

1 IN THE CIRCUIT COURT OF MISSOURI
2 19TH JUDICIAL CIRCUIT, DIVISION I
 HONORABLE JON E. BEETEM, JUDGE

3 MISSOURI ALLIANCE FOR)
4 FREEDOM, INC.,)
)
5 Plaintiff,)
)
6 vs.) 17AC-CC00365
)
7 NICOLE GALLOWAY,)
)
8 Defendant.)

9 TRANSCRIPT OF PROCEEDINGS
10 JANUARY 3, 2018

11 APPEARANCES

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25 Kaye F. Asel, Certified Court Reporter
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1 P R O C E E D I N G S

2 THE COURT: All right. We're on the record in
3 17AC-CC00365, Missouri Alliance for Freedom versus
4 Galloway. For the Plaintiff I've got Ben Hurst and Ed
5 Greim. For the Defendant, or Respondent, I've got Joel
6 Anderson and Paul Harper.

7 We're here today on a couple of different issues. Let
8 me start out and ask some general questions so I can kind
9 of figure this out. Since May 26th -- this is for the
10 Plaintiffs -- are there any further Sunshine Law letters
11 sent to the Auditor's office that are relative to this
12 lawsuit? I'm aware that there are other lawsuits.

13 MR. GREIM: No, Your Honor, there are not.

14 THE COURT: So the universe of claims that I'm dealing
15 with, is I have three or four letters?

16 MR. GREIM: That's right. I think you've got four
17 letters or three letters.

18 THE COURT: Okay. So the Harper/Nelson correspondence
19 with the Department of Revenue are all included in one
20 letter?

21 MR. GREIM: That's right.

22 THE COURT: The Treasurer, second letter, the
23 Treasurer audit, the May 8th letter, 26th letter is the
24 Galloway correspondence?

25 MR. GREIM: That is right, Your Honor.

1 THE COURT: I'm now asking you, Defendant, are you
2 aware of any other requests? Do you have those three
3 requests?

4 MR. ANDERSON: We have those three requests. We're
5 aware of no other requests for documents that are a part of
6 this lawsuit.

7 THE COURT: For this as I'm well aware of. Okay.

8 You know, part of their ripeness argument, it is sort
9 of the moving target argument, and I have -- You're not the
10 only people doing this, so this is nothing new and unique
11 to the court. I have to figure out what the request is. I
12 have to figure out what the response is, and then I have to
13 figure out whether the response is in compliance with the
14 law. The other thing is, if there are records that they
15 choose not or refuse to disclose, whatever it is, we don't
16 necessarily get to use the discovery process to get the
17 records which are protected, okay? So any other way --
18 That is kind of how this has to work. So the question
19 then -- And I've limited discovery to the process of which
20 they were responding because I thought we could move
21 forward on that issue. Because as I gathered from reading
22 Plaintiff's petition, you had some disputes about the
23 process or you thought the process didn't comply with the
24 law or just how we know that we're actually getting what we
25 ask for, so that discovery, I assume, has been conducted,

1 is being conducted? Nothing has been conducted.

2 MR. GREIM: No. Your Honor, if I could just very
3 quickly walk through the procedure here. We had our -- Do
4 you mind if I stand? I'm used to --

5 THE COURT: You may.

6 MR. GREIM: We had our hearing on September 27th.
7 That was on a motion for protective order and it was on a
8 motion to dismiss.

9 THE COURT: Okay.

10 MR. GREIM: So discovery was stayed at that time until
11 the motions to dismiss were decided, so we got no
12 discovery.

13 THE COURT: Okay.

14 MR. GREIM: Now, in the Schaaf matter, we got limited
15 discovery on the venue issue but in this matter nothing.

16 THE COURT: Okay.

17 MR. GREIM: So, Your Honor, we argued then that there
18 were a couple of ripe issues. It is not really just a
19 process. It is the closure of a couple of discreet bodies
20 of records. The only problem is, we can't -- we don't have
21 the envelope information for those records, so we can't say
22 they are closing this letter between Paul Harper and so and
23 so as a certain date, we think that should be open. We
24 just know the category that has been closed. And we pled
25 what we want in discovery is the envelope information, to

1 know how many are in that category and from who to who and
2 what is the specific subject beyond the topic of what those
3 are.

4 THE COURT: Would this be analogous as to what I would
5 think about as privileged law?

6 MR. GREIM: Yes.

7 THE COURT: You refer to it differently in your
8 pleadings but that is what I'm thinking.

9 MR. GREIM: Yes.

10 THE COURT: All right. Now, having considered the
11 extensive universe out there, can someone from Defendants
12 tell me where you are on dealing with -- recognizing that
13 you have to identify, you have to evaluate, determine
14 whether or not a privilege or confidentiality or some other
15 restriction applies, where are you on that?

16 MR. ANDERSON: We have in our view -- And it is
17 because of the uniqueness of the office of the Auditor.
18 Granted, just about every state agency has some level of
19 confidential records or closed records. The Auditor's
20 office is a little bit different and we are very, very
21 concerned with getting anywhere close to audit records
22 themselves. And when I say "audit records" -- And I can go
23 through this in greater detail so we're clear what we're
24 talking about. They are very different than like an
25 attorney-client privilege law. There you usually have a

1 date, who it was to, who it was from, general subject
2 matter, something you can tell that is privileged. Work
3 product is a similar kind of way to address things. But
4 those are records that are confidential in terms of their
5 content, whereas audit files, records related to audits,
6 the entire record is made confidential. The fact it's
7 an -- An attorney-client communication isn't typically held
8 to be confidential maybe in some situations, but the fact
9 the communication is confidential is because of what the
10 communication says.

11 When you are talking about audit files, we're getting
12 into lots of classes of communications, far too many to
13 even try to enumerate, but I think we don't have to go much
14 beyond the statute and published opinions we already have
15 to see that the fact of the communication is revealing who
16 it was to and from may be revealing, and that is just an
17 auditor doing their normal everyday work duties of auditing
18 agencies. That is not to mention situations where
19 whistleblowers come up. And these aren't accumulated
20 concerns because there is a great effort to find out how an
21 auditor does things, why the auditor does things, what are
22 the procedures, what procedures they are going to use.
23 When you start trying to log that kind of thing, we're
24 really getting in to audit papers and that's a very
25 dangerous thing for us to be doing. We don't think we

1 should be there with the audit papers because the request
2 was worded as, give us all files related to this audit and
3 that audit. If you're going to word a request that brings
4 you squarely within a confidential statute, the answer is
5 an emphatic no.

6 Now, they have other requests and that is
7 communications, one for communications, all the
8 communications from auditors and general counsel, that is
9 going to be onerous. There is another log of the office,
10 they asked for other communications on the Auditor itself.
11 That is a little bit different. All of that isn't going to
12 be audit paperwork. It may be closed for other reasons but
13 not all audit, but you are still talking about close to
14 20,000 of just non-audit e-mails alone, not hard copies,
15 other forms of communications, just e-mails, 20,000, to
16 have someone doing in a sense, also an onerous amount of
17 work. Between those two things, we don't think they should
18 be getting anything in the audit papers. We can go into
19 that in greater detail.

20 As to the rest of it -- They may need some information
21 on how audits work, because it is not just the statute, it
22 is not just the statute, it is not just the Missouri
23 constitution, but Missouri statutes to my surprise is
24 pretty much incorporated by reference to the federal audit
25 standards book in its entirety in the statute. It is a

1 complicated matter.

2 So where we are on this, is trying to do a log of
3 20,000 documents, is going to require an attorney because
4 it is mostly attorney-client privilege, something we can't
5 give to a secretary, and we won't give to a secretary.
6 And there is no documents specified they want, just all
7 communications, so they've got thousands and thousands of
8 documents. And the complaint that they made more
9 explicitly I think in the brief filings and the petition is
10 not that there are particular documents they are looking
11 for or even facts pled from which you could conclude that
12 maybe, for example, documents are being hidden for
13 protection, but they just want to see it, want to see it.
14 Because we don't trust the facts that support the petition
15 is really just on information and belief, we filed a
16 protective order, not so much to say they don't get
17 anything, but they've already gotten 10,000 documents. But
18 looking at the pleadings, we filed a protective order and
19 said we should get to the end of this process to at least
20 look and see what you have before you start coming to us
21 saying that you haven't gotten something. And from the
22 things I've seen and heard in the press and so forth, I
23 have reason to believe that maybe they haven't really
24 looked at things they have already. Be that as it may,
25 documents have been closed, attorney-client privilege,

1 personnel records, the usual litany of computers, that is
2 all there, but what we haven't done is try to put 20,000
3 entries in a log trying to describe each and every one of
4 those.

5 THE COURT: 20,000 documents refers to just the
6 correspondence?

7 MR. ANDERSON: Just the e-mail correspondence.

8 THE COURT: E-mail correspondence.

9 MR. ANDERSON: I could give more figures. That's
10 enough.

11 THE COURT: Generally that is what you are talking
12 about. That is separate and distinct from --

13 MR. ANDERSON: That is non-audit.

14 THE COURT: Right. That is separate and distinct from
15 what the audit is?

16 MR. ANDERSON: Yes. Yes.

17 THE COURT: Do you think we should make a
18 determination of what is audit such that we could clearly
19 carve that out?

20 MR. GREIM: Your Honor, we absolutely think that. And
21 I just have to say, gosh, there are so many things that
22 were just said that are mixing and matching categories. We
23 haven't had a chance to really orally argue this motion
24 yet. I think we could clear up some of this difficulty.
25 And I won't go into it now because I want to follow along

1 with your question, but I think we've answered this
2 question in a little chart that we prepared. You've
3 already seen it once.

4 THE COURT: Okay.

5 MR. GREIM: It is just longer now because it has the
6 rest of the stuff we learned from looking at the media and
7 from their other requests, so I would just offer this up to
8 you, along with a -- That's the chart.

9 THE COURT: Okay.

10 MR. GREIM: There is also a page from our brief that
11 talks about what has happened. And then finally a
12 discovery plan which we think would handle -- would avoid
13 the issues that they are talking about and would get us an
14 answer. If I could, Your Honor --

15 THE COURT: Have you seen this we're looking at?

16 MR. ANDERSON: Last night about 5:00 p.m. and once
17 today. I don't mind using it for demonstrative purposes
18 and discussion, but as far as evidence on the record, we
19 object.

20 MR. GREIM: Your Honor, we're not trying to move it
21 into evidence.

22 THE COURT: Right.

23 MR. GREIM: We want to move this to talk about the
24 issues. But I want to go back to the question you just
25 posed. I think looking back at the transcript from the

1 27th of September, Your Honor, this is where I think things
2 ran into a halt and maybe this is why we've had no
3 discovery in this case.

4 I just heard arguments today for the first time that
5 have never been raised in any of the motions for protective
6 orders that have been filed. But I think our earlier
7 argument about an audit still responds to what they've
8 said. Now, there are two things, Your Honor, under the
9 statute relating to audits that are confidential. The
10 statute does not have some murky concept that apparently,
11 according to what we've just heard today, is even stronger
12 maybe than the attorney-client privilege or stronger than
13 attorney work product. Statutes do not say that. They say
14 that there are two things that are protected. In section
15 29.070 and 32.057, which is incorporated by part of the
16 Sunshine Law, 610.021(7), it says communications between
17 the auditor and auditee, that is one category.

18 THE COURT: Right.

19 MR. GREIM: Number two, auditor opinions or records
20 used to perform the audit and so that, that would include a
21 second set of things. Some of those are communications
22 with the auditee. Some of those are going to be internal
23 records of the actual people working on the audit at the
24 Auditor's office.

25 And way back when, back in early October, I think we

1 were responding to their provisional motion -- it's page 7
2 of our opposition brief -- we did a diagram. Records
3 related to the audit is what we requested in the Sunshine
4 request and then the two categories are the core materials
5 that we did request but we're not trying to get in to the
6 lawsuit. We're not trying to get those. We're trying to
7 get a number. And some of the things that Mr. Anderson
8 talked about they have closed. The things that are not
9 within the number -- that are within the number, not within
10 the core, these are political discussions about, gosh,
11 should we audit this agency or talking to friends in the
12 media about what audits may be coming or other things about
13 the audit that are not covered by confidentiality, those
14 are things we want. We are very, very interested in the
15 Auditor's decision making on whether and when to do audits
16 of specific agencies, the exercise of the Auditor's
17 discretion in choosing to do this. Those communications
18 are, whether or not they now have been put in the audit
19 file, they are not made confidential under the statute.
20 And, Your Honor, we don't, we don't have to wait to learn
21 more about exactly what those communications were because,
22 as we've already pled in our petition, in response to our
23 request the Auditor said, well, you can have the audit
24 itself and later she said, you can have my press releases
25 about the audit. Everything else she said is closed. She

1 didn't say, gosh, we have nothing in this office other than
2 these two core confidential areas. They don't exist. That
3 would be a different matter. Instead, she said, no,
4 everything else related to the audit is closed and so there
5 is our issue. Not once -- They've had five months to say,
6 this is actually a no set, we're fighting about nothing
7 here. We've never had these other discussions, there is no
8 records. Instead, they've said they are closed. And as
9 soon as they say that we can say, ah ha, the statute does
10 not protect the other records. It only protects the core.

11 Now, until we can get a log of what these records are
12 we can't argue about -- We're going to have to see what
13 they are. We're going to have to see, at least the court
14 will have to see exactly what these discussions were. We
15 think that they are not closed at the end of the day. The
16 whole point of the law is to avoid releasing them all.

17 Now, you'll hear other concepts being mixed in to try
18 to make that issue murky. The 20,000 e-mails get
19 mentioned. The claim that we're trying to get the audit
20 files in discovery, I still hear that. We're not trying to
21 do those things. And the 20,000 e-mails are a different
22 topic. We've got to stay in each lane as we address these
23 issues or it is going to lead to more delay because I think
24 the court will think that one point relates to another,
25 that is why we have our chart, Your Honor.

1 Now, let me quickly switch over -- Well, before I move
2 on. The issue with the decisions to audit and the
3 communications with other people about the audits, those
4 are the middle counts, those have been ripe ever since
5 July. There is no more production being made. There is no
6 dispute that they are closed. It is time -- We've asked
7 for a log since the late summer. And so for the first time
8 we've just heard today, not even in all their protected
9 order motions, that, wow, maybe the federal guidelines for
10 government audits, those are all incorporated in Missouri
11 law. Maybe there are confidentiality provisions in there
12 and they are going to argue that now applies in Missouri.
13 Your Honor, what is the next argument going to be? We're
14 going to hear another argument in two more months and we're
15 never going to get to this. We think that the most
16 important part of this case is getting to those logs on the
17 issue of what is related to an audit and getting that
18 number of documents. We need to find out what those are.
19 There may not be that many records on that set, but we
20 don't even know that, they won't even tell us that. Again,
21 we've had no discovery whatsoever in this case so we don't
22 know.

23 MR. ANDERSON: I don't want to interrupt, it is your
24 question, but I want to respond to that.

25 MR. GREIM: I'm frustrated. If I could just continue.

1 The other issue with the 20,000 e-mails, that relates
2 to Harper and Nelson, that has been produced, other than
3 the tail end of Harper, and you've seen our briefing on
4 that. And then everything from Galloway has allegedly been
5 produced many, many months ago.

6 Now, we have a little bit of a different issue with
7 the Harper, Nelson and Galloway, and that's the top row and
8 the bottom row of our chart. The issue there right now is
9 texts. We now know that there actually were texts on the
10 State phones that were being used by these officials, we
11 know that. And we know from Barbara Wood, we didn't
12 understand it at the time when she was testifying in court,
13 but we know that she says, well, she relied on Mr. Harper
14 for that review and that there are no texts, so she said
15 there are no texts, yet the records that have been produced
16 show that texts did occur. Where are they? Where are
17 they?

18 And then separately there was a public statement made
19 by -- I know we're beyond the pleadings now. I'm just
20 trying to show you what we've got to get in to. There was
21 a public statement made that says, well, the texts are
22 preserved in some sort of a non-texted form. And, you
23 know, I guess that they could be dumped into e-mails and
24 kept as e-mails, we don't know. But the point is, that is
25 why we have discovery and we've had absolutely nothing on

1 that. So we have a proposal for a log on the e-mail side
2 and that is in a discovery plan; we've been working on this
3 for a long time to try to limit what the obligation would
4 be there.

5 But, Your Honor, what we propose on the e-mails is,
6 let's cut out anything that is about litigation, anything
7 about the lawsuit in which the Auditor is involved. It may
8 be non-privileged but we're willing to just cut all those
9 out, and so whatever is left that hasn't been produced
10 from -- I think Harper is probably the meat of it here,
11 that is not about litigation, other than this lawsuit. If
12 it is about this lawsuit, there is a good chance that it
13 may not have legal advice. It is the kind of thing that
14 would normally go on a privileged log anyway, but
15 everything else could be gone. And in our view that ought
16 to lead to a log that they still have some privilege on
17 there, but mainly it is going to be about the distinction
18 between business advice, political advice for a top
19 political person in the office, and legal advice. I mean,
20 that is the distinction out there. It is happening with
21 the governor's office right now, okay?

22 So we can't just say, well, it is too hard, we're not
23 going to explore with the Auditor, we're just going to let
24 that go, too hard, we just can't litigate it. Your Honor,
25 we think that is the way to handle this, is on the e-mails

1 let's do a log and we can cut out anything that is even
2 about litigation because we're just going to say we don't
3 care about it, we're just going to say we don't care about
4 it, we're going to move forward, and I think that should
5 cut out a vast majority of things that are privileged.

6 We've got a plan for moving ahead. We think that if
7 we can get the logs and then we can have certain dates for
8 discovery on destruction or loss of records while we've
9 been litigating the case and then the delay, the process,
10 you know, how do these records get found and preserved, if
11 we can do that, we can be done with this case and we can
12 "t" this up for a decision on I think what will be a
13 relatively small body of audit-related records that are not
14 covered by the confidentiality provisions in the statute.

15 And then there's the question of delay exfoliation.
16 We need to know why they didn't run search terms for the
17 responsive materials until weeks after this lawsuit was
18 filed. How could that possibly be? And maybe there is an
19 answer but now that we have the records about this, it is
20 time, Your Honor, to get it in discovery, so that is our
21 proposal.

22 THE COURT: Mr. Anderson.

23 MR. ANDERSON: I'll start off by saying, with all due
24 respect, I'm not sure what Mr. Greim is talking about. As
25 far as I know, search terms were run because the requests

1 were acted on when we got them so I don't know what
2 newspaper they've been reading this out of. Some records
3 to a log of e-mails about this lawsuit, that would be two
4 months after the request. I don't know that that was part
5 of their Sunshine Law request, maybe they were talking
6 about something else.

7 I want to start with, and I'm sorry to interrupt in
8 your case, but I wanted to split it up so I don't forget
9 what points they were making, but I want to go to the
10 confidential nature of the audit files. Confidentially
11 provisions related to these files are very broad, they are
12 not a couple of categories. 29.217 requires that work
13 papers and related supported materials shall be kept
14 confidential, including interpretation, advisory opinions
15 or other information or materials used to rely on in
16 performing the audit. It is very broad. That is what our
17 auditors do, they are constantly making plans and trying to
18 figure out how to get their jobs done, that is the bulk of
19 that material. They are also asking the general counsel
20 for opinions on the law, how they should interpret things,
21 that is going back and forth, and that's why that should be
22 a category of its own.

23 If the statute isn't clear enough, we attached it to
24 one of our briefs, or probably more than one, there is an
25 old AG opinion that looked at the same language. The

1 relevant language -- I'm skipping around to just try to
2 get to the point of the relevant language of that opinion.
3 The General Assembly took great care to provide for the
4 publicity of a final audit, but it was highly sensitive to
5 the impropriety of disclosing preliminary information that
6 may or may not find its way into the audit reports.
7 Skipping along, the whole thrust of Chapter 29 is to
8 provide for formal publication of official audits and to
9 provide great care and discretion regarding material which
10 is not itself a part of the final audit. This is an
11 opinion from the Attorney General when asking about the
12 audit papers and other related papers.

13 Indeed an employee of your office who reveals such
14 information is guilty of a felony. We're confident the
15 General Assembly did not intend the Auditor itself to make
16 public preliminary information which, if released by an
17 employee of the Auditor, would be punishable by a term in
18 the penitentiary.

19 Concerning publishing, we also attached that to one of
20 our briefs, that was an order by Judge Kinder looking at
21 someone else who was trying to get the log of papers and
22 the penalty -- I'm not going through the litany of things,
23 but it pertains to predictable interest to make an agency
24 aware of such information of the audit test, the validity
25 of the test, access to working papers to persons supplying

1 information. This is where -- This is an example of why
2 you have proper law. You are communicating with somebody.
3 Who are you communicating with? There was a communication
4 to some agency. If we take all the information out for
5 their log, they are going to have to get into problematic
6 information for the log on the audit papers.

7 Disclosure of unverified subjected opinions of
8 examiners, public disclosure from potential criminal
9 prosecution, these are all the things that we find in audit
10 papers. These restrictions are in addition to laws making
11 confidential records that the Auditor is able to get from
12 other departments. The Auditor has a huge power to
13 basically get into the paperwork of every department of
14 state government and on to the paperwork of organizations
15 that spend and receive public funds and are subject to
16 those.

17 Most noticeably in this case, this is the Department
18 of Revenue. These requests came just several weeks after
19 the Auditor issued a subpoena to the Department of Revenue
20 to produce its records and among those records there is
21 going to be individual income tax refund information. That
22 is confidential and it is in the hands of the Auditor. It
23 is confidential and in the hands of the Department of
24 Revenue. If it wasn't confidential and in the hands of the
25 Auditor, it would be by virtue of the fact that it is

1 confidential for Revenue. So it is not nearly certain
2 information contained in the records, it is the entire
3 records themselves.

4 So this idea that there is really a small carved out
5 class of audit records that is confidential that we need to
6 go into the rest of it, the diagram is wrong. It is a
7 pretty broad category. All we're interested in is the
8 paperwork generated in response to audits and performance
9 of the audit, which is how we interpreted their initial
10 request.

11 THE COURT: Let me ask you this, because I gather from
12 Mr. Greim that he doesn't really care about the individual
13 tax records and the refunds associated therewith. He would
14 be interested in how the Auditor made the decision to audit
15 the Department of Revenue, and I think you characterized
16 that as a political decision or there is a thought that it
17 was a politically motivated decision.

18 MR. GREIM: We will have to see.

19 THE COURT: Okay. Now, I can see how a letter from
20 somebody, I work at the Department of Revenue, you can't
21 believe what they are doing with the refunds, you know,
22 they are just throwing them all in the bucket and say we
23 will get back to those at the end of the summer, that
24 strikes me as a whistleblower. And I think the statute
25 addresses, don't use my name, okay? But when you get --

1 You know, the farther you get from the audit itself and
2 just the general -- Well, let's take the decision to
3 conduct an audit, are you taking the position that the
4 decision to conduct an audit is protected?

5 MR. ANDERSON: Yes.

6 THE COURT: Okay.

7 MR. ANDERSON: The decision to conduct an audit is
8 discretionary with the Auditor. Some audits are required.

9 THE COURT: Right.

10 MR. ANDERSON: And audits are also on going. We have
11 an on-going audit with the Department of Revenue, most
12 departments in the state, and they are the only ones who
13 have the records about former audits, notes we may use in
14 future audits, that is all a part of the audit paperwork,
15 and that is all a part of what is protected, and it is all
16 a part of what is addressed in why you don't get in to the
17 audits that we have.

18 THE COURT: Let me go back then. Then is it the
19 position of the Auditor that, with respect to an audit,
20 Revenue, City of Blue Springs, whatever you can think
21 about, that unless it is the final audit report or by
22 admission a press release about the final audit report,
23 which that doesn't strike me much different than a final
24 report or summary of an audit report, is it the position of
25 the Auditor that everything else that has to do with that

1 audit is covered by the audit confidentiality statute?

2 MR. ANDERSON: That sounded a little bit different.

3 THE COURT: Okay.

4 MR. ANDERSON: There will be communications about the
5 audit that may be made, for example, to the press --

6 THE COURT: Okay.

7 MR. ANDERSON: -- that happened to mention the audit,
8 that could be a related file, that wouldn't be a part of
9 the audit and wouldn't be a part of the decision
10 necessarily.

11 THE COURT: Okay.

12 MR. ANDERSON: It could be a communication that
13 references the audit that is not confidential. Am I
14 addressing your question? It sounded a little bit
15 different the second time than the first time.

16 THE COURT: I'm trying to figure out how to describe
17 that. That Dear Bob Watson, you may be interested in or
18 pursuant to your request, all I can give you is the final
19 copy of the audit or here's our press release about the
20 audit, and that is a communication related to the audit.

21 MR. ANDERSON: Sure.

22 THE COURT: Okay. Does it make a difference if it is
23 not Bob Watson, it is chief of staff to the governor, or
24 the chairman of the party, or something else like that, how
25 do I describe that? You are telling me that that is

1 external, that is a third-party communication that has to
2 do with the audit, how do I describe that, even when you
3 are telling me that we don't think that that is protected?

4 MR. ANDERSON: No, I don't. Let me step back because
5 this is one of the major points as to why I wanted to get
6 away from audit papers entirely. Let's start with whether
7 we're even talking about a Sunshine Law law request, we're
8 talking about the audits. What they asked for was all
9 records related to your audit of the Department of Revenue,
10 all records related to your audit with the Treasurer on
11 some particular issue. What little Missouri law there is
12 on the Sunshine Law is consistent with the statute. It is
13 an open records routine and that is not a request for
14 records. That is a request for information.

15 The test was set out in *Anderson versus Village of*
16 *Jackson County*, which we cited numerous times in our brief.
17 A request has to specify a record or records sufficiently
18 that are records the custodian can reasonably identify, can
19 know when they have found the records. If you ask for the
20 records in a way they have to guess, they have to solve a
21 mystery or you can collect 20,000 documents and still
22 wonder if you got them all, you may be providing
23 information that you don't really have a valid request. I
24 don't even think those are valid requests under the
25 Sunshine Law and that is part of what this challenge is

1 about. Of course, they don't know what documents they
2 didn't get because they requested everything under the
3 stars and want to index everything that was not given to
4 them.

5 Now, not everything that references the Department of
6 Revenue, not everything that references the Department of
7 Revenue's tax audit is necessarily an audit file. We can
8 certainly get in discovery about what constitutes an audit
9 file, but it is broader than what they are talking about.
10 Is it a press release, a cover letter to somebody in
11 closing, that stuff isn't a part of the audit. But they
12 have not specified any record that we could find with that.
13 And I just want to be clear, we're not waiving the first
14 element of this cause of action simply because we tried to
15 give some records, because that seems what they are arguing
16 here.

17 I don't think I've got to your question yet so I'm --
18 THE COURT: I'm trying to figure out how to have --
19 You know, all communications is sort of different.

20 MR. ANDERSON: That's different.

21 THE COURT: The audit, because I hear Mr. Greim, I
22 hear you, and it is like the passing of the night, and I'm
23 trying to figure out how to get to the same point. Can I
24 fairly characterize -- Let me say this. Do you think that
25 Mr. Greim's summary of the May 2nd request relative to

1 Revenue, okay, and the May 8th request relative to
2 unclaimed property, okay, does that fairly summarize his
3 request?

4 MR. ANDERSON: Well, it is hard for me to read this
5 really rapidly. And I have his requests right here. Let's
6 see what comes up here first.

7 May 8th, I request that you make available to me
8 records relating to your audit on Missouri Treasurer for
9 the year ending June 20th of 2016 and related to your close
10 out audit of the Treasurer for the period of July 1, 2016
11 to January 9, 2017. Specifically, I ask that you make
12 available to me the records below: All records relating to
13 the Treasurer's management of unclaimed property, including
14 but not limited to all records concerning fraud, scams,
15 theft or loss related to unclaimed property. It looks like
16 number 2 is an includes but not limited to all records of
17 communication within the office of the Auditor and employee
18 relating to the Treasurer's management of unclaimed
19 property. They are writing for the auditor file there.

20 THE COURT: That would strike me as a little broader
21 than what is on your chart.

22 MR. GREIM: Well, Your Honor, here's the thing. We
23 are not asking for those records. We are not challenging
24 on the Treasurer's side, we're not challenging that in this
25 case.

1 THE COURT: Okay.

2 MR. GREIM: Yes, this we asked for. But what we care
3 about in this case with respect to the Treasurer is the
4 same thing we care about with respect to Revenue, which is
5 the decision to do it.

6 THE COURT: Okay.

7 MR. GREIM: Yes, that is a broad request, but I don't
8 know --

9 THE COURT: So what you are telling me is, I made a
10 broad request, I'm suing about a narrow issue. Is that --

11 MR. GREIM: Yes. On the Auditor --

12 THE COURT: Just on this one.

13 MR. GREIM: On this one, that is right.

14 MR. ANDERSON: In that case, this is where I want to
15 say and have been saying since day one, they need to draft
16 a pleading that directs the lawsuit to what it is talking
17 about. Because when you are looking at the pleadings --

18 THE COURT: I can go back and look at the pleadings,
19 although it has taken me kind of awhile to get here, but if
20 the lawsuit is about correspondence related to a decision
21 to conduct the audit, okay, that is something we can deal
22 with and is something we should be able to deal with. And
23 if I understand your position on that issue is, other than
24 references to the completed audit, okay, other than
25 references to the completed audit, okay, and that would be

1 a copy of your audit, here's the press release about the
2 audit, you asked us about the audit, this is what I can
3 tell you, so carving that, which I would describe as
4 records to the completed audit, okay, then your position is
5 everything else is covered by the statute making what the
6 Auditor does confidential.

7 MR. ANDERSON: I would have to say that is the
8 position speaking somewhat in the abstract. We looked at
9 each document to try to determine this, yes.

10 THE COURT: But for the most part -- I mean, I'm not
11 hearing anybody talking about a document that mentions the
12 Department of Revenue audit prior to the completion of the
13 Department of Revenue audit that is going to fall in that
14 category, and that wouldn't be under your definition of
15 related to.

16 MR. ANDERSON: I don't believe they were denied any
17 documents that referenced the Department of Revenue's
18 audit. At the time there was not an audit paper. I
19 believe they were given all the documents that we have on
20 the Department of Revenue's audit that were not audit
21 papers. Now, in the first, the first release, all they got
22 was the audit itself.

23 THE COURT: Right.

24 MR. ANDERSON: They got a subpoena, and I believe
25 there was a couple of letters attached to the subpoena.

1 MR. HARPER: Not the audit.

2 MR. ANDERSON: Not the audit. We haven't released
3 the audit. We did release the subpoena, that is public.
4 There were other documents that were attached, got that in
5 three days; we didn't have to think about that, we knew it
6 was public, gave to it them. We didn't hear anything from
7 them one way or the other about what we gave them until
8 they filed the lawsuit. We took a look at it; they
9 mentioned communications like with the press and we
10 re-looked at that and found documents that would be, that
11 would be releasable that were not a part of the audit.
12 There has been no effort to not release documents by
13 calling a part of the audit. We've gave them to you.

14 MR. GREIM: Well, Your Honor, two corrections to that.

15 THE COURT: Okay.

16 MR. GREIM: Actually, at first, the Auditor's office
17 claimed that everything else was closed and then later gave
18 us the subpoena, but at this point we have it.

19 But I guess the point I want to circle back to is, it
20 would be very interesting to learn from the Auditor's
21 office that every other document they have that basically
22 have nothing about the decision to audit, there is no such
23 records that exist, in which case the answer should not
24 have been they're closed, it should be, you know, we have
25 nothing else. We only have what we got from the auditee

1 and then we have the internal work papers, we basically
2 have the exact things covered by the statute, but that is
3 not what they did. And today in this courtroom we have now
4 heard a dispute about this issue about the decision to
5 audit someone.

6 MR. HARPER: Your Honor --

7 MR. GREIM: They are saying it is a part of the audit
8 file, and we're saying that it is not a part of the audit
9 file. That is the issue where we've had a dispute going
10 since the very beginning of this case. And when we get the
11 log, I think we will be able to see whether those exist.
12 One thing to remember, Your Honor, we're not asking for
13 them to put on the log all of the things that are
14 confidential under the statute. What we actually put on
15 our claim, and what we've been saying for some time is,
16 let's carve out the communications between the auditors and
17 the audited agency. You don't have to list those on the
18 log. We know they are confidential. We don't need to go
19 through that exercise. The work product, opinions or
20 advice developed by the line auditors -- by that I mean the
21 people actually doing the work -- during the performance of
22 an audit relating to those communications, don't even put
23 those on the log. We don't want to see the envelope
24 information for those. But if it is not one of those
25 categories, we do want to see that.

1 MR. HARPER: Your Honor, I think there is --

2 COURT REPORTER: Whoa, whoa! I can't get two
3 people.

4 THE COURT: Paul, I'll give you a shot.

5 MR. GREIM: And, Your Honor, then we can see whether
6 those things are truly a part of the audit file. But it is
7 not our burden at the outset to say a leaker within the
8 Auditor's office told us that there is all this other
9 information. We have our own log of it but we haven't
10 actually seen the contents and so now we can file a
11 lawsuit. The point is, we've defined the category already
12 and they've said no, we don't believe those need to be
13 produced to you, we think those are closed. At that point,
14 Your Honor, we have a dispute that has been joined. The
15 next step is, okay, what are the records in that category
16 and that's what the log would do.

17 THE COURT: Mr. Harper.

18 MR. HARPER: Your Honor, I think that, I think that
19 one thing that needs to be clarified, what is and is not an
20 audit work paper, and I agree there should be some
21 discovery on that. Quite frankly, I think sitting down and
22 doing an interrogatory with our Director of Quality Control
23 would be beneficial here because as an auditing agency we
24 have to follow the yellow book standards under the statute
25 and quite frankly under federal laws, too, because we audit

1 federal programs. What is and is not a work paper is
2 actually defined by those audit standards, and I believe
3 that some of the things you've heard here are not
4 accurately describing what is required in the yellow book
5 to be audit work papers. In the statute it specifically
6 says that auditor work papers and related supported
7 material are closed.

8 The question I think that we're dancing around here
9 is, what is an audit work paper? Well, what is an audit
10 work paper? You have to look at what an audit work paper
11 is using those audit standards, and I believe that, that
12 the Plaintiff is looking at that much more narrowly than
13 the standards. Quite frankly, our audit or our office has
14 to be audited by other auditing agencies through a peer
15 review process to ensure that we're putting everything
16 correctly in the work papers, and I believe that having
17 some limited discovery what is and is not an audit work
18 paper may be beneficial to everybody.

19 THE COURT: Let me ask you this. Assuming everything
20 you said is correspondence with -- between the Auditor and
21 other people about doing an audit of the Department of
22 Revenue or doing an audit of the Treasurer's office, either
23 one, okay, you believe that that falls within the audit
24 papers definition that you are relying on.

25 MR. HARPER: It might. It depends -- Your Honor, I am

1 not being flip. The question is, is that one of the
2 documents that actually is used and relied on for making
3 that decision, does it lead to entering into those work
4 papers? Many decision items -- Looking at what the scope
5 of an audit is, the scope of an audit begins with the
6 pre-planning and close through, all those pre-planning
7 documents are actually a part of the work papers.

8 THE COURT: But getting back to, how about the letter
9 that says, hey, you ought to audit these people.

10 MR. HARPER: If a letter like that exists, most
11 likely, maybe, maybe not, depending on what else it says in
12 that letter.

13 THE COURT: See, therein lies -- This is where I think
14 I started this conversation this morning, maybe that is
15 where we should go first, because clearly I get from Mr.
16 Anderson that you believe that the protection of audit
17 papers -- And I use that term very generically. I agree
18 with you, I believe the statute is broader than Mr. Greim
19 reads it. The last time I read one of these very narrowly
20 on the Sunshine Law, I got it back it. You know, therein
21 lies a dispute, you know. God forbid we are looking for a
22 dispute before we even talk about it.

23 I'm trying to figure out how to move this forward
24 without personally having to read 20,000 e-mails and
25 requiring you to break them all down. I mean, I'm getting

1 from Mr. Greim today and I'm looking at your petition, you
2 know, requires Mr. Anderson to be a little clearer, we're
3 really talking about this discreet group of communications,
4 we're talking about the decision and communications of
5 third party.

6 MR. ANDERSON: I was in full standing position before
7 he was.

8 THE COURT: All right. Mr. Anderson.

9 MR. ANDERSON: Thank you. Judge, this is one of the
10 reasons why -- I'm not sure what the objection to it is, it
11 sometimes is done all the time, but if you have a problem
12 with the pleading, file an amended pleading to focus the
13 case, unless, of course, the pleading is okay to begin
14 with, facts develop later and you can then amend the
15 pleading. But we're still starting with -- This is why we
16 really want to focus on our motion to dismiss. It's very
17 basic, but it's really to get them to file and focus on
18 where we're going. Maybe we can agree on something, maybe
19 we can't, but the only talking that has been done on this
20 case has been pretty much me and Mr. Greim. We haven't
21 heard anything from the Missouri Alliance for Freedom until
22 the lawsuit and not after that either, so maybe we can get
23 going with some of this.

24 So we focus on the motion to dismiss. First element
25 is the request. When it comes to audit papers -- this is

1 something I'm going to harp on more than anything else --
2 you can't ask -- It is like send me all the confidential
3 files from the CIA, please. We're not going to give them
4 to you. Please catalog for me what we need. Send me all
5 the documents from the CIA or all the communications from
6 the director of the FBI. You've got to be able to identify
7 what you are talking about. And when you say audit-related
8 files, it doesn't identify anything. A records custodian
9 can't find that, you are guessing. We tried to provide
10 documents, they didn't like it, okay, but they didn't
11 really request anything.

12 When we get to the communications, that's different.
13 It is onerous but it is a different kind of request. The
14 records custodian can understand the to line and the from
15 line and do a search of records and then you go through and
16 see what you need there.

17 When it comes to the audit documents, they bring
18 themselves squarely within the prohibitions of the statute,
19 the yellow book, whatever, they bring themselves squarely
20 within that, and here they are arguing that maybe there's a
21 way we're not squarely arguing, let's go with that, and
22 we're trying to guess where they are going, so I don't
23 think we're going to agree going forward on how we do this
24 with terms that don't really request core audit files, line
25 auditors and things like that. The examples that you're

1 asking about with certain letters, everything mentioned in
2 an audit does not necessarily mean it's a part of an audit,
3 we've already said that. You have to look at it and
4 determine what is the communication, what is it connected
5 to, is it a part of some process; if it is not, they can
6 have it, but I don't think we've denied them that.

7 They want to get in and do exactly what they've been
8 arguing all along. We want to test to see what you've done
9 is correct and say you want to carve out a made-up category
10 about the audit files. I think the Plaintiffs should be
11 ordered to amend their pleading to focus the litigation on
12 what they want and then we can look at discovery. I don't
13 have objections to discovery in a lawsuit as a general
14 matter of principle. I do have great concern, like the
15 office of the Auditor is the, as far as I know, only state
16 official, sorry, the only state official with the ability
17 to get into records like this, and that office cannot
18 function if someone can file this kind of general lawsuit,
19 just kind of crawl your way in a little by letter, today we
20 get a log, next day we get excerpts. It just goes on and
21 on and you start chipping away at the auditors ability to
22 do their job. If that is going to happen some day, then
23 maybe so but, Judge, we shouldn't let it happen on a
24 pleading that asks for audit-related records, that is just
25 right out of the statute. It doesn't comply with *Anderson*

1 *versus Village of Jacksonville*. It doesn't comply with the
2 Sunshine Law.

3 THE COURT: Mr. Greim.

4 MR. GREIM: Your Honor, we specifically requested on
5 May 2, 2017 -- This is an exhibit. This is their actual
6 Exhibit 1 to their August 25th motion. -- all records
7 relating to your decision to audit the timeliness of the
8 department's issue of tax refunds. This request includes
9 but is not limited to records of communications, meetings,
10 teleconferences, planning and similar records. So we
11 specifically asked for that category.

12 Now, what did we plead? What did we plead? This is
13 paragraph 23 of our petition. We say Galloway's assertion
14 of confidentially is over broad. None of the statutes
15 cited by Galloway's counsel protect, quote, records
16 relating to your decision to audit the timeliness of the
17 department's issue of tax refunds, close quotes.
18 Galloway's counsel did not deny that such records existed.
19 Instead, she treated them as closed and refused to produce
20 them.

21 So, Your Honor, we have pinpointed this issue in our
22 pleading already. There is nothing for us to go back and
23 do if we go back and amend the pleading. We're five months
24 in to this case and then to get another attempt to push it
25 back further and further.

1 In fact, Your Honor, the real issue that we seem to
2 have today, based on authority that they are citing here is
3 no where in their several motions for a protective order,
4 is simply what goes on the log. That is really the
5 question because people are not going to agree before
6 discovery starts about what things are open and what things
7 are closed. The whole point of a log is to move us past
8 that issue and move us into a zone where we can actually
9 see the records, the specific records that we're talking
10 about. Let's see what the actual records are. And the
11 only question then is just simply defining the criteria for
12 that log in a way that we know what we got, what we got
13 back, that is actually the next step here. It is not to go
14 to reach the end conclusion and say, well, what are the
15 work papers under federal law that we now argue is
16 protected under the Sunshine Law, and we're going to reach
17 that issue first and then only do we begin discovery, and
18 let's maybe make the Plaintiff amend a few more times after
19 they go back and take a position on that. Your Honor, that
20 is not the path. The path forward is, let's make them
21 produce a log and let's carve things out that we know that
22 we don't want.

23 The communications with the auditee should be a lot of
24 material, and not just the e-mail but the attachments, and
25 then the people that actually work on the audit at the

1 Auditor's office, their papers, their communications with
2 each other, their work papers, looking at what came from
3 the auditee, preparing drafts, preparing an analysis, none
4 of that, Your Honor, goes on the log. None of that goes --
5 Just because criteria does go on the log, it is not an
6 admission it is an open record yet, but it goes on the log
7 and then we can all take a look at it and we can say, all
8 right, where are we going to draw the line here on the
9 outer bounds of this statute, but we can't go any further
10 until we have that log, and so our discovery plan is an
11 attempt to do that.

12 Again, we asked for a log back in July. We asked
13 again in September. We've asked for it consistently and
14 there is just not a way to litigate without that log and so
15 that is what we suggest for going forward here. I think
16 once we get that we can push ahead.

17 There are other things that we need on this loss of
18 text messages, on why did they not run search terms until
19 August based on their recent production. Your Honor, if
20 you say the word, we can begin to look into that right now.
21 It doesn't depend on the log but we've got to start doing
22 something here.

23 THE COURT: I could create a protective order which
24 would limit where they go. What I'm trying to figure out
25 is, you know, where we go with communications to third

1 parties and define that outside the Department of Revenue.
2 We could carve out anything about the final audit and
3 certainly after the date of the release of the final audit
4 because that's probably, you know, to the public, and then
5 we're down to, we're down to the meat of what the decision
6 is, records relating to your decision to audit DOR. And I
7 assume that there was a letter, hey, I work in the
8 Department of Revenue and don't use my name, and there is a
9 giant box here of refund requests, we've been instructed to
10 just sit on them, I would think that that would be a fair
11 communication relating to the decision.

12 Is it your position that you wouldn't have to disclose
13 there was a communication at all or that that there was a
14 communication but that -- You made the comment that unlike
15 attorney-client privilege, you know, generally you say the
16 fact of a communication is not privileged, the content of
17 that communication is privileged, and so if you say just
18 the fact that there was a communication is privileged or
19 protected or confidential or whatever word you want to use
20 --

21 MR. ANDERSON: I would say we have to approach -- It
22 is going to sound like a cop out and I'll tell you why it
23 is not. We have to look at circumstances of each
24 communication, may or may not be. And the example you
25 gave, I don't know if you were aware, but, yes, that would

1 be protected by statute in Chapter 29. Now, that is not --
2 One of the reasons why we're concerned with releasing like
3 a redacted copy of it, is we're supposed to protect the
4 main whistleblower but the identity of the whistleblower,
5 which means, if we start upping the information, you get a
6 small office, small group of people, this isn't a statute
7 you may have read.

8 You may have read there are issues in Greene County,
9 they have a big campaign now to find out who the
10 whistleblowers are, there's a Sunshine Law request, a
11 Sunshine lawsuit that is filed, they want to know who it
12 is. If we could send them some document, we will just take
13 the person's name off of the list. Yeah, that could be it.
14 So we have to look at the communication. There could be a
15 communication from someone in the Department of Revenue
16 that is pretty innocuous, no whistleblower, no reason to
17 not turn over, doesn't have anything to do with an audit,
18 but we have to look at those and see what they are.

19 So every communication, most likely communications
20 about the decision to perform an audit are going to fall
21 squarely within the yellow book, squarely within the
22 statute. That there might not, there might be doesn't --
23 We wouldn't have any objection to turn over something like
24 that; I don't think we've withheld anything like that. But
25 if we have to catalog everything, then we're getting into

1 audit papers. Making my point again, we're doing that on
2 the basis of an allegation that we violated a Sunshine Law
3 when the request is for no identifiable document in
4 particular.

5 MR. GREIM: Your Honor, I've got to make one quick
6 point. I think Mr. Anderson has materially misrepresented
7 the Greene County case. I happen to know something about
8 that. No one is looking for the names of whistleblowers,
9 nor are we. I think you could redact it. I think that --
10 Your know, this is the kind of thing that you have an
11 attorney-client privilege. You've got to be careful not
12 to disclose the thing you're not supposed to disclose. I
13 don't think that is a complete bar of discovery. If it
14 turns out somebody found the box in the Department of
15 Revenue and says right around the corner where I sit by the
16 water fountain on the third floor, I think that is going to
17 have to be redacted, I don't think we can see that, that
18 might well lead to the identity of a person, there could be
19 things like that.

20 But, Your Honor, again, a log is the answer, a log is
21 the answer. A log isn't going to have something in there
22 about the person who sits by the water fountain on the
23 third floor if it is not a whistleblower from so and so to
24 somebody. If it is a whistleblower, it will be redacted,
25 the name will be redacted. And the subject will be raising

1 concerns about the Department of Revenue and so, ah-ah,
2 okay, this is the thing that we're talking about. And,
3 Your Honor, it may just be a handful of documents. It may
4 just be a handful of documents, but this is the case to
5 test this overbroad assertion of confidentiality at the
6 Auditor's office and the log is the next step we have to
7 do. There is nothing more we can plead about it. We've
8 requested records. We've requested the kind of records we
9 want and they've closed them. They said it is closed.
10 They didn't say none exist, just didn't happen to have
11 anything, they said closed. That is enough. Now we should
12 get the log as to what is closed.

13 THE COURT: Do you have any idea as to the scope,
14 absent confidentiality, what it would take to respond to
15 that?

16 MR. ANDERSON: To which part?

17 THE COURT: There was no confidentiality and the
18 question was, communications or records relating to the
19 decision to audit the Department of Revenue, if there was
20 no confidentiality, do you have any concept as to the scope
21 of how many documents are responsive to that request?

22 MR. ANDERSON: No, I don't, limiting it to the
23 decision to do it. But, of course, I would be back around
24 as to how is that a Sunshine Law request. If you have to
25 read the content and make it a document, are you beyond a

1 records custodian at that point?

2 MR. GREIM: Your Honor, I don't think that is the law.
3 You may not be able to identify the envelope information of
4 the records, you may not know the title of the record, but
5 you can request that. Then we're not going to have
6 Sunshine Law requests any more until somebody can actually
7 name the records, until somebody can say, well, we know
8 that you do this kind of report on your decision, we want
9 those reports with title such and such. We have identified
10 a category and they have closed it and had they come back
11 and said, gosh, we don't know what you mean by our
12 decision, what is that, we don't know if those exist or we
13 don't think that is a request for records, we think that is
14 a record for information. Even though you said records, we
15 don't treat it that way. No, that is not their response.
16 Their response is closed, records are closed. They should
17 be held to their response.

18 THE COURT: I have historically held the state
19 agencies to their response. I mean, you can file a -- I've
20 not made people cough up records that were confidential,
21 okay, but I've held them to the responsibility of
22 responding appropriate to that, so I'm not particularly
23 concerned about that. You can refuse to give up a
24 confidential record, which you're not required to do, okay,
25 but you can't just -- You also have to deal with it in the

1 context of a Sunshine Law request and that is often the
2 question of these lawsuits, is not whether or not it is
3 confidential, did I respond to it appropriately, it is kind
4 of a two stage analysis. Whether or not you get the record
5 or not depends upon whether or not it is confidential.
6 Whether you prevail on the Sunshine Law depends on whether
7 or not you complied with the Sunshine Law.

8 MR. GREIM: Your Honor, I think maybe the answer is
9 this. Let's say that there are 15 or 20 records that fall
10 into this category. Maybe it is a memo, maybe it is an
11 e-mail, maybe it is a political person or Mr. Harper
12 e-mailing with the Auditor, maybe there is some texts that
13 we don't have, who knows, say there is 15 of them, we might
14 find that any differences we have about the statute don't
15 really matter given those records. We might find that
16 once, once those records actually can be viewed by somebody
17 else and the Auditor knows somebody else is looking at
18 them, the Auditor might say, okay, I admit these are not
19 work papers, whatever the federal law calls work papers,
20 whatever that means, yeah, that can't be implicated by
21 these 15 records that fall in this category, then we can go
22 as far as we can on the law and pleading given the
23 response. The next response has to be to list these in a
24 log and the protection is carving things out from the log.
25 We don't want to see a bunch of things in the log that we

1 know we don't want and so that's the point of our plan, to
2 carve those out. And, you know, we're willing to tinker
3 with the language if that is what is necessary but there is
4 no way forward unless we have a log.

5 MR. ANDERSON: Need to address something about this
6 log that we're referring to. I think the court has the
7 power to manage the proceedings in discovery by asking that
8 a log be produced to some kind of an index, whatever that
9 is. In Plaintiff's pleadings is the allegation that the
10 Auditor's office violated the Sunshine Law by failing to
11 provide a log. There is no rhyme or reason of that
12 situation. There is a statute we cited and we did that in
13 three days on the requests. The fact that it didn't
14 specifically go to a specific identifiable record is
15 because there wasn't an identifiable record requested.
16 Ordinarily we know what records we're talking about because
17 generally we don't make requests. I don't think we've ever
18 had a request like this in our office. You know, and quite
19 frankly, I think we're going through all this because we
20 tried to go ahead and fulfill it anyway. This was before
21 my time.

22 THE COURT: Okay.

23 MR. ANDERSON: But the Sunshine Law doesn't require a
24 log. The Vaughn index federal law that has been around
25 since 1973, almost 45 years, long before the present

1 version of the Missouri Sunshine Law -- it has been
2 codified into federal regulations -- it is all a part of
3 the plan.

4 In the *Vaughn* case you can see why. A law professor,
5 who shouldn't have been messing with it in the first place,
6 a law professor wanted to do some research on reports that
7 was issued by the Civil Service Commission, something about
8 some employment practices and policies, and they basically
9 said, no, because -- And they had three reasons. He was
10 requesting very specific documents. There was no question
11 what they were. Their objection given to them was based on
12 the content only, not what they were but on the content.
13 And, of course, we had some kind of indication why they
14 said this, was an invasion of privacy -- I think there was
15 two other grounds for it -- then we don't -- we really
16 can't do it. They came up with, you should index it. That
17 was a very appropriate case for us and I think there's a
18 lot of appropriate cases for it, but this is a case --

19 Again, Your Honor, I'm just talking about
20 audit-related records. If we're going to take that broad
21 undefined category and come into court and get into -- I
22 don't see how you can avoid getting into confidential
23 records, we've got a problem. The only way to solve that
24 is en camera. Not wanting to do that to the court, lets go
25 right back to re-draft the pleadings, tell us what you are

1 talking about and let us defend against it, let us do our
2 discovery on it; otherwise, we're talking about pleading
3 deficiencies in a discovery motion. We're not going to as
4 a matter of course just object to any discovery in a case
5 that is filed, but state a cause of action under the law.
6 Let's get out of federal courts and into state court and
7 move forward the way we were supposed to, that is really
8 all we're asking for here. That is what I said, if you
9 don't want to amend your pleadings, then don't. If the
10 court dismisses it, let them re-file it. If you do want to
11 amend them, say some of the things you are saying in your
12 pleadings here, because I'm hearing other things that
13 haven't been brought up because I don't know where to
14 begin. They didn't request the right search terms, I don't
15 know how they would know that.

16 THE COURT: With respect to the communications
17 request, when will you have been through those?

18 MR. ANDERSON: The final communication -- I can't give
19 you a date because I'm not the one doing it. I'm going to
20 tell you why. We were almost finished with those and then
21 we got another request, did you see that part of our
22 filing? It is not part of what we're arguing here, which
23 goes to our ripeness issue. They sent us a letter back on
24 November 4th making new requests, which is fine, a Sunshine
25 Law request, but they included an instruction to prioritize

1 this request over any existing request. Why you do that in
2 a case where timeliness is one of the things you are
3 complaining about, I don't know. So what was going to be
4 and what was scheduled to be delivered to them on
5 December 1st, which was all we thought we had left, was set
6 aside, and then we started working on that. I believe
7 we're pretty close to being done with that. Relatively
8 closely done with that and put that back on the desk. We
9 didn't have that much. It is not going to be months into
10 the future, so we really don't have much to do. We're
11 going to be done, we think, unless they send us another
12 letter asking us to do something. This case keeps
13 evolving.

14 THE COURT: Well --

15 MR. ANDERSON: I can -- Go ahead.

16 THE COURT: Okay. I can only evaluate that in the
17 context of good cause and how long it takes you to respond
18 to a request. So if Mr. Greim has asked you to prioritize
19 his request to your November letter, then I understand
20 that. Let's assume that you answer his November letter and
21 then you go back to the May letter, okay, that is the worst
22 case scenario, assuming Mr. Greim does not adjust any of
23 his time lines, so my question is, when do you think you'll
24 have been through everything? I understand that what
25 they've asked for is arguably virtually every piece of

1 paper you've got in the office, I understand that, okay?
2 I'm just saying is, if you go through that, how long is it
3 going to take?

4 MR. ANDERSON: We only had a couple of weeks before we
5 were going to deliver and finish it up before we got a new
6 letter. Does that mean when she turns back around and
7 don't have some other Sunshine Law requests that comes in,
8 no, but we're not -- A couple of weeks is all the work we
9 had left, so I can't say.

10 THE COURT: How much longer on the November 17th
11 request?

12 MR. ANDERSON: That I don't know. I think it is
13 almost done.

14 THE COURT: Would I know by March 1st?

15 MR. ANDERSON: Oh, my goodness yes.

16 THE COURT: Okay. So you would think by March 1st you
17 would have been through, at least we know what the
18 universal documents are going to be, all the communications
19 between Harper and Nelson and all the communications to and
20 from Galloway.

21 MR. ANDERSON: Yes.

22 THE COURT: And you want it at that time. I'm going
23 to make it a cut off just because it is never ending, okay?
24 So with respect to this lawsuit and this request, would be
25 4-27-15 to May 2nd, '17.

1 MR. GREIM: Your Honor, there is a couple of -- We've
2 gone off a little bit here. I've got to correct a few
3 things. I was waiting for it to get corrected. I've got
4 to say this.

5 THE COURT: Okay.

6 MR. GREIM: Your Honor, Mr. Anderson is correct, that
7 when we sent -- I've got to go back to this. When we sent
8 our request mid-November, I think they got it on
9 November 16th, request, related to some cell phone and text
10 materials, he's correct, we said please prioritize this new
11 one over the old one, we said that. Now, at that point,
12 they had said they would be all done by December 1. They
13 had nine business days left and as far as we know they were
14 on track. In fact, Mr. Harper later in the letter said, we
15 would have finished it by December 1 had you not said you
16 wanted the other thing prioritized. We first learned that
17 that was going to be a problem through a press release
18 issued, saying we amended our request and withdrawing our
19 request, and then a motion was filed saying none of it is
20 ripe, we may never get this. Oh, no, no. If that is what
21 you are claiming, please don't. Please just push ahead and
22 do them both at the same time. Your Honor, we communicated
23 that back on December 13th for the first time before we
24 even had our little law day gathering here, which was
25 December 15th.

1 Then on December 15th, after law day we said, okay,
2 guys, there are only nine business days left back in
3 mid-November, can you please have it produced by our
4 January 3rd hearing. Mr. Harper says, no, we can't switch
5 around, we can't switch every time you want to switch. So
6 we say, can you please just give us a date certain. And,
7 Your Honor, we asked that weeks ago and we cannot believe
8 that here in court there's still not an answer to the court
9 on that.

10 THE COURT: I understood the answer to be March 1.

11 MR. GREIM: Respectfully, Your Honor, the nine days
12 that were left were the very last set of Mr. Harper's
13 e-mails. We don't see that there is a lot left with the
14 November request, and we don't see why it is still taking
15 another few months when there were only nine days left back
16 in November, so we would respectfully ask for a little
17 faster date than March 1, but we will take what we can
18 get. Some date is better than nothing. I just wanted to
19 point out --

20 THE COURT: Can you do March 1?

21 MR. ANDERSON: We can do March 1st, Judge. I will
22 admit, they did send some letters saying never mind, do
23 both at the same time, and I think there was a third one --
24 I'm sure you'll correct me if I'm wrong -- withdrawing
25 something, get back to it. We didn't reshuffle on their

1 priorities. We stopped as they asked. We're finishing up
2 work. That is a reasonable date. We just checked, that is
3 a reasonable date.

4 THE COURT: Okay. It would seem that the resolution
5 could be made by a protective order allowing discovery of
6 certain kinds of records; that is probably the best way to
7 control it, is to say you can conduct discovery regarding
8 these records and narrow the scope, is where we start.
9 We're not going to really know on the -- You have to get to
10 the communications, again respond to them, they need to
11 have that.

12 Have you been through the communications with third
13 parties regarding the Auditor/Revenue and third parties
14 regarding the audit, those should be done, right?

15 MR. ANDERSON: That is correct.

16 THE COURT: Okay. Do you have an idea what the
17 scope -- I mean, is Revenue done? Is the Department of
18 Revenue audit done?

19 MR. ANDERSON: No. We gave them -- There is no audit
20 to give them, but we did give them what was public at the
21 time, which was the subpoena and the letters.

22 THE COURT: What is the 697 pages?

23 MR. ANDERSON: That would have been the communication.
24 I thought you said the audit is done.

25 THE COURT: I asked that question, so I'm just trying

1 to figure out --

2 MR. ANDERSON: That would be communications with third
3 parties, press, things that are not a part of the audit
4 files.

5 THE COURT: And there is none of that with respect to
6 the audit of the Treasurer?

7 MR. ANDERSON: No. The Revenue audit had press.
8 There was all kinds of things going around. The Treasurer
9 audit, there was no press release. It was just normal for
10 us.

11 THE COURT: Okay.

12 MR. ANDERSON: May I ask for a clarification?

13 THE COURT: Yes.

14 MR. ANDERSON: When you say "protective order," are
15 you talking about audit files?

16 THE COURT: Well, I would address that issue in the
17 protective order.

18 MR. ANDERSON: We're concerned about getting into the
19 audit files, defining what is --

20 THE COURT: I guess I'll have to define what an audit
21 file is.

22 MR. GREIM: And, Your Honor, our position is, there is
23 no reason for us to get any of those records right now. As
24 long as they are in a log, then we can go through them,
25 maybe we can whittle it down, and so that way we don't have

1 to try to cross the Rubicon before an Army is formed.

2 THE COURT: Have you discussed a standard when you
3 define what an audit file is? Have you discussed a
4 standard to define what an audit file is?

5 MR. HARPER: Yes, Your Honor.

6 THE COURT: That exists where?

7 MR. HARPER: It is referenced in both Chapter 29 as
8 the requirement for the Auditor's office to follow the
9 yellow book standards, which that is the -- I forget the
10 name. -- the audit standards published by the Comptroller
11 General of the United States. We are required to follow
12 those standards under Chapter 29, and those standards state
13 what does and does not need to be documented within an
14 audit.

15 THE COURT: Okay. Do you know what he is talking
16 about?

17 MR. GREIM: Yes, we do. But what we would say is, how
18 that applies to specific records we don't know, but I don't
19 think we need to delve deeper to that issue for purposes of
20 producing a log, I don't think we have to reach that.
21 Instead, I think what we ought to do is, you know, we can
22 look at those standards. We may argue that they are not
23 important wholesale as additional confidentiality
24 restrictions under Missouri law, we don't even have to go
25 there right now, Your Honor. If the log is produced, we

1 can look to see whether anything on that log is going to be
2 implicated, is going to matter under the yellow book
3 standards, we can tell that. And so long as the log
4 doesn't have a whistleblower name on there, there should
5 not be a problem because again the log is not the records.
6 The log, it is like a privilege.

7 THE COURT: Why is it asking to take all the audit
8 papers and put them on a log?

9 MR. GREIM: Well, we're carving out certain things,
10 Your Honor, we don't think need to be on the log to keep it
11 from having to do that, and so on our discovery plan,
12 little "i," is the communications between Galloway's line
13 auditors and the audited agency. Now, talking with our
14 opponents, they say we don't use word -- we don't use that
15 phrase line auditors. What we mean there is, Your Honor,
16 the people actually working on the audit, whoever that is,
17 whatever the term for those people is, that is number one,
18 none of that needs to go. And then number two, work
19 product, opinions or advice developed by the line auditors,
20 again, we mean the people who are working on it -- it is
21 not everybody over there -- during the performance of an
22 audit that are relying on those communications and that
23 should be, that should be rather voluminous. We don't even
24 want to see those on the log, Your Honor. We don't even
25 want to see them on there. We think things that don't fit

1 those two criteria are presumptively not covered by the
2 statute. Maybe we're wrong. Maybe the statute crawls a
3 bit further than those two things if you read the plain
4 text, maybe so, but if we're wrong, all that is going to
5 happen is, those things will be on the log. These two
6 criteria should carve out the vast majority of things in
7 their audit file.

8 In particular, Your Honor, remember, Barb Wood
9 testified that she was going through Mr. Harper's e-mails
10 that said audit file and sent them to the audit file and
11 closed them. In particular, we are very interested in
12 those things and we think they ought to be on the log.
13 There cannot be that many that were just sitting in Mr.
14 Harper's e-mail account that were supposed to be kept
15 secret. But we just need the envelope information that
16 goes on a log be produced for those things.

17 MR. ANDERSON: What he is describing is the entire
18 audit file. You know we do business largely by e-mail,
19 Word process documents. E-mails don't go anywhere, they're
20 always on the server. We do searches, we come up with
21 e-mails. They are, in fact, on the audit file. They are
22 also e-mails, we cannot delete them. Yes, as Ms. Wood is
23 going through this, yes, she is going to see audit-related
24 files and say confidential, that is pretty much it.

25 As far as the elements go, I'll read the statute to

1 lay this, an audit shall conform to the standards
2 established by the Comptroller General of the United States
3 or audit of government or --

4 COURT REPORTER: Whoa, whoa! Slow down.

5 MR. ANDERSON: I'm sorry. -- to the standards
6 established by the Comptroller General of the United States
7 for audits that govern entities, organizations, programs,
8 activities and functions as presented in the publication of
9 government auditing standards, that's the guide I'm talking
10 from the table a little while ago. This is where we go
11 with this. When they are talking about people actually
12 performing the audit, it is the Auditor's office. You've
13 got people out in the field performing the audit. You have
14 the auditor supervising the audit, or managing auditor.
15 Our actual auditor now is a real live auditor. She is a
16 CPA, she is a certified fraud examiner, she is involved.
17 Almost everyone is. Part of the thing that slows us down
18 with Paul isn't just the attorney-client privilege, that is
19 huge, a huge piece of it, it is not small, but this is who
20 they go to, legal questions, all that is part of the audit
21 file. When we're getting into a log, we're getting into
22 dangerous territory.

23 MR. GREIM: Your Honor, we can simplify this even
24 further. Mr. Harper, we propose to do with Mr. Harper and
25 the index for those, they are not going to be done until

1 March 1st, let's forget about doing any index on Mr.
2 Harper. Let's focus only on the audit related path of this
3 case.

4 Your Honor, I don't know if our opponents, maybe they
5 are not reading this correctly. We want to carve out from
6 the log the things that we have under Bi and Bii. We want
7 to carve those things out, not carve them in. We're fine
8 with replacing line auditors with the job titles that
9 they've discussed here. We're fine replacing with those.
10 Although I would say, just claiming that our elected state
11 auditor is a CPA and she can do an audit, I don't think
12 automatically places all of her communications into
13 protection. Now, I think that is a case-by-case basis.
14 Again, that is why we have a log. We whittle this down to
15 see, is she actually getting involved and getting into the
16 nuts and bolts of this, or is she having political
17 discussions. Well, we may come down to one or two records
18 where that matters, but the log is the way to get there.

19 The other thing we would say, we don't dispute that
20 the statute incorporates the government auditing standards
21 control, we understand that. Our point though is that when
22 it comes to what remains confidential, it is not at all
23 clear that that statute simply incorporates all of the best
24 practices and other confidentiality provisions that exist
25 within the yellow book, to the extent that they actually

1 might conflict with specific statutes that Missouri has
2 passed that deal with confidentiality of audits that the
3 State Auditor does, and so the point -- We may never have
4 to cross that particular issue because it may not be
5 relevant on what we care about, which is the decisions,
6 Your Honor. We don't, we don't have to reach that point
7 right now.

8 When we get the log, which I think may not be very
9 substantial, if we carve out little "i" and little "ii," we
10 are going to see there are things that actually implicate
11 where the entire difference is based on whether or not
12 something in the federal yellow book has been incorporated
13 into Missouri law. It may not matter at all. So there is
14 no need to get caught up in that now just for purposes of
15 producing the log. I think what we ought to do though is,
16 we can refine line items in bold sections and include the
17 things that need to be included and carve out those things.
18 And I don't see how you can argue that the entire audit
19 file is going to be produced given the very large
20 exclusions that we've just put into the index. In fact,
21 nothing is being produced . It is just a log, not the
22 records themselves. Now, hopefully we're on to something
23 and eventually a few of those records are produced to us
24 because it turns out that they are not closed. But, again,
25 we just want to log the number.

1 MR. ANDERSON: I know everybody is busy. I saw this
2 at 5:00 p.m. last night, and I think we're wasting the
3 court's time mincing around with what we call something.
4 What I keep seeming to hear, we're carving this out but
5 give us a log, that is part of the problem. Just to be
6 clear, the yellow book to my understanding, and I'm not the
7 logger, does not tell you what is confidential as much as
8 what is a work paper. There -- If we're going to get to
9 logging confidential records, we are going in to dangerous
10 territory. We have not carved out as much as they've
11 carved out. Maybe we can agree on some terms.

12 THE COURT: You want to take a couple of days to look
13 at that?

14 MR. ANDERSON: I would love to look at it, look at it
15 before we came in here.

16 MR. GREIM: Your Honor, I wouldn't have given the
17 night before had I not had the bright idea yesterday that
18 this would break through the ice here. Let me suggest
19 this. This is what we did. We went for two years in our
20 IRS case about what return information was and we finally
21 broke through it; the judge worked through it with us and
22 we got what we needed to see after conferring, so I suggest
23 a parallel idea here and here's what I suggest. We've
24 already presented this. If you would order us to report
25 back to you jointly by Friday on what the log ought to be,

1 what ought to be in the log, we will work on the terms. If
2 we can't agree, you'll see our little proposal and you'll
3 see their proposal next to it and you can choose if we
4 can't agree. You'll get one joint thing from the both of
5 us that either has our agreement or has our position next
6 to their position.

7 THE COURT: Is that worth a shot?

8 MR. ANDERSON: I don't know if Friday is reasonable
9 but certainly decide sometime next week, at least be able
10 to discuss this.

11 THE COURT: Five business days?

12 MR. ANDERSON: That will be fine, Judge. We would
13 still want to reiterate, we think they should amend the
14 petition.

15 THE COURT: I'm not saying that we're not going to go
16 there. Let's see where we go with this, okay, because I
17 can control the petition, I can't control what's being
18 disclosed.

19 MR. ANDERSON: I just want to be clear, we come up
20 with something and they may find out nothing much changed
21 than where we were today.

22 THE COURT: That is always that possibility.

23 MR. ANDERSON: That is what happens.

24 THE COURT: Two things come out of this today, in the
25 next five business days you guys get together and see if

1 can agree on what I call carve out language, what you don't
2 have to produce and what you don't have to log, okay?

3 MR. ANDERSON: Okay.

4 THE COURT: Second thing is, by March 1st, you've been
5 through all the communications and so that no longer -- I'm
6 no longer waiting on those, we can then begin evaluating
7 those.

8 MR. GREIM: Your Honor, you mentioned something at the
9 outset, discovery on process. Are we free now to do
10 discovery on process?

11 THE COURT: Get this part done because if I don't have
12 the carve out, then I balance out what an audit file is.

13 MR. GREIM: Separate from what the audit file is,
14 there is a separate issue on non-production of text message
15 and possible loss of records. We have gone no further into
16 the process than being able to cross Barb Wood several
17 months ago, so I just ask that we confer on these points
18 but at least be able to start to depose people and issue
19 regular discovery on the process.

20 MR. ANDERSON: I think we're right back to amending
21 the pleadings when we're getting into things like that. I
22 think we ought to go with the court's plan now and see what
23 that is.

24 THE COURT: Thank you very much.

25 MR. GREIM: We have some housekeeping matters.

1 THE COURT: Okay.

2 MR. GREIM: The Plaintiffs, without objection, are
3 substituting Exhibit 1C of their summary judgment response
4 and so I'll -- because it is in color we couldn't e-file
5 it, it was too big -- I'll just deposit it and make sure it
6 gets to the clerk. This goes to our recent filing Friday.

7 THE COURT: Okay. Won't they make you scan it?

8 MR. GREIM: I can talk with them.

9 THE COURT: Why don't you deal with the clerk.

10 MR. GREIM: All right.

11 THE COURT: I'll show that Plaintiffs substituted
12 Exhibit 1C in their response. You've seen it?

13 MR. ANDERSON: Yes. It is fine, we agree with that.

14 We have one of our own. We can't let you out of it,
15 Judge. We needed to insert an affidavit on a recent filing
16 on a records affidavit, it is already filed. It is
17 electronic. I assume they won't have an objection to that,
18 just so we don't have to call up for a law day, call it up
19 for today.

20 MR. GREIM: No objection, Your Honor.

21 THE COURT: All right. Thank you very much.

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REPORTER'S CERTIFICATE

I, Kaye F. Asel, Certified Court Reporter, hereby
certify that I was the official court reporter for Division
I of the 19th County Circuit Court; that on
January 3, 2018, I was present and reported all the
proceedings had in MISSOURI ALLIANCE FOR FREEDOM, INC.,
Plaintiff, vs. NICOLE GALLOWAY, Defendant, Case No.
17AC-CC00365. I further certify that the foregoing pages
65 contain a true and accurate reproduction of the
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Official Court Reporter

Transcript completed: February 14, 2018