IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
CIVIL DIVISION

BROOKE SCHREIER GANZ, both individually and as an authorized representative of RECLAIM THE RECORDS, a non-profit, unincorporated association,	)	
Plaintiffs,	)	
	)	Case No.16AC-CC00503
vs.	)	
MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES,	)	
Defendant.	)	

PLAINTIFFS' SUGGESTIONS IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF RESPONSIVE DOCUMENTS

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This is a simple Sunshine Law case in which the Department of Health and Senior Services has withheld from discovery more than 350 documents it claims are privileged under either the attorney-client privilege or the work product doctrine. After literally a year of failed efforts (with a revolving door of Assistant Attorneys General) to informally resolve the dispute concerning the number of claimed privileged documents, Plaintiffs followed the direction of the Missouri Supreme Court that before filing a motion to compel the moving party should conduct "[l]imited discovery by deposition [to] develop a factual record from which the trial court can render an informed decision." *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 368 (Mo. banc 2004).

Notwithstanding this express direction, at the Rule 57.03(b) deposition, the agency's representative refused to answer a single question as to "the factual basis for the claim of privilege" as to **any** of the 368 documents DHSS has withheld from production, claiming that the answers to such questions were themselves privileged.

It is well-settled that DHSS bears the burden of establishing the privileged nature of the documents it is withholding. It is equally well-settled that a party cannot use an assertion of privilege as both a sword and a shield. Because DHSS asserted the "shield" of the attorney-client and work product privileges in refusing to answer deposition questions as to the factual basis of its claim of privilege as to the withheld documents, DHSS is now barred from using that information as a "sword" and proffering to this Court the very thing it refused to provide to Ganz, *i.e.*, "the factual basis for the claim of privilege."

Accordingly, it is impossible for DHSS to meet its burden of coming forward with the required "competent evidence" of the privileged nature of the 368 documents DHSS is withholding, and this this Court should compel their production.

I. Factual Background

A. The original Sunshine Law requests and responses

1. On February 13, 2016, Plaintiff Brooke Ganz—the founder of a non-profit genealogical group named "Reclaim the Records"—made two Missouri Sunshine Law requests to the Missouri Department of Health and Senior Services; one was for birth listings for the period 1910 through 2015, while the second was for death listings for the same period. (Pet. ¶¶ 1, 5).

2. Each of the Sunshine Law requests expressly noted it was "a request just for the basic index to the births [or deaths], and is not a request for any actual birth [or death] certificates."

3. During subsequent discussions with the staff of DHSS concerning her requests, Ganz repeatedly agreed to narrow her request; for example, Ganz agreed to limit her request for the death index to the period 1965-2015, after learning that the death index for earlier years was publicly available from the Missouri State Archives, maintained by the Missouri Secretary of State

4. Following these discussions, DHSS formally responded to the requests by agreeing to provide the requested records, but stating that it would charge $1,490,220 for the listings. (Pet. ¶ 10).

5. Following Ganz's receipt of this cost estimate, Ganz (through counsel) explained how the requests could be fulfilled for substantially less money. (Pet. ¶¶ 15-20).

6. DHSS then revised its cost estimate, stating it would provide the requested listings for a total cost of $5,174.04—a reduction of more than ninety-five percent from the original estimate. (Pet. ¶ 22).

7. After Ganz (through counsel) responded that even this cost estimate was excessive, DHSS denied the two requests outright—despite having previously (and repeatedly) agreed to provide the records. (Pet. ¶ 29).

8. When Ganz's counsel wrote DHSS and requested the agency to reconsider its denial, DHSS simply ignored counsel's request. (Pet. ¶¶ 30-31).

9. Accordingly, on November 23, 2016, Ganz filed suit against DHSS, alleging violation of the Missouri Sunshine Law.

10. Ganz served written discovery requests with her lawsuit, including a request for production of documents which sought documents concerning the wildly-varying cost estimates, as well as the subsequent outright denial of the requests.

B. DHSS' privilege log

11. On February 14, 2017, DHSS responded to Ganz's written discovery requests, including providing (a) a "Privilege Log" which listed 570 separate e-mails, along with 131 attachments, and (b) a "Redaction Log" which listed another seven documents.

12. Following receipt of these logs, Ganz's counsel held a "meet and confer" session with the then-current Assistant Attorney General handling the case, Nathan Weinert, who agreed to review the two logs.

13. On March 28, 2017, Mr. Weinert provided updated logs which—astonishingly—actually **added** documents to the privilege log, meaning the agency was now claiming 228 privileged e-mails, 130 privileged attachments, two privileged spreadsheets, one set of privileged notes, and seven privileged redacted documents, for a total of 368 privileged documents.

14. Copies of the updated Privilege Log and updated Redaction Log are attached as Exhibits 1 and 2, respectively.

15. Mr. Weinert then left the AG's office, and since then the AG's office has assigned numerous different attorneys to the case, resulting in continued delay in resolving the dispute over the two logs, with each new attorney claiming ignorance as to the content of the two logs.

C. Ganz attempts to take a Rule 57.03(b) deposition

16. After a year of failed efforts to resolve the dispute over the two logs, Ganz noticed a Rule 57.03(b) deposition for the express purpose of determining "[t]he factual basis for the claim of privilege for each document" on each of the two logs, *i.e.*, the updated Privilege Log and the updated Redaction Log.

17. Because the two logs listed over 350 separate documents, the notice expressly asked that the witness bring the withheld documents to the deposition so that the witness could refer to the documents.

18. The notice expressly stated: "Plaintiffs' counsel will not ask to inspect or copy the documents at the deposition, but instead the documents will be available to the witness to aid in answering questions on the topics set forth" in the notice.

19. Two days before the scheduled deposition, DHSS filed a Motion for Protective Order, claiming that by having the witness review the withheld documents—either in advance or at the deposition—the privilege would somehow be waived.

20. Based on DHSS' claim of an emergency, this Court granted the motion without the benefit of Ganz's response, and promptly set the case for a status conference.

21. Prior to the status conference, Ganz's counsel offered to stipulate that the witness' review of the withheld documents would not constitute a waiver, and based on that stipulation DHSS' counsel agreed to go forward with the deposition.

22. Accordingly, on November 6, 2017, both parties represented to this Court during the telephone status conference that the dispute concerning the deposition had been resolved, and the parties were working on rescheduling the deposition.

23. Pursuant to the parties' agreement as to non-waiver, on November 22, 2017, Ganz's counsel issued an Amended Notice of Deposition, which included the same request that the witness bring the withheld documents to the deposition, and also contained the following express statement: "Plaintiffs will not assert a waiver of any claimed privileged as to any document listed on [the two privilege logs] which the Department's representative reviews in connection with the deposition, regardless of whether the witness reviews the documents prior to the deposition or during the deposition."

24. A copy of the Amended Notice of Deposition is attached as Exhibit 3.

D. The DHSS representative refuses to answer questions

25. The deposition was conducted on December 11, 2017.

26. Copies of relevant portions of the deposition are attached as Exhibit 4.

27. The agency's designated representative was Kerri Tesreau, the Acting Division Director for the Division of Community and Public Health; Tesreau is not a lawyer. (Depo. p. 5, 20).

28. Tesreau testified that to prepare for the deposition the only documents she reviewed where the Privilege Log (Ex. 1), the Redaction Log (Ex. 2), and the Amended Notice of Deposition (Ex. 3). (Depo. p. 21-23).

29. She testified that she did not look at any other documents (Depo. p. 23), and specifically testified she did not review any of the more than 350 withheld and/or redacted documents. (Depo. pp. 64-65).

30. When she was asked to testify as to Topic 1 in the Amended Notice of Deposition, she refused to answer.

> Q. Are you prepared to speak on Topic No. 1, the factual basis for the claim [of] privilege for each document identified on the Ganz update privilege log … attached as Exhibit 1?
>
> A. On advice of my Counsel, no.

(Depo. pp. 24-27).

31. The witness gave the same answer as to questions regarding the factual basis for the claim of privilege regarding the documents on the separate redaction log, as well as to questions regarding the nature of the legal advice given or sought in any withheld document, the nature of any lawsuit DHSS anticipated, when DHSS first anticipated such a lawsuit, etc. (Depo. pp. 27-28).

32. Finally, when DHSS' designated representative was asked an open-ended question for any information she could provide to justify the agency's decision to withhold the 368 documents on the two logs, she again refused to answer.

> Q. Can you provide any further testimony as to the basis for any claim of privilege by the Department of Health & Senior services as to the documents on Exhibits 1 or 2 [*i.e.*, the two logs]?
>
> A. I'm not answering on the advice of Counsel.

(Depo. p. 66).

33. The only topics as to which the witness would testify were (a) the job descriptions of the various persons listed on the log, and (b) the date the agency made the decision to deny the Sunshine Law requests, *i.e.*, August 8, 2016. (Depo. pp. 26-27, 45).

E. DHSS moves for a protective order *after* the deposition

34. On December 19, 2017—more than a week **after** the deposition of its designated representative—DHSS filed a second motion for a protective order, making the same arguments it made in its first motion for a protective order.

35. The motion states that during the November 6, 2017, telephone status conference with the Court "counsel for the parties indicated that they were attempting to resolve the issues related to Plaintiff's request to depose the corporate representative." (Def. Mot. for Prot. Order, at p. 2).

36. This statement is false; the parties advised the Court during the November 6, 2017, status conference that the parties **had** resolved the issues concerning the deposition, not that they were 'attempting to resolve' those issues—had those issues not be resolved prior the status conference, Ganz's counsel would have asked the Court to resolve them during the conference.[1]

37. DHSS' motion also makes no mention whatsoever of the fact the deposition had already taken place more than a week earlier.

38. The motion asks that "this Court … undertake an *in camera* inspection of the [368] documents identified on its privilege logs." (Def. Mot. for Prot. Order, at p. 5).

[1] DHSS' original motion for a protective order also contained the false statement that Ganz's counsel never responded to DHSS' counsel request to meet and confer regarding DHSS' issues with the deposition notice. This trend of false statements by the Attorney General's office is troubling.

II. Argument

A. The attorney-client privilege and work product doctrine in Missouri

1. The attorney-client privilege

"A communication is not privileged simply because it is made by or to a person who happens to be a lawyer." *Diversified Indus. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977) (applying Missouri law). Rather, the privilege only protects communications directly related to a request for—or the receipt of—legal advice. "To be privileged, the purpose of the communication between an attorney and client must be to secure legal advice." *Ratcliff v. Sprint Missouri, Inc*., 261 S.W.3d 534, 5646 (Mo. App. W.D. 2008).

Because the privilege is limited to communications made "to secure legal advice," "merely including counsel among the recipients of a document does not bring the document within the ambit of the attorney-client privilege; the document must be shared in furtherance of the client's solicitation of legal advice." *Olga Despotis Trust v. Cincinnati Ins. Co*., No. 12cv02369, 2014 WL 2611821, at *2 (E.D. Mo. Jun. 11, 2014) (applying Missouri law).

Similarly, business communications between a lawyer and a client are not privileged. "[I]t is settled in Missouri that 'a party may not claim the privilege where the dealing and communication between a non-lawyer and a lawyer concern non-legal matters." *State ex rel. Koster v. Cain*, 383 S.W.3d 105, 120 (Mo. App. W.D. 2012).

2. Work product doctrine

To be protected from disclosure by the work product doctrine, a document must be "prepared in anticipation of litigation." *Bd. of Reg. for the Healing Arts v. Spinden*, 798 S.W.2d 472, 477 (Mo. App. W.D. 1990). The "mere likelihood of suit is not sufficient

to invoke the privilege." *Id.* at 478. Instead, the document must literally be "prepared in anticipation of litigation." *Id.*

Accordingly, documents which are "prepared in the ordinary course of business and not for purposes of litigation" are not protected by the work product doctrine. *See Electric Power Sys. Int., Inc. v. Zurich Am. Ins. Co.*, No. 15cv1171, 2016 WL 3997069, at *4 (E.D. Mo. Jul. 26, 2016).[2] Thus, because an insurer's ordinary business is to adjust claims, "an insurer's continued attempt to adjust a claim is part of its ordinary course of business" and documents generated in that process are not protected by the work product doctrine. *Id.*

This remains true until—at the earliest—the insurer decides to deny coverage. "[A]n insurer's decision to decline coverage is typically the point at which the ordinary course of business ends and the anticipation of litigation begins." *Scottrade v. The St. Paul Mercury Ins. Co.*, No. 09cv1855, 2011 WL 572455, at *5 (E.D. Mo. Feb. 15, 2011). Even then, however, the date by which the insurer actually anticipates being sued can be later.

For example, in *Electric Power Sys. Int., Inc. v. Zurich Am. Ins. Co.*, No. 15cv1171, 2016 WL 3997069 (E.D. Mo. Jul. 26, 2016), the court held that the plaintiff's casualty insurance carrier did not reasonably anticipate litigation until it received notice that the insurer had retained counsel—in response to a denial of coverage—and was considering legal action. Thus, that later date was "the date that a specific threat of litigation

[2] Because "[t]he Missouri work product rule is a rescript of Federal Rule of Civil Procedure 26(b)(3)," *State ex rel. J.E. Dunn Const. Co. v. Sprinkle*, 650 S.W.2d 707, 711 (Mo. App. 1983), federal cases construing the work product privilege are relevant in construing the work product doctrine in Missouri.

became palpable and thus is the effective date from which Zurich could have anticipated litigation for purposes of work product protection." *Id*. at *4.

3. Procedural rules

"The party asserting attorney-client privilege bears the burden of proof to demonstrate that the privilege applies." *State ex rel. Koster v. Cain*, 383 S.W.3d 105, 116 (Mo. App. W.D. 2012). The same is true for a party asserting the work product doctrine. *See Westbrooke*, 151 S.W.3d at 367.

A party cannot meet that burden by simply asserting a document is privileged, for "[a] blanket assertion of privilege is not sufficient." *Cain*, 383 S.W.3d at 116. "Instead, '[t]he party claiming the privilege must supply the court with sufficient information to enable the court to determine that each element of the privilege is satisfied.'" *Id*. This showing must be in the form of "competent evidence." *Westbrooke*, 151 S.W.3d at 367.

Equally important, the party challenging the claim of privilege must have "sufficient information to assess whether the claimed privilege is applicable." *State ex rel. Atchison, Topeka and Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 554 (Mo. banc 1995). Accordingly, the Missouri Supreme Court has expressly stated that "**[l]imited discovery by deposition** or otherwise" should be allowed in order for "the parties develop a factual record from which the trial court can render an informed decision." *Westbrooke*, 151 S.W.3d at 368 (emphasis added).

4. Privileged information cannot be both a sword and a shield

Privileged information cannot be both a sword and a shield. "[I]t is unfair to permit a party to make use of privileged information as a sword when it is advantageous for the privilege holder to do so, and then as a shield when the party opponent seeks to use privi-

leged information that might be holder to the privilege holder." *State v. Davis*, 522 S.W.3d 360, 368 (Mo. App. E.D. 2017); *State v. Long*, 257 Mo. 199, 219 (Mo. banc 1914) (party "cannot use this privilege both as a sword and a shield, to waive when it inures to her advantage, and wield when it does not").

The rationale behind this rule is simple: "a party should not be able to use a privilege to prejudice an opponent's case or to disclose some selected communications for self-serving purposes." *State ex. rel St. Johns Reg. Med. Ctr. v. Dally*, 90 S.W.3d 209, 215 (Mo. App. S.D. 2002); *Johnson v. Bd. of Nursing Administrators*, 130 S.W.3d 619, 632 (Mo. App. W.D. 2004) ("while a party is permitted to assert its privilege as a protective shield, it is not allowed to fashion it into a sword").

In line with this rule, a party will be prevented from later introducing evidence which it has failed to provide in response to valid discovery requests. *See, e.g., Wilkerson v. Prelutsky*, 943 S.W.2d 643, 650 (Mo. 1997). Here, Ganz properly noticed up a Rule 57.03(b) deposition of a DHSS representative for the express purpose of having DHSS provide the "factual basis for the claim of privilege" as to the documents on the agency's logs. But DHSS' representative refused to answer any questions as to that topic, claiming privilege. As a result, DHSS is barred from offering evidence as to that topic, *i.e.*, the "factual basis for the claim of privilege," because DHSS would then be turning its claim of privilege into a sword, using what it said in the deposition was privileged information to now show the factual basis for its claim of privilege as to the documents on its logs.

Put another way, DHSS' hardball tactics in refusing to comply with the valid deposition notice have placed the agency in a position where it cannot meet its burden of demonstrating the validity of its claim of privilege as to the documents on its logs.

B. Application of the law to the claimed privileged documents

1. Attorney-client privilege claims

It is axiomatic that in order for a communication to be covered by the attorney-client privilege the communication must be between an attorney and a client. Despite this obvious fact, 139 documents on DHSS' privilege log—and all seven documents on DHSS' redaction log—contain no information of any sort indicating the document consists of a communication between a lawyer and a client.

Specifically, of the 39 names on the two logs, only two are attorneys: Nikki Loethen and Sharon Ayers. Notwithstanding this fact, 139 separate entries on the two logs show e-mails (and attachments) sent to and from non-lawyers which DHSS claims are protected by the attorney-client privilege.

For example, DHSS claims that an April 21, 2016, e-mail from Stacy Kempker to Lynette Jackson is an "Attorney Client Communication," as shown in this entry from DHSS' privilege log:

AGO0000000103	Email	4/21/2016 16:56	FW: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2015	Kempker, Stacy [Stacy.Kempker@health.mo.gov]	Jackson, Lynette [Lynette.Jackson@health.mo.gov]	Kempker, Stacy [Stacy.Kempker@health.mo.gov]	Attorney Client Communication

But Kempker is an Administrative Assistant within the Division of Community and Public Health and Jackson is an Administrative Assistant within the Section of Epidemiology and Public Health Practices. (Depo. p. 30-32). Neither are attorneys.

Nor is this a single instance. As noted above, there are 139 separate entries on the privilege log which—like the Kempker-Jackson e-mail—contain no indication whatsoever that they are communications to or from an attorney, but are withheld on the ground they are "Attorney Client Communication." The footnote below contains the Bates numbers of

those 139 documents.[3] In addition, as also noted above, all seven of the documents on the redaction log show no indication they are to or from an attorney.

And even when the log shows an e-mail to or from (or cc'd to) an attorney, the log provides no information as to how the communication relates to a request for—and the rendering of—actual legal advice.

For example, following the publication of a news report on Ganz's lawsuit against DHSS, Loethen, the agency's general counsel, sent an e-mail to various individuals at DHSS with the subject line: "article re Reclaim the Records litigation."

AGO0000000037	Email	12/5/2016 22:01	article re Reclaim the Records litigation	Loethen, Nikki [Nikki.Loethen@health.mo.gov]	Lyskowski, Peter [Peter.Lyskowski@health.mo.gov];Fischer, Bret [Bret.Fischer@health.mo.gov];Kirbey , Harold [Harold.Kirbey@health.mo.gov];Tesreau, Kerri [Kerri.Tesreau@health.mo.gov];Hobart, Ryan [Ryan.Hobart@he		Attorney Client Communication

[3] AGO40, AGO90, AGO91, AGO92, AGO93, AGO94, AGO101, AGO102, AGO103, AGO104, AGO105, AGO112, AGO113, AGO114, AGO115, AGO116, AGO120, AGO122, AGO123, AGO124, AGO125, AGO126, AGO127, AGO127.1, AGO128, AGO132, AGO132.1, AGO132.1.1, AGO132.2, AGO135, AGO136, AGO137, AGO138, AGO139, AGO140, AGO143, AGO144, AGO145, AGO148, AGO152, AGO152.1, AGO152.2, AGO152.3, AGO153.4, AGO168, AGO175, AGO176, AGO176.1, AGO180, AGO180.1, AGO181, AGO181.1, AGO184, AGO185, AGO187, AGO188, AGO189, AGO190, AGO191, AGO193, AGO195, AGO198, AGO199, AGO203, AGO205, AGO206, AGO207, AGO208, AGO209, AGO211, AGO211.1, AGO211.2, AGO211.3, AGO213, AGO214, AGO215, AGO216, AGO218, AGO226, AGO250, AGO253, AGO268, AGO268.1, AGO268.2, AGO269, AGO269.1, AGO269.2, AGO270, AGO272, AGO273, AGO274, AGO286, AGO287, AGO288, AGO294, AGO299, AGO303, AGO310, AGO311, AGO312, AGO313, AGO313.1, AGO313.2, AGO314, AGO315, AGO315.1, AGO315.2, AGO316, AGO317, AGO317.1, AGO318, AGO319, AGO319.1, AGO319.2, AGO320, AGO322, AGO324, AGO324.1, AGO326, AGO326.1, AGO326.2, AGO326.3, AGO326.3.1, AGO330, AGO333, AGO334, AGO335, AGO339, AGO339.1, AGO339.2, AGO339.3, AGO339.4, AGO341, AGO342, AGO343, AGO344, AGO344.2, DHS642-49, DHS 2836.

As can be seen, the only information provided in the log other than the date, subject and to/from entries is the claim the e-mail is an "Attorney Client Communication." But as noted above, a "blanket assertion of privilege is not sufficient." *Cain*, 383 S.W.3d at 116. Yet that is all that DHSS had provided—and when Ganz attempted to gather more information about the "factual basis for the claim of privilege" for this (and every other document on the two logs), DHSS stonewalled Ganz when its designated representative refused to provide any information whatsoever to support DHSS' claim that this document (and every other document on the two logs) is privileged.

DHSS, as the party asserting the privilege, has the burden of establishing each and every element of the privilege. But when asked to come forward with competent evidence to establish its claim of privilege, DHSS refused to comply with a validly-issued deposition notice, and instead failed to comply with its obligations. As such, it is impossible for DHSS to now meet its burden without turning its claim of privilege during the deposition into a sword.

2. Work product doctrine claims

DHSS' claim to work product protection fares no better. As noted above, work product protection only applies once a party reasonably anticipates litigation. Here, DHSS has asserted work product privilege as to 267 separate documents on its privilege log, and all seven documents on its redaction log. It is obvious from a review of the log that this assertion is frivolous.

For example, DHSS asserts the work product privilege for an e-mail sent on February 18, 2016—four days after DHSS received Ganz's original Sunshine Law request:

AGO0000000087	Email	2/18/2016 10:01	FW: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2015	Hollis, Emily [Emily.Hollis@health.mo.gov]	Ayers, Sharon [Sharon.Ayers@health.mo.gov];Loethen, Nikki [Nikki.Loethen@health.mo.gov]		Attorney Work Product

It is simply inconceivable that four days after DHSS received the original Sunshine Law requests from Ganz that the agency was reasonably anticipating litigation by Ganz.

DHSS also claims work product privileged for two documents which appear to be partial results for Ganz's actual Sunshine Law requests. Specifically, DHSS is withholding a spreadsheet titled "1920 births with dates [&] names," as well as a second spreadsheet titled "1968 death with dates [&] names," as shown in this excerpt from DHSS' log:

DHS 000671 - DHS 002127	Excel spreadsheet	7/25/2016	1920 births with dates names	Loise Wambaugh			Attorney Work Product
DHS 002128 - DHS 002830	Excel spreadsheet	7/25/2016	1968 deaths with dates names	Loise Wambaugh			Attorney Work Product

It appears these two spreadsheets (which contain two of the very birth and death listings which Ganz requested) were prepared in response to Ganz's Sunshine Law requests, and were not created in anticipation of any actual litigation—particularly given the fact that both listings were created on July 25, 2016, which was **before** DHSS decided to deny Ganz's requests on August 8, 2016. (Depo. p. 45).

Moreover, of the 267 documents which DHSS claims are covered by the work product privilege, only 28 documents—or about ten percent—were created after August 8, 2016—the date DHSS decided to deny Ganz's requests.[4] And even documents which were created after August 8, 2016, do not appear to have been created for purposes of

[4] A16, A16.1, A14, A17.1, A17.2, A18, A18.1, A19, A19.1. A19.2, A19.3, A19.4, A21, A22, A23, A24, A28, A28.1, A28.2, A28.3, A28.4, A28.5, A29, A29.1, A29.2, A29.3, A29.4, A29.5.

litigation, but for PR or other reasons. For example, DHSS asserts work product protection for e-mails with the "subject" line: "Concern over 'Reclaim the Records."[5]

Again, when Ganz tried to assess the validity of DHSS' claim of work product for these documents, DHSS stonewalled her. It cannot now introduce information which would show the factual basis for its claim of privilege when it refused to provide that information during the Rule 57.03(b) deposition.

C. The withheld documents are responsive

There is no question that the documents which DHSS is withholding are responsive to Ganz's Rule 58.01 document request. Attached as Exhibit 5 is DHSS' formal response to Ganz's request, in which DHSS explicitly—and repeatedly—states that "[a] log of specific emails **responsive to this request** has been attached."

Accordingly, if DHSS cannot meet its burden of showing the withheld documents are privileged, this Court must order their production as responsive documents. *See* Mo. Sup. Ct. R. 61.01(d).

D. Conclusion

DHSS's conduct in this case is inexcusable. For more than a year Ganz has attempted to get DHSS to produce documents which the agency concedes are directly related to her claimed violations of the Missouri Sunshine Law. Rather than providing those documents, DHSS has repeatedly stonewalled Ganz. That this would occur in any lawsuit is a shame, but for it to happen in a lawsuit which seeks to enforce the public's right to access public records is utterly shameful.

[5] A21, A22, A23, A24.

DHSS has chosen to play hardball, and now should suffer the consequences of its litigation decisions. Despite being given more than a year to justify its withholding of 368 admittedly responsive documents, DHSS whiffed on its last chance to provide justification for that decision when its designated representative refused to answer questions as to a single one of the 368 withheld documents.

Because DHSS bears the burden of establishing the legitimacy of its claims of privilege—and because DHSS cannot meet that burden due to its refusal to provide the factual basis for those claims—this Court has no choice but to order DHSS to produce to Ganz all of the documents on DHSS' privilege and redaction logs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the above was filed on January 4, 2018, using the CaseNet electronic filing system, which will generate notice to the following:

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