MISSOURI CITY CLERKS AND FINANCE OFFICERS ASSOCIATION

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SPRING INSTITUTE

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Sunshine Law

The law: §610.010 - §610.225 RSMo
Helpful website: http://ago.mo.gov/Open-Government.htm

§ 610.010. Definitions.

. . . (3) "Public Business", all matters which relate in any way to the performance of the public governmental body's functions or the conduct of its business;

. . . (6) "Public record", ***any record***, whether written or electronically stored, retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared for the public governmental body by a consultant or other professional service paid for in whole or in part by public funds, including records created or maintained by private contractors under an agreement with a public governmental body or on behalf of a public governmental body; provided, however, that personally identifiable student records maintained by public educational institutions shall be open for inspection by the parents, guardian or other custodian of students under the age of eighteen years and by the parents, guardian or other custodian and the student if the student is over the age of eighteen years. The term "public record" shall not include any internal memorandum or letter received or prepared by or on behalf of a member of a public governmental body consisting of advice, opinions and recommendations in connection with the deliberative decision-making process of said body, unless such records are retained by the public governmental body or presented at a public meeting. Any document or study prepared for a public governmental body by a consultant or other professional service as described in this subdivision shall be retained by the public governmental body in the same manner as any other public record;

§ 610.021. Closed meetings and closed records authorized when, exceptions, sunset dates for certain exceptions.
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:

(1) ***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;

(2) Leasing, purchase or sale of real estate by a public governmental body where public knowledge of the transaction might adversely affect the legal consideration therefor. However, any minutes, vote or public record approving a contract relating to the leasing, purchase or sale of real estate by a public governmental body shall be made public upon execution of the lease, purchase or sale of the real estate;

(3) ***Hiring, firing, disciplining or promoting of particular employees by a public governmental body when personal information about the employee is discussed or recorded.*** However, ***any vote on a final decision,*** when taken by a public governmental body, to hire, fire, promote or discipline an employee of a public governmental body ***shall be made available with a record of how each member voted to the public within seventy-two hours of the close of the meeting where such action occurs; provided, however, that any employee so affected shall be entitled to prompt notice of such decision during the seventy-two-hour***

period before such decision is made available to the public. As used in this subdivision, the term "personal information" means information relating to the performance or merit of individual employees;

…

(11) Specifications for competitive bidding, until either the specifications are officially approved by the public governmental body or the specifications are published for bid;

(12) Sealed bids and related documents, until the bids are opened; and sealed proposals and related documents or any documents related to a negotiated contract until a contract is executed, or all proposals are rejected;

(13) Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such, and the names of private sources donating or contributing money to the salary of a chancellor or president at all public colleges and universities in the state of Missouri and the amount of money contributed by the source;

…

(17) Confidential or privileged communications between a public governmental body and its auditor, including all auditor work product; however, all final audit reports issued by the auditor are to be considered open records pursuant to this chapter; …

§ 610.022 Closed meetings, procedure and limitation--public records presumed open unless exempt--objections to closing meetings or records, procedure.

1. Except as set forth in subsection 2 of this section, no meeting or vote may be closed without an affirmative public vote of the majority of a quorum of the public governmental body. ***The vote of each member of the public governmental body on the question of closing a public meeting or vote and the specific reason for closing that public meeting or vote by reference to a specific section of this chapter shall be announced publicly at an open meeting of the governmental body and entered into the minutes.***

2. A public governmental body proposing to hold a closed meeting or vote shall give notice of the time, date and place of such closed meeting or vote and the reason for holding it by reference to the specific exception allowed pursuant to the provisions of section 610.021. Such notice shall comply with the procedures set forth in section 610.020 for notice of a public meeting.

3. Any meeting or vote closed pursuant to section 610.021 shall be closed only to the extent necessary for the specific reason announced to justify the closed meeting or vote. Public governmental bodies shall not discuss any business in a closed meeting, record or vote which does not directly relate to the specific reason announced to justify the closed meeting or vote. ***Public governmental bodies holding a closed meeting shall close only an existing portion of the meeting facility necessary to house the members of the public governmental body in the closed session, allowing members of the public to remain to attend any subsequent open session held by the public governmental body following the closed session.***

4. Nothing in sections 610.010 to 610.028 shall be construed as to require a public governmental body to hold a closed meeting, record or vote to discuss or act upon any matter.

5. Public records shall be presumed to be open unless otherwise exempt pursuant to the provisions of this chapter.

6. In the event any member of a public governmental body makes a motion to close a meeting, or a record, or a vote from the public and any other member believes that such motion, if passed, would cause a meeting, record or vote to be closed from the public in violation of any provision in this chapter, such latter member shall state his or her objection to the motion at or before the time the vote is taken on the motion. The public governmental body shall enter in the minutes of the public governmental body any objection made pursuant to this subsection. Any member making such an objection shall be allowed to fully participate in any meeting, record or vote that is closed from the

public over the member's objection. In the event the objecting member also voted in opposition to the motion to close the meeting, record or vote at issue, the objection and vote of the member as entered in the minutes shall be an absolute defense to any claim filed against the objecting member pursuant to section 610.027.

Atty. Gen. Op. 59-76 (March 10, 1976)(Danforth)

"In considering the language used by the legislature and giving effect to the applicable rules promulgated with respect to such interpretations by the court in Cohen v. Poelker, we note that a 'cause of action' is by historical legal definition somewhat different than litigation which has already commenced. That is, a cause of action is generally defined as a right of action at law which arises from the existence of a primary right in the plaintiff and an invasion of that right by some delict on the part of the defendant, and that the facts which establish the existence of that right and that delict constitute the cause of action. *Ballantine's Law Dictionary 1948 Edition*, p. 197."

FMLA

The law: 29 U.S.C. 2601, *et seq.*
The regulations: 29 CFR Part 825
Helpful website: http://www.dol.gov/whd/fmla/index.htm

29 CFR § 825.104 Definition of a "Covered employer." … An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed.

29 CFR § 825.800 ***Public agency*** means the government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State, or any interstate governmental agency. Under section 101(5)(B) of the Act, a public agency is considered to be a "person" engaged in commerce or in an industry or activity affecting commerce within the meaning of the Act.

29 USC § 2612 – Employees are eligible for FMLA leave:

- for the birth and care of the newborn child of the employee;
- for placement with the employee of a son or daughter for adoption or foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition; **or**
- to take medical leave when the employee is unable to work because of a serious health condition.
- for any qualifying exigency arising out of immediate family member's covered active duty in the Armed Forces.

Drug Testing

Helpful website: http://www.workplace.samhsa.gov/wpworkit/index.html

The 4th Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. "

See National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602 (1989).

Certifying Candidates

§ 115.351. Candidate may not file for more than one office or as a candidate for the same office on more than one ticket at the same election

No person shall file for one office and, without withdrawing, file for another office to be filled at the same election…Any person violating any provision of this section shall be disqualified from running for nomination or election to any office at the primary and general election next succeeding the violation.

§ 115.346. Persons in arrears for municipal taxes or fees shall not be candidates for municipal office, when.

Notwithstanding any other provisions of law to the contrary, no person shall be certified as a candidate for a municipal office, nor shall such person's name appear on the ballot as a candidate for such office, who shall be in arrears for any unpaid city taxes or municipal user fees on the last day to file a declaration of candidacy for the office.

§ 71.005. Candidates for municipal office, no arrearage for municipal taxes or user fees permitted.

No person shall be a candidate for municipal office unless such person complies with the provisions of section 115.346, RSMo, regarding payment of municipal taxes or user fees.

§ 77.380. Officers to be voters and residents of city, exceptions, appointed officers.

All officers elected to offices or appointed to fill a vacancy in any elective office under the city government shall be voters under the laws and constitution of this state and, except appointed officers, must be residents of the city. No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office.

§ 79.250. Officers to be voters and residents--exceptions, appointed officers.

All officers elected to offices or appointed to fill a vacancy in any elective office under the city government shall be voters under the laws and constitution of this state and the ordinances of the city except that appointed officers need not be voters of the city. No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office. All officers, except appointed officers, shall be residents of the city.

Political Signs

Political speech continues to enjoy the highest level of constitutional protection, including as applied in the context of zoning (such as sign regulations). The U.S. Supreme Court has said that municipalities may not *completely ban* political signage on private property in a residential district, even on the basis of aesthetics or safety. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

Although cities may regulate the size, number and duration of temporary signs on private property and may require removal after some period of time, a prohibition that applied only to "political signs" displayed more than 30 days prior to the election and required removal within 7 days after the election violated the U.S. Constitution as being improperly *content-based* regulation when singling out "political" signs. *Whitton v. City of Gladstone*, 832 F.Supp. 1329 (W.D. Mo. 1993), *aff'd in part, rev'd in part* 54 F.3d 1400 (8th Cir. 1995). Also, if a municipality allows lighting of commercial signs, the municipality must permit lighting of permanent political (or other non-commercial) signage. *Whitton v. City of Gladstone.*

That said, certain other types of speech or expression have a lesser degree of protection. For example, municipalities have a right to regulate the **time, place and manner** of offerings of adult entertainment. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (U.S. 1986) (upholding zoning ordinance prohibiting adult movie theaters within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school where ordinance was seeking to control "secondary effects" of adult uses); *see also, e.g., U.S. Partners Financial Corp v. Kansas City*, 707 F. Supp. 1090 (W.D. Mo. 1989); *Thames Enterprises v. City of St. Louis*, 851 F.2d 199 (8th Cir. 1988) (upholding restriction of adult entertainment and massage parlors to minimum 500 feet from residential district); *but cf., Blue Moon Entertainment,*

LLC v. City of Bates City, 441 F.3d 561 (8th Cir. 2006) (conditional use permit constituted prior restraint).

The Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 563 (1980). For general commercial speech to enjoy First Amendment protection, first, the sign "at least must concern lawful activity and not be misleading." At the same time, the regulation must concern a substantial governmental interest. "If both inquiries yield positive answers, [the court] must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566; *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (striking down ban on news racks containing "commercial handbills" that did not apply to news racks containing "newspapers").

Increase in Fees

The Hancock Amendment (Mo. Const., Art X, §§ 16-24) precludes a municipality from imposing a charge or fee ***without voter approval*** if the charge or fee constitutes a "tax, license or fee." In § 22(a), the Hancock Amendment says:

> Counties and other political subdivisions are hereby prohibited...from increasing the current levy of an existing tax, license or fees...without the approval of the required majority of the qualified voters of that...political subdivision voting thereon.

However, a charge that constitutes a "**user fee**" is not subject to the vote requirement.

Generally, under Missouri case law, a fee is a **true user fee**, not a tax, and may be increased by a municipality without voter approval if it is (1) charged **for an actual service or good**; (2) charged only to persons receiving the good or service; (3) charged after or at the time the service or good is provided; and (4) based on the **actual cost of providing the service** or good to the specific person charged. *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301 (Mo. banc 1991) (Setting out the above test and rejecting the idea that *all charges* by governmental entities are subject to the Hancock Amendment).

The *Keller* Court determined that the "fees" referred to by the Hancock Amendment, meant only fees that are "taxes in everything but name", and not "true" user fees. As a tool for analyzing the nature of a particular charge, the Court set what is now known as the Keller Test:

Keller Criteria	Tax	User Fee
When is the fee paid?	Likely due to be paid on a periodic basis	Likely due to be paid only on or after provision of a service to the individual paying the fee
Who pays the fee?	Likely to be blanket-billed to all or almost all of the residents of the political subdivision	Likely to be charged only to those who actually use the good or service for which the fee is charged
Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer?	Less likely to be dependent of the level of goods or services provided to the fee payer	Likely to be dependent on the level of goods or services provided to the fee payer
Is the government providing a service or good?	If there is no good or service being provided, or someone unconnected with the government is providing the good or service, then any charge required by and paid to a local government is probably subject to the Hancock Amendment.	If the government is providing a good or service or permission to use government property, the fee is less likely to be subject to the Hancock Amendment
Has the activity historically and exclusively been provided by the government?	Government has historically and exclusively provided the good, service, permission or activity	Government has not historically and exclusively provided the good, service, permission or activity,

Where a court is undecided as to which way the factors weigh.

Compelling Attendance/ Voting

While many cities state in their ordinances that the council members "shall attend all regular, closed and special meetings" how an absent member is compelled to attend is problematic.

The authority for "attendance requirements" comes from:

> ***Third Class Cities*** **-- 77.090. Proceedings of, how kept.** The council shall cause to be kept a journal of its proceedings, and the ayes and nays of the members shall be entered on any question at the desire of any two members. The council may prescribe and enforce such rules as may be necessary *to secure the attendance of its members* and the expeditious transactions of its business.
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> ***Fourth Class Cities*** **-- 79.150. Board to keep journal of proceedings.** The board of aldermen shall cause to be kept a journal of its proceedings, and the ayes and nays shall be entered on any question at the request of any two members. The board of aldermen may *prescribe and enforce such rules as it may find necessary for the expeditious transaction of its business*.
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> ***Villages*** **-- 80.070. Trustees--quorum.** At all meetings of the board, a majority of the trustees shall constitute a quorum to do business; a smaller number may adjourn from day to day, and may *compel the attendance of absent members* in such manner and under such penalties as the board of trustees previously, by ordinance, may have prescribed.

According to the authoritative treatise on municipal law, *McQuillin, The Law of Municipal Corporations,* a monetary penalty for missing a meeting may not be legal. "Where a penalty for nonattendance is prescribed by ordinance, such penalty may not be authorized under a statute providing that a minority of the council member might 'compel the attendance of absentees under such penalties as may be prescribed by ordinance,' the city council having neither express nor implied power to impose a penalty on a council member for mere failure to attend a council meeting." *4 McQuillin Mun. Corp. § 13:27 (3rd ed.)* citing *City of Earlville v. Radley*, 237 Ill. 242, 86 N.E. 624 (1908).

McQuillin also says that just because you are an elected official does not mean you give up your rights. "Occupying the post of a municipal legislator does not divest a council member of rights that would otherwise be enjoyed under the First Amendment to speak freely or not speak at all. Furthermore, an ordinance requiring council members to vote aye or nay on questions put to council vote is a content-based restriction on constitutionally protected free speech. While the requirement is constitutionally permissible if narrowly drawn so as to serve a compelling municipal interest, abstention from voting does not impair the functioning of the council since it has the same effect as voting no on an issue and the requirement is thus constitutionally invalid." *4 McQuillin Mun. Corp. § 13:27 (3rd ed.)* citing *Wrzeski v. City of Madison*, *Wis*., 558 F. Supp. 664 (W.D. Wis. 1983) (footnotes omitted).

Ordinance Form Requirements/ Amending under Consideration

Unless you are a Charter City with a charter that provides otherwise, once a bill (proposed ordinance) is introduced for consideration, and then the Board/Council wants to amend it and pass it at the meeting, the Board/Council will have to read the amended bill in its entirety and cannot simply vote to pass the bill "as amended by title only." Villages and cities alike can only pass a proposed ordinance by reading by title only if copies of the proposed ordinance are "made available for public inspection prior to the time that the bill is under consideration." If the proposed ordinance is changed after it is under consideration, the proposed ordinance was not available for public inspection prior to its consideration.

Ordinances--procedure to enact. (4th class)

79.130. The style of the ordinances of the city shall be: "Be it ordained by the board of aldermen of the city of . . . . ., as follows:" ***No ordinance shall be passed except by bill***, and no bill shall become an ordinance unless on its final passage a majority of the members elected to the board of aldermen shall vote for it, and the ayes and nays be entered on the journal. Every proposed ordinance shall be introduced to the board of aldermen in writing and shall be read by title or in full two times prior to passage, both readings may occur at a single meeting of the board of aldermen. ***If the proposed ordinance is read by title only, copies of the proposed ordinance shall be made available for public inspection prior to the time the bill is under consideration by the board of aldermen.*** No bill shall become an ordinance until it shall have been signed by the mayor or person exercising the duties of the mayor's office, or shall have been passed over the mayor's veto, as herein provided.

Style of ordinances--procedure to enact (3rd class).

77.080. The style of the ordinances of the city shall be: "Be it ordained by the council of the city of . . . . , as follows:" ***No ordinance shall be passed except by bill***, and no bill shall become an ordinance unless on its final passage a majority of the members elected to the council shall vote therefor, and the ayes and nays shall be entered on the journal. Every proposed ordinance shall be introduced to the council in writing and shall be read by title or in full two times prior to passage, both readings may occur at a single meeting of the council. ***If the proposed ordinance is read by title only, copies of the proposed ordinance shall be made available for public inspection prior to the time the bill is under consideration by the council.*** No bill shall become an ordinance until it shall have been signed by the ***officer presiding*** at the meeting of the council at which it shall have been passed. ***When so signed, it shall be delivered*** to the mayor for his approval and signature, or his veto.

Trustees--passage of ordinances. (Village and Townships)

80.110. ***No ordinance shall be passed except by bill***, and no bill shall become an ordinance unless on its passage a majority of all the members of the board of trustees vote therefor, and the yeas and nays be entered upon the journal; every proposed ordinance shall be introduced to the board of trustees in writing and shall be read by title or in full two times prior to passage, both readings may occur at a single meeting of the board of trustees. ***If the proposed ordinance is read by title only, copies of the proposed ordinance shall be made available for public inspection prior to the time the bill is under consideration by the board of trustees.*** All ordinances shall be in full force and effect from and after their passage after being duly signed by the chairman of the board of trustees ***and attested by the village clerk***.