

**IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
CIVIL DIVISION**

**BROOKE SCHREIER GANZ, both indi-)
vidually and as an authorized representa-)
tive of RECLAIM THE RECORDS, a non-)
profit, unincorporated association,)**

Plaintiffs,)

vs.)

**MISSOURI DEPARTMENT OF)
HEALTH AND SENIOR SERVICES,)**

Defendant.)

Case No. 16AC-CC00503

PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

Plaintiff Brooke Schreier Ganz, both individually and as an authorized representa-
tive of Reclaim the Records, a non-profit, unincorporated association, moves this Court,
pursuant to Rule 74.04(a) of the Missouri Rules of Civil Procedure, for summary judgment
in her favor and against Defendant Missouri Department of Health and Human Services on
all claims asserted in her Petition for Declaratory and Injunctive Relief.

As set forth more fully in the attached Statement of Uncontroverted Material Facts,
and in Plaintiffs’ Suggestions in Support of this Motion, the uncontroverted facts establish
as a matter of law that DHSS violated the Missouri Sunshine Law when it denied Ms.
Ganz’s requests for historical birth and death listings, after initially agreeing to provide the
listings if Ms. Ganz would pay DHSS \$1.49 million. Moreover, the uncontroverted facts
show that DHSS’ denial of Ms. Ganz’s requests came after the former State Registrar urged
DHSS to “require them to take you to court,” and to use the delay caused by the lawsuit to
go to the Missouri Legislature and have it amend Missouri law to close the birth/death
lists—which DHSS attempted to do after Ms. Ganz brought this suit.

WHEREFORE, Plaintiff Brooke Schreier Ganz, both individually and as an authorized representative of Reclaim the Records, a non-profit, unincorporated association, moves this Court to enter summary judgment in her favor and against Defendant Missouri Department of Health and Senior Services, together with such other and further relief as this Court deems just.

Respectfully submitted,

LATHROP GAGE, LLP

By: /s/Bernard J. Rhodes

Bernard J. Rhodes (MO #29844)

Taryn A. Nash (MO #70271)

2345 Grand Blvd., Ste. 2400

Kansas City, MO 64108

(816) 292-2000 – Telephone

(816) 292-2001 – Facsimile

brhodes@lathropgage.com

tnash@lathropgage.com

ATTORNEY FOR PLAINTIFFS

STATEMENT OF UNCONTROVERTED FACTS

Pursuant to Rule 74.04(c), Plaintiff Brooke Schreier Ganz sets forth the following uncontroverted material facts:

Reclaim the Records

1. Plaintiff Brooke Schreier Ganz is the founder, and current President, of Reclaim the Records, a non-profit association of genealogists, historians, researchers, journalists, and open government advocates committed to making genealogical data readily available to the public for free. (Ganz Aff. ¶¶ 12, 23, 24, 29).

2. Ms. Ganz is a genealogist and computer programmer who began Reclaim the Records in 2015 out of her frustration with getting historical marriage license indexes from the New York City Municipal Archives. (Ganz Aff. ¶¶ 1, 6-8, 12).

3. When the Archives refused to provide her with copies of the indexes, Ms. Ganz became the first known genealogist in the United States to successfully sue a government archive using a state Freedom of Information law for the return of records to the public. (Ganz Aff. ¶¶ 9-11).

4. Ms. Ganz then had the microfilm copies she won from the Archives digitally scanned, and then uploaded the new digital images to the Internet Archive, a non-profit online library, for free public use. She also later created a website and posted the marriage indexes online, where they are available for free. (Ganz Aff. ¶ 10).

5. Since then, Ms. Ganz and Reclaim the Records have continued to use state and federal open records laws to obtain copies of important genealogical data sets and post those records online for free. (Ganz Aff. ¶ 14).

6. In addition, where necessary, Ms. Ganz and Reclaim the Records have brought open records lawsuits to reclaim public records, as they have here. (Ganz Aff. ¶¶ 15-17).

7. Once the group reclaims these records, they are made available for free to the public, which uses them for finding family members, tracing family lineage, preparing family trees, and much more. (Ganz Aff. ¶¶ 18-20).

8. Since its founding, the group has reclaimed more than 28 million records for the public's benefit. (Ganz Aff. ¶ 21).

9. In February 2017, the group became a 501(c)(3) non-profit organization. (Ganz Aff. ¶ 22).

10. The group's board of directors includes a Fellow of the American Society of Genealogists (membership is limited to only 50 living fellows); the former Chief Technology Officer of FamilySearch, the largest genealogy organization in the world, which is operated by The Church of Jesus Christ of Latter-day Saints; and a forensic consultant to the U.S. Army who conducts genealogical research to identify potential family members of unaccounted soldiers from World War I, World War II, Korea and Vietnam for possible DNA matches with soldier's remains recovered from the battlefield. (Ganz Aff. ¶ 23).

11. As founder and President of Reclaim the Records, Ms. Ganz will fairly and adequately represent the interests of the group's members. (Ganz Aff. ¶ 29).

The Sunshine Law Requests

12. On Saturday, February 13, 2016, Ms. Ganz, on behalf of Reclaim the Records, e-mailed two Missouri Sunshine Law requests to Defendant Missouri Department of Health and Senior Services. (Rhodes Aff. Ex. 7 ¶ 5. Ganz Aff. Ex. A).

13. One request was for Missouri birth listings for the period January 1, 1910, through December 31, 2015, while the second request was for Missouri death listings for the same period. (Rhodes Aff. Ex. 7 ¶ 5. Ganz Aff. Ex. A).

14. In her requests, Ms. Ganz expressly stated, “this is a request for just the basic index to the [births/deaths], and is not a request for any actual [birth/death] certificates.” (Rhodes Aff. Ex. 7 ¶ 5. Ganz Aff. Ex. A).

15. On Wednesday, February 17, 2016, Nikki Loethen, DHSS’ General Counsel, reviewed the two requests and directed Emily Hollis (also in the DHSS Office of General Counsel) to “do the 3-day response” for each request. (Rhodes Aff. Ex. 9).

16. Ms. Loethen’s reference to “the 3-day response” is to Section 610.023.3 of the Missouri Revised Statutes, which provides as follows: “Each 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 by the custodian of records of a public governmental body.” Mo. Rev. Stat. § 610.023.3.

17. Later that same day, Ms. Hollis sent two otherwise identical e-mails to Ms. Ganz—one e-mail in response to the request for birth listings and the other in response to the request for death listing. (Rhodes Aff. Ex. 7 ¶ 6. Ganz Aff. ¶¶ 33-35; Ex. B).

18. In her e-mails, Ms. Hollis stated that “[t]he Department is working to fill your request” and said that payment of research and copy charges may be required “prior to your receipt of the requested records.” (Rhodes Aff. Ex. 7 ¶ 6. Ganz Aff. Ex. B).

19. A copy of Ms. Hollis’ e-mail to Ms. Ganz is below:

From: Hollis, Emily	02/17/2016
Subject: FW: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2016	
<p>Dear Ms. Ganz:</p> <p>The Missouri Department of Health and Senior Services (Department) is in receipt of your request dated February 16, 2016 for a listing of persons born in the State of Missouri between January 1, 1910 and December 31, 2015. You have requested that this list include the sex and birth certificate number of each person.</p> <p>The Department is working to fill your request. Due to the number of records to be reviewed, and day to day business, it is estimated that a response will be provided to you on or after March 31, 2016, Please note, the Department may charge \$21.38 per hour for research and \$.10 per page for records. An invoice may be sent to you for any charges in the fulfillment of your request prior to your receipt of the requested records.</p> <p>If you have any questions, please contact our office at (573) 751-6005. Thank you.</p> <p>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></p>	

(Rhodes Aff. Ex. 7 ¶ 6. Ganz Aff. Ex. B (highlighting added)).

20. The same day, Ms. Hollis wrote two employees in DHSS' Division of Community and Public Health with directions to "[p]lease begin collection of records." (Rhodes Aff. Ex. 10; Ex. 11).

Ms. Ganz follows up

21. On April 18, 2016, when Ms. Ganz had still not received either the birth and death listings—or a cost estimate for the listings—she again e-mailed DHSS to follow up on her requests. (Rhodes Aff. Ex. 12. Ganz Aff. ¶ 36).

22. On April 26, 2016, Ms. Ganz received an e-mail from Dr. Loise Wambuguh who asked Ms. Ganz to contact her about her requests. (Ganz Aff. ¶ 37; Ex. C).

23. On April 27, 2019, Ms. Ganz spoke by telephone with Dr. Loise Wambuguh, who is the acting Bureau Chief for the Bureau of Vital Statistics in DHSS' Division of Community and Public Health. (Ganz Aff. ¶¶ 37-38).

24. Dr. Wambuguh told Ms. Ganz that DHSS' birth listings only went back to 1920. (Ganz Aff. ¶ 39).

25. Dr. Wambuguh also told Ms. Ganz that DHSS' death listings only went back to 1968—and that death records prior to 1968 had previously been transferred to the Missouri State Archives. (Ganz Aff. ¶ 39).

26. Dr. Wambuguh also told Ms. Ganz that DHSS would provide names and the date of birth or death, but would not provide either the gender of the person or a birth/death certificate number (which Ms. Ganz had stated in original request she would like to have if available). (Ganz Aff. ¶ 40).

27. In response, Ms. Ganz agreed to modify her requests in accordance with these date parameters, and to remove her request for gender and for certificate numbers. (Ganz Aff. ¶¶ 41-42).

28. At no time during the call did Dr. Wambuguh ever state that DHSS had denied the requests, or was considering denying the requests and told Ms. Ganz that DHSS

regularly provides these listings to persons and groups, including epidemiologists and public health researchers. (Ganz Aff. ¶¶ 43-44).

29. Dr. Wambuguh concluded the call by stating that someone would be getting back to Ms. Ganz with a cost estimate. (Ganz Aff. ¶ 45).

Ms. Ganz follows up again

30. On May 23, 2016, Ms. Ganz called Dr. Wambuguh and left her a voicemail stating that she was still waiting for a cost estimate. (Ganz Aff. ¶ 46).

31. Shortly thereafter, Ms. Loethen (DHSS' General Counsel) called Ms. Ganz. (Ganz Aff. ¶ 47).

32. During that call, Ms. Loethen discussed Ms. Ganz's requests with her. (Ganz Aff. ¶ 48).

33. Ms. Loethen also told Ms. Ganz that DHSS was still working to provide her with a cost estimate for her requests. (Ganz Aff. ¶ 48).

34. At no time during the call did Ms. Loethen ever state that DHSS had denied the requests, or was considering denying the requests. (Ganz Aff. ¶ 49).

35. On May 27, 2016, Ms. Loethen wrote Ms. Ganz an e-mail confirming her phone conversation with Ms. Ganz. (Rhodes Aff. Ex. 7 ¶ 8. Ganz Aff. ¶ 50; Ex. D).

36. In her e-mail, Ms. Loethen stated that DHSS was still working on a cost estimate for fulfilling Ms. Ganz's requests pursuant to Chapter 610, RSMo, and stated that the cost estimate would be provided in approximately five business days. (Rhodes Aff. Ex. 7 ¶ 8. Ganz Aff. Ex. D).

37. Chapter 610 of the Missouri Revised Statutes of Missouri is the Missouri Sunshine Law. *See* Mo. Rev. Stat. § 610.010, *et seq.*

38. At no point in the e-mail did Ms. Loethen state that DHSS had denied Ms. Ganz's request, or that it was considering denying the requests. (Rhodes Aff. Ex. 7 ¶ 8. Ganz Aff. Ex. D).

39. A copy of Ms. Loethen's e-mail is set forth below:

From: Loethen, Nikki	05/27/2016
Subject: FW: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2016	
<p>Dear Ms. Ganz:</p> <p>As we discussed, the department is working to confirm a cost estimate of fulfilling your request for a list of people who were born and died on each day from 1910 - 2015. The department may not have the information for the earlier years of the request but is checking. The department will charge for staff time (and programmer time if necessary) as authorized by Chapter 610, RSMo. The department's current hourly rate for staff time is \$20.85 per hour. The department understands that you want to receive the information electronically and is checking on whether it is possible to provide the information in that format, rather than on paper. The cost estimate will be provided to you within approximately five business days.</p> <p>Sincerely,</p> <p>Nikki Loethen General Counsel Department of Health & Senior Services 921 Wildwood Drive Jefferson City, MO 65102 Phone: 573.751.6005 Facsimile: 573.751.0247</p>	

(Rhodes Aff. Ex. 7 ¶ 8. Ganz Aff. Ex. D (highlighting added)).

Trolling for Information on Reclaim the Records

40. On June 15, 2016, Dr. Wambuguh attended a meeting with other members of DHSS' Division of Community and Public Health concerning Ms. Ganz's requests. (Rhodes Aff. Ex. 13).

41. Craig Ward, the DHSS State Registrar, was invited to attend the meeting, but he was out of the office and did not return until the next day, June 16, 2016. (Rhodes Aff. Ex. 14).

42. The following day, June 17, 2016, Mr. Ward sent a series of e-mails to contacts at other state and city health departments scheduling phone calls with each of them to obtain information about Reclaim the Records. (Rhodes Aff. Ex. 15).

DHSS' Cost Estimates

43. Meanwhile, on June 22, 2016, Ms. Ganz sent Ms. Loethen an e-mail seeking information as to the status of her requests. (Rhodes Aff. Ex. 16. Ganz Aff. ¶ 52).

44. Two days later, on June 24, 2016, Ms. Hollis responded to Ms. Ganz's requests with a cost estimate of \$1.49 million, which she stated was pursuant to Section 610.026, RSMo (the Missouri Sunshine Law).

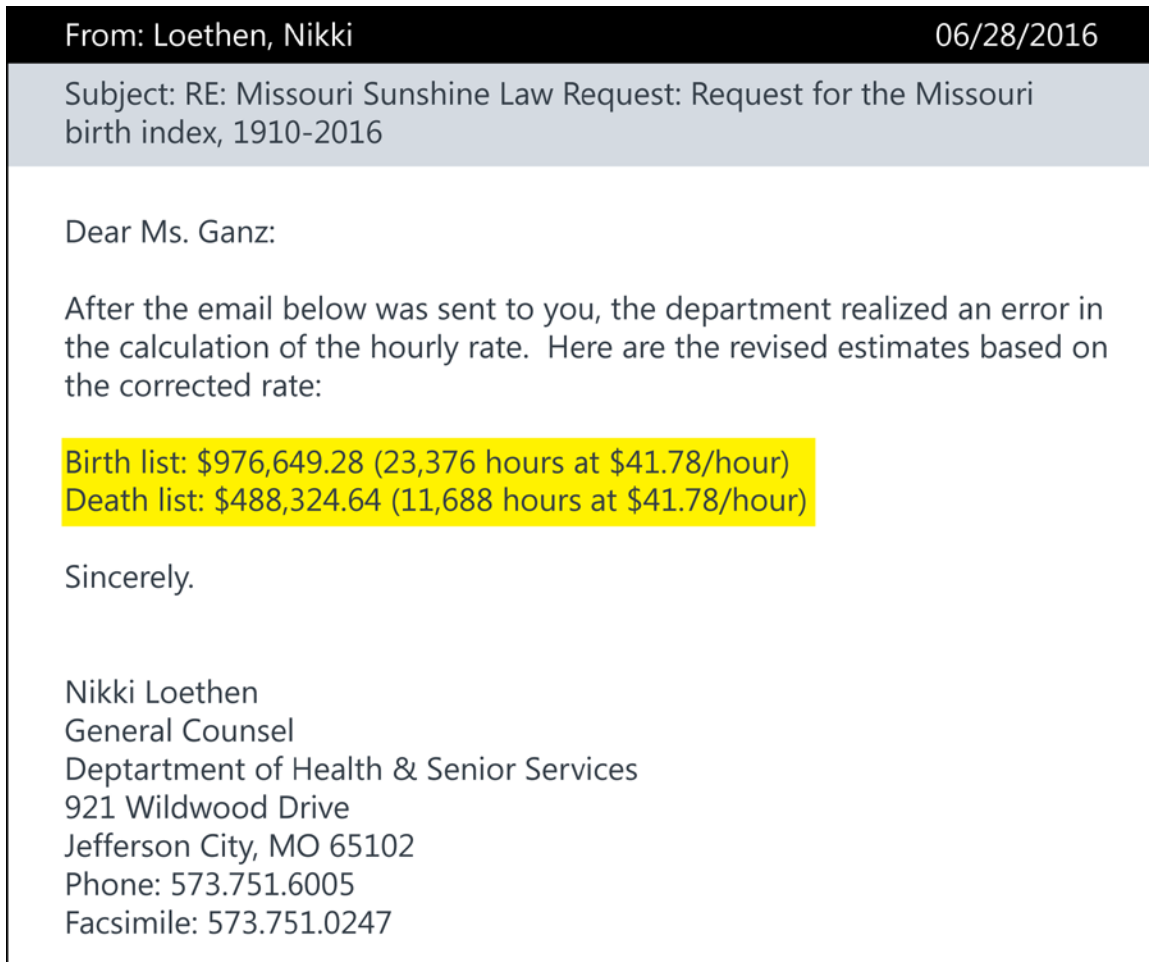
From: Hollis, Emily	06/24/2016
Subject: RE: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2016	
<p>Dear Ms. Ganz:</p> <p>Pursuant to your request for an estimate and Section 610.026, RSMo, compliance with the two records requests below is estimated to cost the following:</p> <p>Birth list: \$993,480 (23,376 hours at \$42.50/hour) Death list: \$496,740 (11,688 hours at \$42.50/hour)</p> <p>Thank you.</p> <p>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></p>	

(Rhodes Aff. Ex. 7 ¶ 10. Ganz Aff. ¶¶ 53-54; Ex. E (highlighting added)).

45. DHSS' estimate assumed it would take 35,064 hours (or more than four years of someone working 24 hours a day, seven days a week) to retrieve the records.

(Rhodes Aff. Ex. 22, 34:2-36:3).

46. On June 28, 2016, Ms. Loethen sent Ms. Ganz an e-mail revising the hourly rate by 72¢ an hour, but maintaining it would still take 35,064 hours of DHSS staff time to provide the listings.



(Rhodes Aff. Ex. 7 ¶ 14. Ganz Aff. ¶¶ 55-56; Ex. F (highlighting added)).

Ms. Ganz retains counsel

47. Given DHSS' unreasonable delays and exorbitant cost estimates, Ms. Ganz retained counsel, Bernard Rhodes of Lathrop Gage, to assist her in obtaining the records. (Ganz Aff. ¶ 57. Rhodes Aff. ¶ 5).

48. On June 28, 2016, Mr. Rhodes spoke by telephone with Ms. Loethen, who advised Mr. Rhodes that the \$1.49 million cost estimate was based on separate searches for each day of the two relevant periods, *i.e.*, the 96-year period for the birth listings (1920-2015), and the 48-year period for the death listings (1968-2015). (Rhodes Aff. ¶¶ 7-8).

49. In response, Mr. Rhodes advised Ms. Loethen that the \$1.49 million cost estimate violated the Sunshine Law, which does not allow for “per record” charges when the records are maintained on a computer database, but instead expressly provides that the only allowable charges are the actual time it takes a staff member to retrieve the records from the database. (Rhodes Aff. ¶ 9).

50. Mr. Rhodes also asked Ms. Loethen to provide him information as to the type of database DHSS used to maintain the birth and death lists so that he could propose a search methodology consistent with the Sunshine Law. (Rhodes Aff. ¶ 10).

51. On July 7, 2016, Ms. Loethen sent Mr. Rhodes an e-mail advising that DHSS maintains the listings on an IBM mainframe computer in a flat file database, *i.e.*, there is only one record per line. (Rhodes Aff. ¶ 11; Ex. 1; Ex. 7 ¶ 17).

52. On July 12, 2016, Mr. Rhodes sent Ms. Loethen an e-mail and explained how—using the information Ms. Loethen had provided about DHSS’ computer system—the two listings could be produced by using two simple date range searches, *i.e.*, one search for the birth records and one search for the death records. (Rhodes Aff. ¶ 12; Ex. 2; Ex. 7 ¶ 18).

53. On July 22, 2016, when Mr. Rhodes had not received any response from Ms. Loethen, he sent a follow-up e-mail to her. (Rhodes Aff. ¶ 13).

54. Later that same day, Ms. Loethen responded that she was still waiting to hear from DHSS staff “whether lists compliant with Section 193.245 could be created in fewer hours,” utilizing the methodology proposed by Mr. Rhodes. (Rhodes Aff. Ex. 3; Ex. 7 ¶ 21).

DHSS' Revised Cost Estimate

55. On August 1, 2016, when Mr. Rhodes had not received a response from Ms. Loethen as to whether the birth and death listings could be created using the method he proposed, he sent a follow-up e-mail to Ms. Loethen. (Rhodes Aff. ¶ 15).

56. Later that same day, Ms. Loethen sent Mr. Rhodes an e-mail dramatically revising the cost estimate from \$1,464,973.92 to \$5,174.04.

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

Nikki Loethen
 General Counsel
 Department of Health & Senior Services
 912 Wildwood Drive
 Jefferson City, MO 65102
 Phone: 573.751.6005
 Fax: 573.751.0247

(Rhodes Aff. ¶ 16; Ex. 4; Ex. 7 ¶ 22 (highlighting added)).

57. In her e-mail, Ms. Loethen explained the difference between the two estimates by stating that “[s]taff has determined that they can run the lists for one year at a time versus one day at a time as originally estimated.” (Rhodes Aff. Ex. 4; Ex. 7 ¶ 22).

58. Ms. Loethen also stated that she had asked DHSS staff to research whether it was possible—as Mr. Rhodes had stated—to run all the years in one search, and said that if staff said such a search could not be run, “I have asked them to explain why.” (Rhodes Aff. Ex. 4; Ex. 7 ¶ 22).

59. Ms. Loethen told Mr. Rhodes, “I will let you know what I learn.” (Rhodes Aff. Ex. 4; Ex. 7 ¶ 22).

The Secret Plan to Deny the Sunshine Law Requests

60. On July 21, 2016—while Mr. Rhodes and Ms. Loethen were corresponding about search methodologies that would comply with the Sunshine Law—Dr. Wambuguh spoke with Garland Land, the former State Registrar, about Ms. Ganz’s requests. (Rhodes Aff. Ex. 17; Ex. 22, 61:4-15, 68:2-4).

61. Later the same day, Mr. Land wrote Dr. Wambuguh and told her that DHSS should deny Ms. Ganz’s requests, and “require them to take you to court,” and to use the delay caused by the lawsuit to get the Legislature to change the law.

I would not honor the request. I would require them to take you to court and then bring in national geneological and vital records experts to testify why making indexes is not good public policy. By delaying this you might file a regulation or get the Legislature to clarify the intent of the law.

(Rhodes Aff. Ex. 17; Ex. 22, 68:2-4).

62. The next day, Dr. Wambuguh wrote Mr. Land and advised him that she would “share ... this useful advice ... with my colleagues.” (Rhodes Aff. Ex. 18).

DHSS Executes the Secret Plan – Part 1

63. Exactly two weeks later, on August 9, 2016, Ms. Loethen wrote Mr. Rhodes and—rather than providing information as to whether it was possible to run just two searches, as she stated she would do in her August 1st e-mail—advised him that DHSS was denying both Ms. Ganz’s request for birth listings and her request for death listings, and was refusing to provide either listing, stating that “the department has opted to exercise the discretion granted in Section 193.245(1), RSMo, to decline these requests.” (Rhodes Aff. ¶ 19; Ex. 5; Ex. 7 ¶ 29).

64. The decision to deny Ms. Ganz’s requests had been made the day before, on August 8, 2016, exactly two weeks after Mr. Land’s e-mail advising DHSS to “not honor the request [and] require them to take you to court.” (Rhodes Aff. Ex. 17; Ex. 22, 93:14-17).

65. The decision to deny Ms. Ganz’s requests came nearly six months after Ms. Ganz made her requests. (Rhodes Aff. Ex. 7 ¶ 29; Ex. 22, 93:14-17).

DHSS Executes the Secret Plan – Part 2

66. On August 22, 2016, less than two weeks after DHSS denied Ms. Ganz’s requests, Mr. Ward—who previously had sought information from his contacts at other health departments about Reclaim the Records—e-mailed his contacts and advised them that DHSS had denied Ms. Ganz’s requests. (Rhodes Aff. Ex. 19).

67. He also advised them that not only had DHSS denied Ms. Ganz’s request, but that DHSS had also “submitted a legislative request to rescind the particular statute.” (Rhodes Aff. Ex. 19).

68. Mr. Ward then wrote: “I’m hoping that’s the end of it.” (Rhodes Aff. Ex. 19).

Ms. Ganz’s Counsel Responds to the Denial

69. But that was not the end of it, because on August 24, 2016, Mr. Rhodes sent Ms. Loethen an 11-page letter advising her that (a) DHSS’ reversal of its position was contrary to the Missouri Sunshine Law, and (b) Ms. Ganz intended to pursue litigation—and to seek penalties and attorneys’ fees for DHSS’ purposeful violation of the Sunshine Law—unless DHSS provided the requested records at actual cost. (Rhodes Aff. ¶ 21; Ex. 6).

70. Ms. Loethen never responded to Mr. Rhodes’ letter. (Rhodes Aff. ¶ 23).

DHSS Executes the Secret Plan – Part 2 (Continued)

71. As stated in Mr. Ward’s e-mail, DHSS did in fact attempt to convince the Missouri Legislature to amend Missouri law to close birth and death listings. (Rhodes Aff. Ex. 22, 21:18-22:4).

72. Specifically, DHSS lobbied to have the Missouri Legislature remove the provision in Section 193.245 that provides that birth and death listings are available upon request. (Rhodes Aff. Ex. 22, 21:18-22:4).

73. To date, DHSS’ attempt to amend Missouri law to close birth and death listings has failed. (Rhodes Aff. Ex. 22, 22:9-23:1).

74. DHSS, however, is considering additional steps to convince the Missouri Legislature to amend Missouri law to close birth and death listings. (Rhodes Aff. Ex. 22, 23:13-24).

75. DHSS' attempt to amend Missouri law to close birth and death listings while this lawsuit has been pending is precisely what Mr. Land advised DHSS to do: "By delaying this you might file a regulation or get the Legislature to clarify the intent of the law." (Rhodes Aff. Ex. 17).

DHSS' Past Practice Was to Regularly Provide Birth and Death Listings

76. Before DHSS denied Ms. Ganz's requests, it regularly provided birth and death listings. (Rhodes Aff. Ex. 22, 85:11-15).

77. In fact, in just the three years before Ms. Ganz made her requests, DHSS provided somewhere between 50 and 100 such listings to various requestors. (Rhodes Aff. Ex. 22, 7:1-10 & 16:17-19).

78. These listings included the first name, last name, and date of birth of every person who was born or died in Missouri on a given date. (Rhodes Aff. Ex. 22, 9:6-18).

79. If the request asked for more than one date, the listing would provide the same information for each date of the request. (Rhodes Aff. Ex. 22, 9:19-10:24).

80. DHSS placed no restrictions on the use of these listings. (Rhodes Aff. Ex. 22, 7:23-25).

DHSS Has Stopped Providing Birth and Death Listings

81. Since DHSS denied Ms. Ganz's requests, it has stopped providing birth and death listings, while it seeks an amendment to the Missouri statutes to close such listings. (Rhodes Aff. Ex. 22, 21:18-22:2, 23: 13-24).

DHSS' Shifting Hourly Rate Charges

82. When Ms. Hollis, from the DHSS Office of General Counsel, first acknowledged receipt of Ms. Ganz's Sunshine Law requests on February 17, 2016, she advised that "the Department may charge \$21.38 per hour for research."

The Department is working to fill your request. Due to the number of records to be reviewed, and day to day business, it is estimated that a response will be provided to you on or after March 31, 2016, Please note, the Department may charge \$21.38 per hour for research and \$.10 per page for records. An invoice may be sent to you for any charges in the fulfillment of your request prior to your receipt of the requested records.

(Rhodes Aff. Ex. 7 ¶ 6. Ganz Aff. Ex. B (highlighting added)).

83. On May 27, 2016, Ms. Loethen, DHSS' General Counsel, wrote Ms. Ganz as stated: "The department's current hourly rate for staff time is \$20.85."

As we discussed, the department is working to confirm a cost estimate of fulfilling your request for a list of people who were born and died on each day from 1910 - 2015. The department may not have the information for the earlier years of the request but is checking. The department will charge for staff time (and programmer time if necessary) as authorized by Chapter 610, RSMo. The department's current hourly rate for staff time is \$20.85 per hour. The department understands that you want to receive the information electronically and is checking on whether it is possible to provide the information in that format, rather than on paper. The cost estimate will be provided to you within approximately five business days.

(Rhodes Aff. Ex. 7 ¶ 8; Ganz Aff. Ex. D (highlighting added)).

84. However, when Ms. Hollis sent the first cost estimate of \$1.49 million on June 24, 2016, it set forth charges of "42.50/hour."

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)

(Rhodes Aff. Ex. 7 ¶ 10. Ganz Aff. Ex. E (highlighting added)).

85. Moreover, as can be seen above, Ms. Hollis expressly stated in her e-mail that the \$42.50 hourly charge was prepared pursuant to Chapter 610 of the Missouri Statutes—just as Ms. Loethen had stated in her e-mail of May 27, 2016. (*Compare* Rhodes Aff. Ex. 7 ¶ 10 and Ganz Aff. Ex. E *with* Rhodes Aff. Ex. 7 ¶ 8 and Ganz Aff. Ex. D).

86. On June 28, 2016, Ms. Loethen sent a revised cost estimate of \$1.46 million, in which she changed the hourly rate from \$42.50 to “\$41.78/hour.” (Rhodes Aff. Ex. 7 ¶ 14. Ganz Aff. Ex. F).

87. Ms. Loethen based the difference on the fact “the department realized an error in the calculation of the hourly rate.” (Rhodes Aff. Ex. 7 ¶ 14. Ganz Aff. Ex. F).

88. When Ms. Loethen provided the cost of estimate of \$5,174.04 on August 1, 2016, it was based on the same “\$41.78 hour” rate used in her June 28, 2016, cost estimate of \$1.46 million.

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

(Rhodes Aff. Ex. 4; Ex. 7 ¶ 22. Ganz Aff. Ex. F (highlighting added)).

DHSS miscalculated the “average hourly rate of pay”

89. The Missouri Sunshine Law provides that a public governmental agency may charge for staff time to produce records maintained on computer facilities. Mo. Rev. Stat. § 610.026.1(2). (Rhodes Aff. ¶ 30).

90. Specifically, Section 610.026 provides as follows:

Fees for providing access to public records maintained on computer facilities ... shall include **only** the cost of copies, **staff time, which shall not exceed the average hourly rate of pay for staff** of the public governmental body required for making copies and programming, if necessary, and the cost of the disk, tape, or other medium used for the duplication.

Mo. Rev. Stat. § 610.026.1(2) (emphasis added). (Rhodes Aff. ¶ 31).

91. The work to be performed responding to Ms. Ganz's request was work that would have been performed by one or more DHSS Research Analysts. (Rhodes Aff. ¶ 42; Ex. 22, 27:18-28:13).

92. Specifically, the work would have been performed by persons with the job titles Research Analyst I, Research Analyst II, or Research Analyst III. (Rhodes Aff. ¶ 43; Ex. 22, 27:18-28:13).

93. Persons employed within these three categories would have been paid at varying rates—all within a set range. (Rhodes Aff. ¶ 44; Ex. 22, 29:11-30:1).

94. According to DHSS' authorized representative, to determine the "average hourly rate of pay for staff time," "we would take the average of each of those three ranges and then average that." (Rhodes Aff. Ex. 22, 30:3-10).

95. Using this methodology, the average hourly rate of pay was \$17.63. (Rhodes Aff. ¶¶ 46-49; Ex. 23).

96. When DHSS provided its fee estimates to Ms. Ganz, it began with an hourly rate of pay of \$22.61 per hour, which was mistakenly calculated by taking the "average" and the "maximum" rate of pay of the highest paid class and averaging those numbers. (Rhodes Aff. ¶¶ 36-38, 50; Ex. 20).

DHSS' hourly rate calculations include "additions"

97. Additionally, when DHSS provided its fee estimates to Ms. Ganz it added amounts in addition to the hourly rate of \$22.61. (Rhodes Aff. ¶¶ 36-37; Ex. 20; Ex. 22, 27:18-34:1).

98. To begin with, DHSS took the "direct PS [i.e. Pay Scale] rate" of \$22.61 and then added \$10.70 an hour in "fringe benefits." (Rhodes Aff. ¶¶ 36-37; Ex. 20; Ex. 22, 27:18-30:17).

99. This fringe benefit factor is a "generalized rate" for every employee in DHSS. (Rhodes Aff. Ex. 22, 30:11-17).

100. DHSS then took the sum of (a) the hourly rate of staff pay and (b) the fringe benefit factor, and multiplied the sum of those two numbers by an "indirect allocation" of general administrative expense factor of 20.9%, or another \$6.96 an hour. (Rhodes Aff. ¶ 53; Ex. 20; Ex. 22, 30:18-33:11).

101. DHSS then added to that number a "network" charge of \$.93 per hour, and a "server" charge of \$0.58 per hour. (Rhodes Aff. ¶ 54; Ex. 20).

102. The total of these charges equals the \$41.78 hourly charge that DHSS expected Ms. Ganz to pay.

Actual hourly rate	\$22.61
Fringe benefits	\$10.70
Indirect allocation	\$6.96
Network charge	\$0.93
<u>Server charge</u>	<u>\$0.58</u>
Total	\$41.78

(Rhodes Aff. ¶ 55; Ex. 20).

103. As can be seen, the additions to the actual hourly rate nearly doubled the hourly charge DHSS expected Ms. Ganz to pay. (Rhodes Aff. ¶ 55).

The Actual Cost of Producing the Listings

104. Ms. Loethen's August 1, 2016, cost estimate of \$5,174.04 was based on searches for one year at a time. (Rhodes Aff. Ex. 4; Ex. 7 ¶ 22; Ex. 22, 55:19-56:6).

105. Specifically, the estimate for the birth listings was based on 96 separate searches (for each of the years 1920 through 2015) at an estimated time per search of .75 hours, while the estimate of the death listings was based on 48 separate searches (for each of the years 1968 through 2015) at an estimated time per search of 1.08 hours. (Rhodes Aff. ¶¶ 58-59; Ex. 24).

106. In her e-mail forwarding the estimate, Ms. Loethen stated that she had asked staff to determine whether it was possible to run all the years in one search (as opposed separate searches for each year), and that she was waiting for an answer to that question. (Rhodes Aff. Ex. 4; Ex. 7 ¶ 22).

107. Ms. Loethen never advised as to whether it was possible to run all the years at one time. (Rhodes Aff. ¶ 61).

108. However, in the deposition of the authorized DHSS representative, the representative stated that DHSS did not try to run anything other than a one-year search. Rhodes Aff. (Ex. 22, 40:17-41:4).

109. The representative speculated that she did not believe it was possible to run a ten-year search. (Rhodes Aff. Ex. 22, 40:20-24).

110. Accordingly, she believed that an effective search would be somewhere between one year and ten years. (Rhodes Aff. Ex. 22, 40:25-41:4).

111. If Ms. Loethen had used a five-year search period, *i.e.*, halfway between one year and ten years, the number of hours needed to perform the resulting 20 searches

for the birth listings (96 years divided by 5 years per search) would have been 15 hours (20 searches x .75 hours per search), while the number of hours needed to perform the resulting 10 searches for the birth listings (48 years divided by 5 years per search) would have been 10.8 hours (10 searches x 1.08 hours per search). (Rhodes Aff. ¶ 65).

112. If Ms. Loethen had used the actual “average hourly rate of pay for staff” of \$17.63, the total cost of providing the birth listings by using five-year searches would have been \$264.45 (15 hours x \$17.63 an hour), while the total cost of providing the death listings by using five-year searches would have been \$190.40 (10.8 hours x \$17.63 an hour). (Rhodes Aff. ¶ 66).

113. Based on these calculations, the combined total for both listings would have been \$454.85, or less than ten percent of DHSS’ last estimate of \$5,174.04—or roughly three-tenths of one percent of DHSS’ original \$1.49 million estimate. (Rhodes Aff. ¶ 67).

CERTIFICATE OF SERVICE

I certify that on May 21, 2019, the foregoing was served via e-mail, in both PDF and Word, on the following:

Shawna Bligh
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Shawna.Bligh@ago.mo.gov

/s/Bernard J. Rhodes
An Attorney for Plaintiffs