Auditor in a prematurely filed case that attempts to forestall a county audit, requested by its citizens, on the grounds of a hypothetical alleged injury. By statute, the SAO is to be granted access to relevant records of entities subject to audit, access that may be subject to judicial determination by the SAO seeking enforcement of a subpoena. But this case is not related to any legal proceedings commenced by the SAO to enforce a subpoena. At the time of the filing of the original petition, no subpoena had been served or even mentioned. This case represents a global challenge to the authority of the State Auditor to perform her legal duties, using the mere possibility of a subpoena enforcement action as a jumping-off point. This challenge is based upon the assumption that the SAO may gain access to attorney-client communications, access that can only be achieved by voluntary compliance of the Commission, or by court order to enforce a subpoena. Such an order can only be obtained by filing an action for enforcement in which the SAO bears the burden of proof. In other words, no injunction is necessary to protect any of the Commission's records.

Accordingly, the SAO is not presently able to gain access to any records not voluntarily provided by the Commission except by administrative subpoena subject to court review prior to enforcement. For this reason alone, a preliminary injunction is unnecessary.

Additionally, the Commission is not entitled to preliminary injunctive relief because findings that support the factors to consider in granting such relief are not present here:

- The Commission cannot meet its burden of showing likely success on the underlying merits of the action because the entirety of the Commission's argument in support of its request for declaratory and permanent injunctive relief is a plainly erroneous statement of law: "The Auditor's authority *only* extends to examining *accounts* which receive or expend public funds." Commission's Memorandum, p. 1 (emphasis added).[4] Such a position is unsupported by the plain language of the Missouri Constitution, Missouri statutes, and case law interpretation of both.
- The Commission cannot demonstrate that irreparable harm will result in the absence of an injunction because the harm alleged by the Commission is hypothetical and, even if actual, is adequately protected by an action at law. Further, there can currently be no harm that would warrant a preliminary injunction because the SAO has already agreed, and the Court has ordered, no enforcement of the present subpoena without further order of Court.
- Because the audit of the County is one demanded by the County's citizens in a petition, the broad declarations and injunctive demands of the Commission would effectively either stop the audit or so severely limit it that the concerns of the County's citizens would be squelched. This is a direct harm to the taxpayers of Clay County, Missouri, and

[4] The "Commission's Memorandum" refers to the Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction.

undercuts the public interest in permitting citizens to petition their government for an accounting of the use of public funds, and to rely on the State Auditor to do so.

- The Commission's requested injunctive relief is also too indefinite to be enforceable. An injunction must be sufficiently specific that it permits enforcement without the need for external proof and another hearing. The Commission's requests for injunctive relief are a combination of gag-orders and commands to obey the law--none of which are proper injunctive commands.

## I. The Commission is not likely to succeed on the merits because the Commission erroneously bases all of its declaratory relief on the proposition that the State Auditor may examine only "accounts" into and out of which public funds flow.

The Commission emphatically asserts that the State Auditor's authority is limited to a "post-audit" review of the books, and anything beyond that is unconstitutional. Since this assertion is the lynchpin of the Commission's underlying case, and is plainly incorrect, the Commission cannot succeed on the merits as pled in their First Amended Petition. The Commission's argument essentially ignores most of the language in Article IV, Section 13, as well as the caselaw interpreting those sections and all of Chapter 29, RSMo, to reach its conclusions.

### A. The State Auditor is authorized by the Missouri Constitution and required by statutes to conduct a full audit of the County, not limited to a financial review.

In addition to certain required duties established in Mo. Const. Article IV, Sec. 13 (Section 13), the Missouri Constitution requires the State Auditor to perform audits and investigations that are required by law. Missouri law requires an audit of a county of the state when demanded by citizen petition. §29.230. Such an audit is defined under state law to be "an independent, objective assessment of the stewardship, performance, or cost of

government policies, programs, or operations." §29.005(2). By its own terms, clarified by the Missouri Supreme Court in *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012), the State Auditor's duties are those that *relate to* the supervision and auditing of the receipt and disbursement of public funds, and not limited to "financial audits" that consider only whether the entities books fairly represent its financial condition.

**1. The SAO is authorized by the Missouri Constitution to perform audits and investigations required by law.**

This case is ostensibly based on a request for the Commission's board meeting minutes, particularly the closed minutes. Obviously, it is in such meetings that discussions and decisions on County business are made. The Commission asserts that the SAO's request to examine its closed meeting minutes is beyond the authority of the State Auditor because "[t]he Auditor's authority *only* extends to examining *accounts* which receive or expend public funds." Commission's Memorandum, p. 1 (emphasis added). The Commission concludes that "the County has complied with the audit by allowing the Auditor access to all accounts of the County which receive or expend public funds," including "all employees who handle or oversee the direct receipt or expenditure of funds." FAP, ¶¶10, 12.

In support of this notion that the State Auditor may only examine "accounts," the Commission refers to but a few words from the Missouri Constitution's provisions on the authority of the State Auditor: that the State Auditor shall "post-audit the accounts of all state agencies" and that "no duty shall be imposed on [the State Auditor] by law which is not related to the supervising and auditing of the receipt and expenditure of public funds." FAP, ¶18

(quoting Mo. Const. Article IV, Sec. 13). But those few words do not come close to unpacking the authority-granting terms in Section 13.

The plain language of Section 13 provides much broader authority to conduct audits and more--and provides that additional duties may, in fact, be imposed by law provided such duties are *related to* the use of public funds:

> The state auditor shall have the same qualifications as the governor. He shall establish appropriate systems of accounting for all public officials of the state, **post-audit the accounts** of all state agencies and audit the treasury at least once annually. **He shall make all other audits *and investigations* required by law**, and shall make an annual report to the governor and general assembly. He **shall establish appropriate systems** of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. **No duty shall be imposed on him by law which is not *related* to the supervising and auditing of the receipt and expenditure** of public funds.

Sec. 13 (emphasis, bold and italic, added). The Commission chooses to look only at the term "post-audit" and the focus on the "direct" receipt and expenditure of public funds.

In essence, the Commission argues that the State Auditor is limited to conducting financial post-audits even though no such limit appears in the plain language of Section 13.[5] This is not a restrictive reading of the language. It simply ignores much of it.

[5] The use of the term "post-audit" in Section 13, when read in context, is not a limitation on authority, but an imposed duty. *McFadden v. Kelly*, 722 S.W.2d 110, 111 (Mo. App. W.D. 1986) (recognizing this as a "duty" in its analysis of the appropriateness of a subpoena). *See also Director of Revenue v. State Auditor*, 511 S.W. 2d 779, 783 (Mo. 1974) (finding a post-audit of a state agency to be mandatory). By allowing for other duties to be imposed by law, other kinds of audits may be imposed on agencies in addition to what this constitutional provision requires--so long as those duties are related to the receipt and expenditure of public funds.

The language relied upon by the Commission is not applicable to a county audit. The "post-audit" provision relates to accounts of "all state agencies." Certainly, the County is not claiming to be a state agency subject to a discretionary "post-audit" by the State Auditor.

Furthermore, *Director of Revenue v. State Auditor*, 511 S.W. 2d, 779, 783 (Mo. 1974), cited by the Commission as authority for its drastic restriction of the authority of the State Auditor, is distinguishable on at least three critical points. First, that case, an audit of the accounts of a state "agency," is addressed to the second sentence of Sec. 13 (the "post-audit" reference). The case at bar is addressed to the third sentence ("all other audits and investigations required by law"), which does not refer to a "post-audit" and does not contain the limiting term "accounts." Second, *Revenue* was not a dispute over the scope of the audit. It was limited to a consideration whether the State Auditor was entitled to individually identifiable tax return information. On that note, that court did not rule that the State Auditor was categorically prohibited from obtaining such information. The court ruled that the purposes stated by the auditor for seeking the information did not require breaching the statutorily mandated confidentiality of such information (the identity of individual taxpayers). *Revenue*, 577 S.W.2d at 783. Finally, the dispute in *Revenue* did not turn on the court's definition of an "audit." The parties stipulated to a definition that the court used in its reasoning. *Id.* at 782. Contrary to the Commission's use of *Revenue*, the authority in the case reaffirms that the State Auditor's authority to inspect is determined by the purposes of the audit itself, not some predetermined bright line between a financial audit and some other audit required by law. In *Revenue*, the purposes of the audit were determined by the type of audit that the parties apparently agreed upon:

> The parties stipulated that **'audit' means:** 'An **examination of financial statements** by an independent auditor in order that the auditor may present an opinion as to the fairness with which the financial statements present the financial position of the entity audited.'

*Id.*

In the case at bar, the meaning of the term "audit" is defined by statute, which stands in stark contrast to the Commission's limited view of an "audit:"

> an independent, objective assessment of the ***stewardship, performance, or cost of government policies, programs, or operations***, depending upon the type and scope of the audit. All audits shall conform to the standards established by the comptroller general of the United States for audits of government entities, organizations, programs, activities, and functions as presented in the publication Government Auditing Standards[.]

§29.005(2) (emphasis added). On its face, the statute defines an audit as more than merely assessing the fairness of the financial picture of the auditee by examining its books.

Long after the decision in *Revenue*, the Missouri Supreme Court considered the proper meaning of the terms "post-audit" and "audit" in a case dealing with an attempted audit of the State Auditor by the Oversight Division of the Joint Committee on Legislative Research, a case raising issues of separation of powers. *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228 (Mo. banc 1997). Applying the plain and ordinary meaning of these terms as supplied by the dictionary, the high court found that the term "audit" means, "'a methodical examination and review of a situation or condition (as within a business enterprise) concluding with a detailed report of findings.'" *Id*. at 232 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 143 (1976)). Quoting the same source, the court found that a "post-audit" is "an 'audit made subsequent to the final settlement of a transaction.'" *Id*. The court concluded that "[t]hese common definitions make clear that a post-audit has at its core financial transactions."

The statutory definition in §29.005(3) is entirely consistent with the definition and principles in these cases.

A more recent examination of the meaning of Section 13 and statutes imposing duties on the State Auditor is one cited to, but not discussed, by the Commission. In an action to prevent certain initiatives from appearing on the ballot, plaintiffs in a series of cases consolidated in *Brown,* 370 S.W.3d 637, challenged the constitutionality of a statute that delegated to the state auditor the duty to prepare fiscal notes and summaries. Like the Commission in the case at bar, the plaintiffs in *Brown* cited *Farmer v. Kinder*, 89 S.W.3d 447 (Mo. banc 2002), as standing for the proposition that the delegated duty (in that case to the State Treasurer) went beyond the constitutional limits using "related to" language similar to the language in Section 13. The word "account" is not mentioned.

But in *Farmer*, the State Treasurer was delegated a duty of collecting abandoned property, one that was held not related to "the receipt, investment, custody and disbursement of state funds[.]" *Brown*, 370 S.W.3d at 651. The *Brown* court observed that the State Treasurer was seeking to expand her powers by exercising powers over property. *Id.* But with respect to the State Auditor being delegated the duty of preparing fiscal notes and summaries, the *Brown* court described the matter very differently:

> While *Farmer* found the treasurer was seeking to expand her powers beyond those enumerated in MO. CONST. art. IV, sec. 14, the provision at issue here is distinguishable because it explicitly grants the auditor authority to conduct "investigations as required by law." As such, **the auditor is not seeking to expand his power but rather is exercising a power he expressly possesses.**

*Id.,* at 652 (emphasis added). *Brown* not only addresses the investigative authority granted to the Auditor, but it reaffirms that the powers of the State Auditor are not limited to financial

post-audits of accounts. Other duties that are delegated to the State Auditor are constitutional if they are "related to" the supervising and auditing of the receipt and expenditure of public funds.

The language of Section 13 authorizes duties for the Auditor that include, at a minimum:

- conducting audits of the receipt and expenditure of public funds;
- conducting audits *related to* the receipt and expenditure of public funds;
- supervising the receipt and expenditure of public funds;
- supervising matters that are related to the receipt and expenditure of public funds;
- performing investigations of the receipt and expenditure of public funds;
- performing investigations *related to* the receipt and expenditure of public funds.

From the foregoing, it is plain that the State Auditor's authority is not limited to conducting financial, post-audits of accounts.

**2. The State Auditor is required to audit Clay County, Missouri, and is not limited to a financial verification of the County accounts.**

The authority of the State Auditor for the purposes of the petition audit of the County appears in the third sentence of Section 13: The State Auditor has authority to conduct "audits and investigations required by law." This audit is a mandatory audit by statute under the specified circumstances:

> The state auditor **shall audit** any political subdivision of the state, including counties having a county auditor, **if requested to do so by a petition** submitted by a person who resides or owns real property within the boundaries or area of service of the political subdivision and such petition is submitted to the state auditor within one year from requesting the petition from the state auditor and is signed by the requisite percent of the qualified voters of the political subdivision.

§29.230.2 (emphasis added).

The term, "post-audit," is not included in this statutorily mandated audit, nor is there any expression in Section 13 that such additional audits required by law are to be limited to financial post-audits of accounts, or any other particular kind of audit. Section 13 certainly has no language limiting the State Auditor to performing a verification of the "financial picture of an agency after-the-fact." Commission's Memorandum, p. 10.

**3. The State Auditor is fully authorized to conduct a "performance audit" and such audits are integrated into the definition of an "audit."**

In arguing that the State Auditor is limited to conducting financial audits of "the books" of the County, the Commission makes specific objection to the State Auditor's efforts to conduct a "performance audit." With respect to closed meeting minutes, the Commission has this to say: "Since the Auditor cannot show that all of the County Commission's closed session minutes are **relevant to a financial audit**, the only possible explanation for her demands is that she wishes to conduct a performance audit." Commission's Memorandum, p. 12 (emphasis added). Apparently, the Commission sees the relevance of closed meeting minutes in performance audits.

There is no chance of success on the merits for this outrageous claim for the reasons discussed in the preceding section of these Suggestions: The Commission is reading **only** the portion of Section 13 that commands the State Auditor to "post-audit" the accounts of "state agencies," not to "audit" local political subdivisions like Clay County, Missouri.

In the Commission's discussion of the alleged unauthorized "performance audit," a term the Commission does not define or describe with alleged facts, the Commission fails to quote, cite to, or even mention Missouri statutes that provide for performance audits. *See, e.g.*, §§29.005(2), (6); 29.185. §29.005(6) provides the following definition:

> "Performance audits", audits that provide findings or conclusions based on an evaluation of sufficient, appropriate evidence against identified criteria. Performance audit objectives shall include, but not be limited to, the following:
>
> (a) Effectiveness and results. This objective may measure the extent to which an entity, organization, activity, program, or function is achieving its goals and objectives;
>
> (b) Economy and efficiency. This objective shall assess the costs and resources used to achieve results of an entity, organization, activity, program, or function;
>
> (c) Internal control. This objective shall assess one or more components of an entity's internal control system, which is designed to provide reasonable assurance of achieving effective and efficient operations, reliable financial and performance reporting, or compliance with applicable legal requirements; and
>
> (d) Compliance. This objective shall assess compliance with criteria established by provisions of laws, regulations, contracts, and grant agreements or by other requirements that could affect the acquisition, protection, use, and disposition of an entity's resources and the quantity, quality, timeliness, and cost of services the entity produces and delivers;

This provision goes beyond the "financial picture" audit of accounts, but is plainly related to the receipt and disbursement of public funds and consistent with the Missouri Supreme Court's definition of an audit. The Commission's attempt to circumvent this authority would require an unwarranted restrictive reading of Section 13, and indeed an outright disregard for many of its terms.

Even the overly restricted reading alone runs afoul of the rules for interpretation of constitutional provisions:

> Generally, "constitutional provisions are subject to the same rules of construction as other laws, except that constitutional provisions are given a broader construction due to their more permanent character." *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 899 (Mo. banc 2006).

*Brown,* 370 S.W.3d at 647.

The Commission appears to head in just the opposite direction, opting instead to place great reliance on a case about post-audits of the accounts of state "agencies," *Dir. of Revenue v. State Auditor*, 511 S.W.2d 779, 783 (Mo. 1974) (discussing the post-audit of the accounts of the Missouri Department of Revenue). The Commission also cites to, but does not fully address, other cases that either do not address the Auditor's powers, or support the notion that the Auditor is not restricted to post-audits of the accounts of state agencies: *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 233 (Mo. banc 1997) (invalidating a statute that purported to authorize the legislative branch to audit the State Auditor--and also affirming in *dicta* that the State Auditor has authority to audit compliance with law, not merely financial audits of accounts); *Farmer v. Kinder*, 89 S.W.3d 447 (Mo. banc 2002) (holding that the State Treasurer is not authorized to enforce collection of property under a provision limiting authority to funds); *Brown v. Carnahan*, 370 S.W.3d 637, 648 (Mo. banc 2012) (holding that a statute authorizing the Auditor to prepare fiscal notes and summaries was a proper exercise of authority to conduct "investigations" required by law, specifically distinguishing *Farmer*); *Schweich v. Nixon*, 408 S.W.3d 769, 776 (Mo. banc 2013) (holding that the State Auditor does not have standing to bring claims regarding appropriations other than those to the State Auditor's Office). These authorities were decided prior to the amendments to Chapter 29 that explicitly provide for performance audits. *See* H.B. 116 (2013) (adding new sections to Chapter 29 that appear presently as §§29.005(2), (6); 29.185).

The Commission's pleadings are lacking in facts that purport to support their objection to a "performance audit." Because the Commission pleads no facts in support of this

contention, it is impossible to analyze its merits. Accordingly, the Commission cannot be expected to prevail.

## II. The Commission cannot demonstrate that irreparable harm will result in the absence of an injunction because the harm alleged by the Commission is hypothetical and, even if actual, is adequately protected by an action at law.

The gravamen of the Commission's argument for "harm" is directed at attorney-client communications, although confidential personnel information is also mentioned. This concern is reflected in the Commission's overbroad requests for preliminary and permanent injunctive relief that would prohibit the State Auditor from even asking about records that may contain attorney-client privileged communications. But the Commission nowhere alleges that the audit team made any request for such communications. The request, as alleged by the Commission, and as shown in the subpoena attached to the Commission's pleadings (Plaintiff's Exhibit F), is for the meeting minutes of the Commission.[6]

### A. The Commission controls its records. Records the Commission does not want to produce are in no danger of being forcibly obtained by the SAO whether or not injunctive relief is issued here.

The State Auditor has no authority to simply "take" records from the Commission. It is purely up to the Commission as to whether they voluntarily grant access to their records. If they refuse, the State Auditor has subpoena authority, but if the Commission would choose not

[6] It is very likely that some closed meeting minutes would contain attorney-client privileged communications. But the subject matter of such communications is not privileged, nor is the State Auditor prohibited from obtaining such information where shown that it is necessary to the audit. §29.230; *Revenue*, 577 S.W.2d at 783 (discussed above). Matters to consider that would be relevant to such an analysis are absent here because the Commission produced nothing.

to comply with that subpoena, it would be incumbent on the SAO to file an action in court to enforce it--as opposed to a court subpoena where the party subpoenaed would file a motion to quash:

> If any person refuses to comply with a subpoena, **the auditor shall seek to enforce the subpoena before a court of competent jurisdiction** to require the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records.

§29.235.4(2) (emphasis added). *See also*, *Jackson v. Mills*, 142 S.W.3d 237, 240 (Mo. App. W.D. 2004) (Director of Department of Public Safety subject to enforcement only by the circuit court). Finding an auditee in contempt is a punishment for failure to obey the order of the court--not the subpoena of the agency.

> Such court may issue an order requiring such person to appear before the auditor or officers designated by the auditor to produce records or to give testimony relating to the matter under investigation or in question. Any failure to comply with such order of the court may be punished by such court as contempt.

§29.235.4(2).

Also relevant to the case at bar is the notion that the showing of relevancy for the subpoenaed records is one made to the court--not to the entity subpoenaed.[7] Thus, the Commission's demand for an injunction that requires the SAO to make a showing to the Commission before issuing a subpoena is inapposite. *See Jackson,* 142 S.W.3d at 240 (noting

[7] This is not to suggest that discussions between auditor and auditee staff cannot work through these matters (they usually do). But the Commission seeks a court-ordered legal compulsion to make a showing prior to compliance, a condition not found in statute. Since this is requested in both preliminary and permanent injunctive relief, the Commission would require the Court to effectively amend §§29.130 (free access to offices, records), and 29.235 (subpoena power and enforcement).

the importance of requiring circuit court enforcement (citing *State Bd. of Registration for the Healing Arts v. Vandivort*, 23 S.W.3d 725, 728 (Mo.App.2000))). Additionally, requiring a showing to the Commission (or any auditee) of the grounds for the subpoena would add a condition precedent into the statute. The plain language of the statute authorizes the State Auditor to issue a subpoena, "[i]nsofar as necessary to conduct an audit under this chapter." §29.235.4(1).

At the time of the filing of the present case, the audit team had only requested closed meeting minutes. The subpoena at issue was served the same day. No action has been taken to enforce the subpoena, and by agreement, there is an order of this Court in effect staying any enforcement action. Even so, in a hearing to enforce a subpoena, the burden of proof on the relevancy of the subpoena is on the SAO, not the party subpoenaed. The alleged interest the Commission argues that it has in the confidentiality of its closed meeting records cannot be infringed by the State Auditor without a hearing in which the SAO has the burden of proof. No such proceeding has been commenced, and no such proceeding is in any way imminent. The Commission has failed to show any harm at all, much less the likelihood of irreparable harm.

**B. Releasing confidential records to the State Auditor is not equivalent to making such records public.**

It appears that the Commission complains that the release of information in some of its closed meeting minutes would somehow violate the Sunshine Law (Chapter 610 RSMo), or perhaps that the Sunshine Law provides a defense to producing books and papers to the State Auditor. This argument is consistent with a discussion appearing in the correspondence between the parties where the production of closed meeting minutes was reported to be

subject to the Commission's decision on whether to "open" those documents. Exhibit C attached to FAP. Put more plainly, the Commission argues that the Sunshine Law--a law that governs what records must be made available to *the public*, also controls the degree to which the State Auditor has access to the books, accounts and papers as concern the duties of the State Auditor.

The notion that the State Auditor has no greater access to books, accounts, and papers than the general public would have is not reflected in Missouri law, nor is there any legal citation offered by the Commission. The Sunshine Law is addressed to the relationship between the public and the government, expressly stating the policy of making records and meetings "open to the *public*." §3610.011.1 (emphasis added).

The Sunshine Law does not address the State Auditor's access to closed records. But a statute, not cited by the Commission, does: "The state auditor shall have free access to all offices of this state for the inspection of such books, accounts and papers *as concern any of his duties*." §29.130 (emphasis added). Built into this statutory language are words of limitation: Access to records must "concern" the State Auditor's duties. There is no language limiting the State Auditor's access to only public records.

The Commission's stated confidentiality concerns are inapplicable as well. Providing records to the State Auditor does not effect an opening of closed records and does not authorize making public that which is otherwise made confidential by law. Auditor workpapers and related supportive material are required to be kept confidential. §29.200.17. The Sunshine Law provides that communications between a public governmental body and its auditor, including all audit work product, is confidential. §610.021(17). And auditors are under an oath

that they "will not reveal the condition of any office examined by him or any information secured in the course of any examination of any office to anyone except the state auditor." §29.070. Violation of this oath constitutes a felony. §29.080.

It is incumbent on the Commission to make a showing of irreparable harm. But there can currently be no harm that would warrant a preliminary injunction because the SAO has already agreed, and the Court has ordered, no enforcement of the subpoena without further order of Court. In essence, the Commission currently has the relief requested making any preliminary injunction unnecessary.

**III. The public will suffer a direct injury in the delay of an audit that the citizens of Clay County, Missouri requested after a tremendous amount of effort. The public at large depends upon the State Auditor to hold government accountable for its handling of public resources.**

An impediment to government accountability through timely transparency is an injury to all citizens. But in this--a petition audit--thousands of Clay County's concerned citizens requested that the State Auditor conduct an independent audit of their government, the importance of which is recognized formally in the establishment of a statutory process for making just this sort of request. §29.230.

The Commission asks for orders from this Court that would dismantle this authority and require the State Auditor, who is obligated to perform an "independent" audit (*see* §29.005(2)) to "make a case" to the Commission--not merely for access to attorney-client privileged communication--but for access to anything the Commission does not deem relevant. For both preliminary and permanent relief, the Commission seeks "[a]n order prohibiting the SAO from taking any action to enforce any demand for any records that are not relevant to a post-audit of accounts." We can tell from the letter from Commission counsel (Exhibits D to FAP) and the

Commission's Memorandum, that the Commission deems anything not directly connected with the post-audit of the accounts of the County to be beyond the reach of the State Auditor.

Requiring a "case to be made" to the Commission prior to seeing any records that do not appear, to the Commission, to be related to the independent audit of the County would allow the Commissioners, the very administration under the citizen-demanded audit, to conduct or steer critical parts of the audit. In essence, the citizens request for an outside audit would be immediately defeated.

**IV. The Commission's requested injunctive relief is also too indefinite to be enforceable.**

Although what is at issue before the Court under this Motion is the preliminary injunctive relief requested in the Motion, in the underlying case, the request for permanent injunctive relief is substantially the same. The Commission seeks orders from this Court to prohibit the SAO from taking any action to enforce its demands for closed meeting records generally, closed meeting records containing attorney-client communications, and any records at all that are not relevant to a post-audit of the County accounts.

An injunction must be sufficiently specific that it permits enforcement without the need for external proof and another hearing. This is addressed specifically in court rule:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the petition or other document, the act or acts sought to be restrained[.]

Rule 92.02(e); *Blackburn v. Richardson,* 849 S.W.2d 281, 292 (Mo. App. S.D. 1993).

The Commission's requests for injunctive relief are a combination of gag-orders and commands to obey the law--none of which are proper injunctive commands.

The challenge with proposing injunctive relief in this case is a direct result of its unnecessary nature. If an SAO subpoena was self-enforcing, the matter might be different. But it is not. If the Commission truly wants to protect certain information or records, they can help themselves without the intervention of the court.

The first request is as follows:

> From taking any action to enforce her demands or subpoena for closed session minutes of the Commission without first showing that particular minutes are relevant to specific areas of her audit, and that the specific area of her audit is within her limited authority under the Missouri Constitution;

The request is vague with respect to what "action" is referred to. The only action under the law is one to enforce a subpoena (discussed earlier). It is also vague with respect to the party with the authority to determine relevancy. Absent a pending court action, which cannot be filed until after relevancy is determined, the Commission and the SAO are the only parties left. Thus, the SAO would be required to make a showing to the Commission before it served a subpoena.

Because there is no pending action to enforce a subpoena and, therefore, no particular records to request, further argument is speculative. However, as a general proposition, the Sunshine Law permits closure of meetings only for specified purposes--almost all of which involve the discussion of government business that is related to the receipt and expenditure of public funds and, therefore, related to the audit. These include, but are not limited to:

- Litigation, settlement agreements. §610.021(1).
- Leasing and purchasing of real estate. §610.021 (2).
- Hiring, firing, and other personnel matters. §610.021(3).
- Preparation and discussions to negotiate with employee groups. §610.021(9).

- Specifications for competitive bidding. §610.021(11).
- Sealed bids related to a negotiated contract. §610.021(12).
- Communications with the County auditor. §610.021(17).
- Records related to the procurement of security systems. §610.021(19(a)).

The statutory structure for obtaining records allows for all the "process" that is necessary. Because it does so, an injunctive command to seek only that which is relevant to the audit is nothing more than a command to obey the law. An injunction to obey the law is improper and violates Rule 92.02(e). *City of Clinton v. Terra Foundation, Inc*., 139 S.W.3d 186, 193 (Mo. App. W.D. 2004). *See also*, *Wyman v. Missouri Department of Mental Health*, 376 S.W.3d 16, 25, n.2 (Mo. App. W.D. 2012) (questioning whether an injunctive command that merely restates obligations under the law was proper).

The Commission's second request suffers from the same deficiencies as the first, but includes the Court as the supervising party:

> From taking any action to enforce her demands or subpoena for closed session minutes protected by the attorney-client privilege or the attorney work product doctrine without first obtaining an order from this Court showing that a recognized exception to the attorney-client privilege or work product doctrine applies to specific minutes the Auditor wishes to review[.]

In this request, the Court would become a real-time arbiter of what the SAO may request, even before a subpoena is served. To follow its logic, the SAO would be required to come before the Court and prove that certain records it has never seen contain some measure of attorney-client privilege (or not), and obtain leave to serve a subpoena that very well could be back in front of the court on an action to enforce. This would require the Court to hold the case open for the duration of the audit. There is no procedure like this in law and, as discussed

previously, there is an existing procedure in law that provides process and protection to the auditee (the action to enforce the subpoena). The Commission does not address this process or show in what way it is inadequate. Unlike the first request, this request makes new law and procedure, and does so on unstated grounds.

Finally, the Commission's third request:

> From taking any action to enforce any demand for records that are not relevant to a post-audit of the accounts of the Commission into which public funds are deposited or expended, as this represents the outer limits of the Auditor's powers under the Missouri Constitution.

The State Auditor is not limited to a post-audit of the accounts of the County as discussed above. Even if the term "audit" was substituted for "post-audit of the accounts," this is an unlawful command to "obey the law," which is not an appropriate injunctive command (discussed above).

The injunctive relief requests are the same in the Commission's requests for preliminary and permanent injunctions, and suffer from the same infirmities. Requests 1 and 2 are essentially requests that the SAO be prohibited from adhering to Missouri statutes and the Missouri Constitution. As set forth earlier, the SAO is entitled to access to records relevant to an audit, and is granted the power to have a subpoena enforced in court if shown to be appropriate under the law. It is a circular argument: The way in which the SAO makes a case in court for certain records is to serve a subpoena that is later filed in an action to enforce it. The Commission is asking the Court to require that the SAO obtain a court order to issue a subpoena if the request is for attorney-client privileged information, and to obtain the permission of the Commission to pursue a subpoena for any other records. Granting request 3 would invalidate not only Missouri statutes, but also a large portion of Section 13 itself.

## CONCLUSION

From the foregoing, the Commission's Motion for a Preliminary Injunction should be denied. It is entirely based on a misreading of Article IV, Section 13 of the Missouri Constitution, and a complete disregard of applicable statutes. Most immediately, though, the Commission does not need extraordinary relief to protect records that are entirely under its control.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and related attachments were delivered via the Court's electronic filing system on March 13, 2019 to attorneys of record:

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