MOPERM
Missouri Public Entity Risk Management Fund
Serving Public Entities Since 1987
Newsletter Winter 2020

OPEN RECORDS REQUESTS: WHEN IT COMES TO LITIGATION, THE SUN STILL MAY SHINE ON CLOUDY DAYS.

Government entities in Missouri constantly receive requests for information in the form of "Sunshine Law" or "Open Records" requests for information or documents. These requests are based on Chapter 610, RSMo, which requires the disclosure of records that are otherwise not considered "closed records." This article discusses (1) what records should be considered a "closed record" when there is the legitimate threat of a lawsuit, (2) closing Settlement Agreements and Release documents, and (3) what, if anything, needs to be provided if a requested record does not exist.

For purposes of this article the relevant section of § 610.021, RSMo, specifically states:

> **Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close meetings, records and votes, to the extent they relate to the following:**
>
> **Legal actions, causes of action or litigation involving a public governmental body** and any confidential or privileged communications between a public governmental body or its representatives and its attorneys. However, **any** minutes, vote or **settlement agreement relating to legal actions, causes of action or litigation involving a public governmental body or any agent** or entity representing its interests or acting on its behalf or with its authority, including any insurance company acting on behalf of a public government body as its insured, **shall be made public upon final disposition of the matter voted upon or upon the signing by the parties of the settlement agreement, unless, prior to final disposition, the settlement agreement is ordered closed by a court after a written finding that the adverse impact to a plaintiff or plaintiffs to the action clearly outweighs the public policy considerations of section 610.011,** however, the amount of any moneys paid by, or on behalf of, the public governmental body shall be disclosed; provided, however, in matters involving the exercise of the power of eminent domain, the vote shall be announced or become public immediately following the action on the motion to authorize institution of such a legal action. Legal work product shall be considered a closed record;

The sun may still shine when it comes to potential litigation:

The scenario starts with a government entity receiving notice of a potential suit. This notice may come in various forms, including a formal notice of a claim or disguised as a letter of representation and request that records be preserved. Whatever the form of the notice, prior to a recent decision from the Western District, Missouri Court of Appeals, if the public government entity anticipated a lawsuit, the records requested could be protected as closed records. *Tuft v. City of St. Louis*, 936 S.W.2d 113 (Mo. Ct. App. E.D. 1996).

The Court in *Tuft* specifically ruled that Missouri's Sunshine Law exemption permitting the closure of governmental records when they relate to "legal actions, causes of action, or litigation involving a public governmental entity" was not limited to pending litigation but, rather, also covered potential litigation. The phrase "cause of action" was held to mean the claim or general subject matter on which an action may be maintained and was not limited to cases in which a suit has already been filed, so long as the governmental entity could show a substantial likelihood that litigation may occur and a clear relationship between the documents sought and the anticipated litigation.

In late 2019, the horizon changed to allow the sun to shine even during cloudy weather. In *Wyrick v. Henry,* Case No. WD 82557, (Mo. Ct. App. W.D. November 12, 2019), after receiving formal notice of a claim against the governmental entity resulting from a vehicle collision, counsel for the claimant sent a request for records seeking complaints regarding safety and accidents at the intersection, design of the intersection, and traffic studies conduct at the intersection. Based on the *Tuft* decision, the request was denied as the records were considered closed based on the threat of litigation.

The Western District Court of Appeals held that the earlier *Tuft* decision does not stand for the proposition that public records can be closed to a person who has threatened litigation, but rather it is the nature of the record requested that controls whether it is "related to" pending or potential litigation. The Court went on to underscore the need for a "clear nexus" between the nature of the record sought and the actual or threatened litigation. The Court concluded public records do not have the required "clear nexus" to litigation just because they might be relevant to threatened litigation. A "clear nexus" exists only in narrow instances where the record sought by its inherent nature "relates to" pending or threatened litigation. It does not matter who is asking for the record or whether the entity has notice of threatened litigation.

In this author's opinion, the decision of the Western District now subjects governmental entities to full-blown records discovery as if they were involved in litigation, without the protection afforded to litigants who are involved in litigation. The decision in *Wyrick* now presents a conundrum for governmental entities. Do they continue to follow *Tuft* until *Wyrick* becomes a final decision or is transferred to the Missouri Supreme Court, or should they take a safer course and follow *Wyrick*? The answer is, for now, take the safer course.

As a practical pointer, if there is a potential for future litigation when records are provided pursuant to a Sunshine Law request, a copy of the records should be kept to later provide to defense counsel should a lawsuit be filed. For the sake of convenience, if the originals of the documents requested are in electronic format, they should be preserved in their "native" format. This will save both the entity and counsel from forgetting what was produced, and it will also preserve metadata associated with the electronic files.

Practical pointer number two: don't shy away from charging for the time and expense in complying with the request. The statute allows governmental entities to charge reasonable rates for employee time and supplies used to comply with a Sunshine Request. Sometimes the person making the request doesn't appreciate the cost associated with meeting a burdensome request and may narrow or withdraw the request once they are advised of the cost.

The sun doesn't necessarily shine when it comes to Settlement Agreements and Releases:

The second circumstance to be addressed has to do with a request for copies of settlement agreements. On occasion, a governmental body will receive a request under the Sunshine Law for a copy of a settlement and release. Generally, once a lawsuit is concluded, the terms of the settlement become open records and must be disclosed under the law. However, there is one circumstance under which the terms of the settlement, with exception of the amount paid, can be designated a closed record.

The opportunity to close records related to a settlement and release most frequently arises in situations involving a minor, an incapacitated person, or a wrongful death case. In each situation, a settlement requires some form of court approval. If, as part of the court approval process, evidence is presented that the adverse impact of allowing the general public access to the particulars of the settlement will have an adverse impact to the claimant which **clearly outweighs the public policy considerations of § 610.011, RSMo,** the settlement agreement ("Release") can be ordered closed by the approving court.

If a governmental body desires to keep settlement agreements as closed records (the exception being the amount paid in settlement) the time for doing so is when the court approves the settlement.

The sun doesn't shine when comes to providing something you don't have:

The final area is requests for records or documents that do not exist. The short answer is if the record or document doesn't already exist, there is no requirement that such a record be created just to comply with the request made. For example, sometimes a governmental body will be asked for a list of prior similar occurrences or a roster of individuals involved in a specific situation or occurrence. If a list or roster doesn't already exist, there is no requirement that a list or roster be created.

Under § 610.023(2), RSMo "[e]ach public governmental body shall make available for inspection and copying by the public of that body's public records." Public record is defined as "any record, whether written or electronically stored, retained by or of any public governmental body[.]" § 610.010(6), RSMo. In interpreting this definition of public record, the Missouri Supreme Court has held that "[t]he ordinary meaning of the word retain is 'to hold or continue to hold in possession or use[.]'" *Jones v. Jackson County Circuit Court*, 162 S.W.3d 53, 59 (Mo. Ct. App. W.D. 2005) (quoting *Hemeyer v. KRCG–TV*, 6 S.W.3d 880, 881 (Mo. banc 1999)). Applying the plain meaning of the word "retain," the definition of "public record" includes only those records—either written or electronic—that are already in existence that the public governmental body is "holding" or "maintaining" in its possession. *Jones*, 162 S.W.3d at 59.

There is nothing in the definition of "public records," that indicates it includes written or electronic records that ***can*** be created by the public governmental body, even if the new record could be created from information taken from existing records. *Id*. at 60. Thus, the plain language of the Sunshine Law does not require a governmental body to create a new record upon request, but only to provide access to existing records held or maintained by the governmental body. *Id*. (see also, *Am. Family Mut. Ins. Co. v. Missouri Dept. of Ins*., 169 S.W.3d 905, 914-15 (Mo. Ct. App. W.D. 2005), stating the Sunshine Act does not empower individuals or the courts to order a governmental agency to create records.)

I hope this article will come to mind and offer a bit of guidance the next time your governmental body receives a request for documents and records under the Missouri's Open Meetings and Records Act.

Steven Coronado, the author of this article, is with the law firm of Baty Otto Coronado PC with offices in Kansas City, St. Louis and Springfield, Missouri. Steve has been defending government entities and specifically MOPERM members for over 25 years. He is a member of the Governmental Liability Committee of the Defense Research Institute (DRI) and a former member of the organization's Board of Directors. He is also a former Director and President of the Missouri Organization of Defense Lawyers (MODL). Steve enjoys the challenges presented by cases involving public entities and their employees. He is grateful to be of service to those who have chosen to serve the public.
The article was prepared with the assistance of Lauren Nichols, an associate with the Baty Otto Coronado firm. Lauren is a member of the KCMBA and is a recent graduate of the University of Nebraska College of Law. Lauren is excited to begin her legal career and looks forward to working with public entities and their employees in the future.

2019 In Review

Thanks to our valuable members and staff, MOPERM experienced another busy and successful year in 2019. Since September, MOPERM's Underwriting department has been working hard to complete renewals and binding policies. MOPERM will be starting 2020 with over 950 members.

MOPERM's Claims department spent another year efficiently processing claims in a timely manner. The number of new claims reported in 2019 was slightly above the 2018 claims level. While it is good to see only a slight increase, MOPERM's Member Services staff will be working with members throughout the coming year to reduce the number of new claims.

The Claims icon on MOPERM's home page contains forms that are necessary when notifying MOPERM of a loss or potential loss. Claim notices may be filed directly with MOPERM by the member or agent. Members and agents can access claim forms through MOPERM's website, www.moperm.com

MOPERM's Accounting Unit assists it's members with billing and other fiscal issues throughout the year.

Since employment practices claims are on the rise, it is highly suggested when faced with a potential employee issue, contact MOPERM's Employment Practices Hotline at (888)5-MOPERM.

With 2019 behind us, MOPERM's Board of Trustees and staff look forward for what the new year has in store, and wishes all of our valuable members the very best for 2020.

Members have the ability access the MOPERM Account Portal System (MAPS). The portal provides policy information, outstanding invoice information, limited loss history and more.

If you do not have a password and user ID you may contact Jim Odom or Anna Kabler.

MAPS
MOPERM Account Portal System

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Other News to Note:

Office Hazards

With the cold weather upon us, it is easy to plug in a space heater by your feet or just plug in a heating pad for your lap.

With this in mind, MOPERM would like to share the more common office hazards found during previous public entity property inspections. Avoiding these potential problems in the workplace helps ensure sure that you, your coworkers, and public entity stay safe.

Damaged Power Cords: Damaged and ungrounded cords pose a threat of electric shock to employees, can present a fire hazard, and are a violation of safety codes. To minimize risks, inspect cords regularly for wear, and never use a power cord with damaged external sheathing or exposed wires. Never use plugs when the third prong, used to ground the device, has been damaged or removed.

Misused Extension Cords: Improper use of unapproved extension cords can present a serious fire hazard in the workplace. The most common cause of fires from extension cords is improper use and/or overloading. Extension cords in the workplace should always be properly approved by a certifying laboratory (such as UL), used only temporarily, and used to connect only one device at a time.

Unsafe Space Heaters: Portable space heaters can pose a major fire hazard if used improperly. Space heaters in the workplace should always be approved for commercial use by a recognized safety testing laboratory, never placed near combustible materials, and have a tip-over switch to ensure they will turn off automatically if knocked over. Additionally, space heaters should never be used with extension cords or power strips

MOPERM U

Welcome to MOPERM U

LocalGov U

Affordable e-learning provided by LocalGovU

Please check out MOPERM's on-line courses. The course catalog is available on our home page www.moperm.com in the Member Services section.

If your employees work from home when the hazardous travel policy is implemented or during inclement weather, completing some of the courses may benefit both employees and your entity.

If you would like to schedule a visit, please contact Jim Odom or Anna Kabler

Please pass this newsletter and other information received from MOPERM along to all of your employees/ Board Members

Preventing claims and protecting the solvency of the pool is the ultimate goal of Member Services.