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August 24, 2016

VIA E-MAIL NIKKI.LOETHEN@HEALTH.MO.GOV

Nikki Loethen
General Counsel
Department of Health & Senior Services
912 Wildwood Drive
Jefferson City, MO 65102

Re: Reclaim the Records

Dear Ms. Loethen:

I am writing in response to your letter of August 9, 2016.

Chronology of Events

On February 13, 2016, my client, Reclaim the Records, mailed two Missouri Sunshine Law requests to the Missouri Department of Health & Senior Services. One request was for birth listings for the period 1910 through 2015, while the second request was for death listings for the same period. On February 19, 2016, Emily Hollis of your office acknowledged receipt of my client's Sunshine Law requests. Ms. Hollis' e-mail stated she estimated that a response to my client's requests would be provided on or after March 31, 2016. Ms. Hollis' e-mail contains no mention of, nor citation to, any exemption under the Sunshine Law.

On April 18, 2016, when my client had not received a response to its requests, it sent a follow-up e-mail in which it noted the promised response date of March 31, 2016.

On May 27, 2016, you wrote my client and advised that you were still working on a cost estimate for fulfilling my client's requests, and stated that the cost estimate would be provided in approximately five business days. Like Ms. Hollis' earlier e-mail, your e-mail contains no mention of, nor citation to, any exemption under the Sunshine Law.

On June 22, 2016, when my client still had not received a response to its requests, it sent a follow-up e-mail in which it noted the promised response date of five business days following May 27, 2016.

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On June 24, 2016—more than four months after the Department acknowledged receipt of my client’s Sunshine Law requests—Ms. Hollis responded to my client’s requests with the following cost estimate:

From: Hollis, Emily	06/24/2016
Subject: RE: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2016	
Dear Ms. Ganz:	
Pursuant to your request for an estimate and Section 610.026, RSMo, compliance with the two records requests below is estimated to cost the following:	
Birth list: \$993,480 (23,376 hours at \$42.50/hour)	
Death list: \$496,740 (11,688 hours at \$42.50/hour)	
Thank you.	
Emily E. Hollis Office of General Counsel Dept. of Health & Senior Services P.O. Box 570 Jefferson City, MO 65102 Phone: (573) 751-6005 Facsimile: (573) 751-0247 Email: Emily.Hollis@health.mo.gov <mailto:Emily.Hollis@health.mo.gov>	

Following receipt of this absurd cost estimate, my client retained me. You and I talked on June 28, 2016. During that call, you explained that you had discovered an error in the hourly rate calculation used in the cost estimate provided by Ms. Hollis on June 24, 2016, and stated that you would be sending out a revised cost estimate.

Also during our call, I asked you for information regarding the type of database the Department used to maintain the lists, and explained that I was interested in this information because I believed that with this information I could provide suggestions as to how the listings could be provided for a much lower cost.

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Following our call you sent my client the e-mail you had promised, revising the hourly rate by 72¢ an hour, but maintaining the same number of hours.

From: Loethen, Nikki	06/28/2016
Subject: RE: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2016	
Dear Ms. Ganz:	
After the email below was sent to you, the department realized an error in the calculation of the hourly rate. Here are the revised estimates based on the corrected rate:	
Birth list: \$976,649.28 (23,376 hours at \$41.78/hour)	
Death list: \$488,324.64 (11,688 hours at \$41.78/hour)	
Sincerely,	
Nikki Loethen General Counsel Department of Health & Senior Services 921 Wildwood Drive Jefferson City, MO 65102 Phone: 573.751.6005 Facsimile: 573.751.0247	

On July 7, 2016, you provided me with the information I had requested concerning the type of database the Department used to maintain the birth and death listings. Using that information, on July 12, 2016, I sent you an e-mail and explained to you how the two listings could be produced for far less than the cost estimates you had previously provided.

On July 22, 2016, when I had not heard from you, I sent you a follow-up e-mail. Later that same day you sent me an e-mail stating: “Staff is reviewing the information you provided below to determine whether **lists compliant with Section 193.245** could be created in fewer hours, thereby reducing the cost estimates. I will check on the status of this and get back to you.” (Emphasis added).

On August 1, 2016, you sent me the following e-mail:

Rhodes, Bernie

From: Loethen, Nikki <Nikki.Loethen@health.mo.gov>
Sent: Monday, August 01, 2016 10:58 AM
To: Rhodes, Bernie
Subject: RE: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2015

Staff has determined that they can run the lists for one year at a time versus one day at a time as originally estimated, which drastically reduces the cost estimate (see below). However, I have asked them to determine whether it is possible to run all the years at a time, thereby further reducing the estimate. If running all the years at a time is not possible, I have asked them to explain why. I will let you know what I learn. The original estimate was based on a misunderstanding regarding what the statute allows in terms of providing a list for a particular date.

Birth lists: 72 hours at \$41.78/hour = \$3,008.16
Death lists: 51.84 hours at \$41.78.hour = \$2,165.88

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As you can plainly see, at no point during this extensive e-mail exchanges did you or Ms. Hollis make any mention of, nor citation to, any exemption under the Sunshine Law. Instead, the only topic discussed was the cost of providing the two listings. Quite the contrary, in your July 22, 2016, e-mail, you expressly stated that you would provide me with a cost estimate for “**lists compliant with Section 193.245.**” (Emphasis added).

Despite that statement, on August 9, 2016, you wrote me and—for the very first time—asserted that pursuant to Missouri Revised Statutes § 193.425(1), the Department

was refusing to provide the requested records—despite the fact your July 22, 2016 e-mail specifically stated that you would be providing “**lists compliant with Section 193.245.**” (Emphasis added).

The Department has waived any right to rely on any statutory exemption

To begin with, the Department has waived any right to rely on any statutory exemption to the Sunshine Law—even if one existed, which it does not.

The Missouri Sunshine Law provides that “[e]ach request for access to a public record shall be acted upon as soon as possible, but in no event later than the end of the third business day following the date the request is received.” Mo. Rev. Stat. § 610.023.3. The Law further provides that while the “period for document production may exceed three days for reasonable cause,” *id.*, it contains no such provision for extending the time for a public governmental body to deny a request. In other words, any denial of a request must be made within three business days.

Where, as here, a public governmental body fails to deny a claim—or fails to provide a valid reason for a denial—the governmental body waives the right to later claim an exemption under the Sunshine Law. As Cole County Circuit Judge Jon Beetem recently explained in an analogous situation in which a request was denied for one reason—but the governmental body later added a second reason—claims of exemption can only be made during the initial three-day period.

Defendant’s attempt to claim one exemption when it denies a citizen’s request for records, and then claim additional exemptions apply after being sued for nondisclosure, is not supported by any reading of chapter 610, nor does it comport with the public policy of the state. . . . The legislature has mandated that if a custodian denies access to public records, the custodian must, upon request, specify the legal basis for the denial. Permitting Defendant to assert additional reasons for denial after litigation commences, as it attempts here, renders superfluous the statutory requirement of notice of the reasons for denial.

ACLU of E. Mo. Fund v. Mo. Dep’t of Corr., Case No. 12AC-CC00692 (June 23, 2014).

Accordingly, even if the Department had a basis to claim a valid statutory exemption—which it plainly does not—the Department waived any such right by not asserting it until nearly six months after it first received my client’s Sunshine Law requests—and after repeated exchanges of correspondence with you and Ms. Hollis, who both failed to make any reference whatsoever to any exemption.

You fundamentally misunderstand the Vital Records Act

In your August 9, 2016, letter, you cite to Section 193.245 of the Vital Records Act and assert that this section gives the Department “discretion” to grant or deny a request for a listing of birth and deaths. Your assertion is groundless.

Section 193.245 provides as follows:

It shall be unlawful for any person to permit inspection of, or to disclose information contained in, vital records or to copy or issue a copy of all or part of any such record except as authorized by this law and by regulation or by order of a court of competent jurisdiction or in the following situations:

- (1) A listing of persons who are born or who die on a particular date may be disclosed upon request, but no information from the record other than the name and the date of such birth or death shall be disclosed;
- (2) The department may authorize the disclosure of information contained in vital records for legitimate research purposes;
- (3) To a qualified applicant as provided in section 193.255;
- (4) Copies of death records over fifty years old may be disclosed upon request.

Mo. Rev. Stat. § 193.245.

Any reasonable interpretation of this section leads to the conclusion that while it is “unlawful for any person to ... disclose information contained in vital records,” it is not unlawful for any person to disclose “[a] listing of persons who were born or who died on a particular date.” In other words, the term “may be disclosed” means simply that those listings “may be disclosed” without violating the Act. The use of the term “may be disclosed” does not, in any way, grant the Department “discretion” to release—or not release—a listing of births or deaths.

This conclusion is supported by nearly 150 years of Missouri Supreme Court precedent. In *State ex rel. Vernon County v. King*, 36 S.W. 681 (1896), the Court explained that “[i]t is ... a well-recognized rule of construction that the word ‘may’ should be interpreted to mean ‘shall’ when referring to a ‘power given to public officers, and concerns the public interest and the rights of third persons, who have a claim, by right, that the power shall be exercised in this manner.’” *Id.* at 683.

In support of its ruling, the Court quoted from its earlier decision in *Steines v. Franklin Co.*, 48 Mo. 167 (1871), where the Court wrote: “This principle is founded in justice, and was declared in the early day, that where the rights of third persons are involved, or the public good requires it, the word ‘may’ will always be construed to mean ‘shall.’” *Id.* at 178.

Nor is the Court’s precedent limited to the 1800s. In *Kansas City v. J.I. Case Threshing Mach. Co.*, 87 S.W.2d 195 (1935), the Court reaffirmed this line of authority. “A mandatory construction will usually be given the word ‘may’ where public interests are concerned and the public or third persons have a claim de jure that the power conferred should be exercised or whenever something is directed to be done for the sake of justice or the public good.” *Id.* at 931.

Section 193.245 squarely fits within this rule, *e.g.*, the term “may” relates to ‘power given to public officers, and concerns the public interest and the rights of third persons.’ First, Section 193.425 gives the Department the ‘power’ to disclose birth and death listings. Second, the power to disclose birth and death listings clearly relates to the public interest in accessing such listings.

As such, the term “may” does not provide the Department with discretion to provide such listings, but instead must be construed to mean “shall” provide such listings upon request.

You fundamentally misunderstand the Sunshine Law

But even if your construction of Section 193.425 was correct—which it is not—the section does not make the birth and death listings closed records under the Sunshine Law.

Section 610.021(14) of the Sunshine Law allows a public governmental body to withhold “[r]ecords which are protected from disclosure by law.” The Missouri Court of Appeals has repeatedly held that this exemption only applies where “a statute ... **prohibits** their disclosure.” *Pulitzer Pub. Co. v. Mo. State Employees’ Ret. Sys.*, 927 S.W.2d 477, 481 (Mo. Ct. App. – W.D. 1996) (emphasis added). The Western District supported its decision in *Pulitzer* by citing to a Southern District opinion in which the Court of Appeals explained that public records must be open unless another statute “specifically prohibit[s] public inspection” of the records. *Oregon County R-IV School Dist. v. LeMon*, 739 S.W.2d 553, 557 (Mo. Ct. App. – S.D. 1987).

Here, even you don’t claim that Section 193.245 “specifically prohibits” disclosure of birth and death listings; instead, you assert only that the section gives the Department “discretion” to withhold the records. But both *Pulitzer* and *LeMon* clearly require something more—they require that the statute “prohibit” disclosure.

Such a reading of the Sunshine Law, of course, is consistent with the statutory requirement in the Law that it “be liberally construed and [its] exceptions strictly construed” to promote “the public policy of the stated that ... records ... of public governmental bodies be open.” Mo. Rev. Stat. § 610.011.1; see *Guyer v. City of Kirkwood*, 38 S.W.3d 412, 414 (Mo. 2001) (“the decision to open or close the record must be informed by the express public policy stated in section 610.011.1”).

Your security concerns are bogus

Equally specious are your claims of “security concerns” and rampant speculation about identity thieves and hackers. To begin with, your assertion reflects total ignorance of the fact the U.S. Social Security Administration already makes such information available on the Internet. Specifically, the SSA publishes the Social Security Death Master File—also called the Social Security Death Index. Numerous commercial entities, including Ancestry.com, allow users to search that database for free, as shown below.

The screenshot displays the Ancestry.com search interface for the U.S. Social Security Death Index, 1935-2014. The interface is divided into several sections:

- Search Form:** Located at the top left, it includes a "SEARCH" button, a checkbox for "Match all terms exactly", and input fields for "First & Middle Name(s)", "Last Name", "Birth" (with sub-fields for Day, Month, and Year), "Death" (with sub-fields for Year and Location), "Any Event", "Keyword", and "SSN".
- Search Results:** A list of search results is shown on the right side of the interface, including links to "The Social Security Administration Death Master File", "Social Security Death Master File: A Much Misunderstood Index", "The Social Security Death Index", "Using the Social Security Death Index", "Important Notes Regarding the SSDI and Ordering SS-5s", and "Social Security and Railroad Retirement".
- Source Information:** Located at the bottom left, it provides details about the data source: "Ancestry.com. U.S., Social Security Death Index, 1935-2014 [database on-line]. Provo, UT, USA: Ancestry.com Operations Inc, 2011. Original data: Social Security Administration. Social Security Death Index, Master File. Social Security Administration."

I just used this search page to find information about my father, who died in 2010. To my knowledge, no one has stolen his identity in the last six years.

Moreover, you conveniently ignore the fact that the reason your estimate for death records is lower than your estimate for birth records is because the Department has already transferred all but the last 50 years of death records to the State Archives, where the records are readily searchable on the Secretary of State's website.

The screenshot shows the Missouri Digital Heritage website. At the top, it says "SECRETARY OF STATE JASON KANDER" and "Missouri Digital Heritage". There is a search bar with a "Search" button and a link to "Advanced Search". Below the header is a navigation menu with links: Home, Civil War, Browse Collections, Special Exhibits, Educational Resources, About, and Quick Links. The main content area is titled "Missouri Death Certificates, 1910 - 1965" and features a search box with a "[Search]" placeholder and a "Search Death Certificate Database" button. Below the search box, there is a paragraph of text: "At the Missouri State Archives, it's our goal to give Missourians easy access to our state's rich history. That's why we've placed millions of documents and images online at www.MissouriDigitalHeritage.com. And we're adding more to that collection every week. But unless you're already a genealogy buff, you might be surprised to learn that some of the most interesting and popular documents in our collection include more than 2.2 million death certificates."

Nor is online access limited to death records. The State of California, for example, releases the California Birth Index which—like the SSDI—is available to search on the web for free. For many of the websites offering this index a subscription is not even required, because the websites are supported by advertising, like californiabirthindex.org.

The screenshot shows the website californiabirthindex.org. The header includes "CALIFORNIA BIRTH RECORDS 1905 thru 1995". The main heading is "CALIFORNIA BIRTH INDEX". Below the heading is a search form with the label "Search Birth Records:" and two input fields for "Firstname" and "Lastname", followed by a "SEARCH" button. Below the search form, there are two columns of text. The left column is titled "What Is The California Birth Index?" and contains the text: "The California Birth Index, or CABI, is a database that stores records of births in California from 1905 to 1995. The CABI was compiled by the California Office of Health Information and Research. The records are not stored in the form of birth certificates, but rather abstracts of birth certificates." The right column is titled "Browse By Last Name" and contains the text: "ABCDEFGHIJKLMNOPQRSTUVWXYZ" followed by a link "Find Birth Certificates" and the text: "myheritage.com/Birth-Records Billions of Online Records. Find birth records - Easy and Free!"

As such, your objections are plainly frivolous.

Do you have an ulterior motive?

Given the utter lack of a legitimate basis for your 13th hour objection, one must ask whether the Department's sudden claim that this basic index data is so sensitive that it ought not to be released is the fact the Department has been selling this exact same index data to researchers, scientists, epidemiologists, and others for years—at an obviously illegal and inflated price? As such, perhaps the reason you suddenly deem this data to be sensitive has less to do with its actual content and more to do with how its publication could affect your anticipated future revenue stream, for if the data were finally available to the public for free, your Department would no longer be able to earn revenue by selling it to members of the researcher community—who could be putting their limited resources to better use than lining the Department's pockets.

The runaround must end

Both my client's patience—and my patience—have limits. As I noted at the beginning of this letter, my client's original Sunshine Law requests were made more than six months ago. After months of delay caused by the Department's absurd calculation of the cost of complying with my client's simple requests, you have now asserted a facially-invalid claim that the requested records are subject to an exemption—when they plainly are not.

Your actions lead inescapably to the conclusion that you are purposefully violating the Sunshine Law. First, you take literally months to provide a cost estimate. Then, the cost estimate is for the utterly absurd amount of \$1.5 million, based on the equally absurd estimate of 35,000 hours. Then, after I provided you with information which demonstrates the absurdity of your cost estimate, you conceded that the actual cost is—at most—\$5,000, and not \$1.5 million.

But then, realizing that \$5,000 will no longer discourage my client from obtaining the requested public records, you devise a new basis for preventing access to the requested records: assert a frivolous exemption.

Accordingly, be advised that unless the requested records are produce in the next ten days—at actual cost—suit will be filed against the Department. By “actual cost,” I mean the actual cost to run one search for the requested death listings and one search for the requested birth listings, plus the actual cost of one thumb drive to hold the data files, the estimated cost of which is probably no more than \$10.

Be advised further that in our suit we will seek not only production of the requested records, but we will also seek two separate \$5,000 penalties for your

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purposeful refusal to properly respond to each of my client's requests. Finally, we will also seek our attorneys' fees. And just so that you understand the consequence of continuing to deny my client's requests, earlier this year Cole County Circuit Court Judge Jon Beetem awarded my client \$73,335.41 in attorney's fees, following my successful showing that the State had violated the Missouri Sunshine Law.

Very truly yours,

LATHROP & GAGE LLP

By: */s/Bernard J. Rhodes*