

The Trouble With Electronic Records: *Creation v. Re-creation Under The Sunshine Law*

The Missouri Sunshine Law allows public access to governmental records and meetings. Missouri courts have recognized that the “plain language of the Sunshine Law does not require a public governmental body to create a new record upon request, but only to provide access to existing records held or maintained by the public governmental body.” *Jones v. Jackson County Circuit Court*, 162 S.W.3d 53, 60 (Mo. App. 2005). The Eastern District Court of Appeals recently explained, however, that in certain circumstances a municipality or governmental body is required to *reproduce* discarded records that were previously in existence.

In *Weeks v. St. Louis County, Mo., et al*, --- S.W.3d --- (ED 111496 2023) (*motion for rehearing and/or transfer denied* January 08, 2024), the requestor sought information relating to vehicle stops made by several police departments.

One request at issue in the case was initially submitted to the City of Webster Groves (City), and then referred to the Regional Justice Information Services Commission (REJIS), because the City had contracted with REJIS to generate a report compiled from records of motor vehicle stops as required by Section 590.650 RSMo. Although REJIS had told the requester Weeks that it “could recreate the reports ... [in] approximately four hours at a cost of \$352” and although Weeks had agreed to pay the estimated cost, the City denied the request and instructed REJIS not to recreate the reports on the grounds that the requested records had been discarded by the City (i.e., not retained) and REJIS would have to re-generate the reports, stating that the Sunshine Law does not “mandate the creation and generation of custom reports upon request.” The trial court agreed and

granted summary judgment in favor of the City.

The Court of Appeals, though, reversed the trial court rejecting this argument, noting “Section 610.010(6) mandates that any document or study prepared for a public governmental body by a professional service, such as REJIS, shall be retained by the public governmental body.” In holding that the City was required to provide the records, the Court of Appeals explained that recreating these reports, that had been previously prepared, did not amount to creating a new, custom report that is not typically prepared.

The request also sought information that was not required to be contained in the requested reports under Section 590.650 RSMo. The Court of Appeals upheld the denial of this information, again explaining that the Sunshine Law does not require a city to generate a new record containing information compiled from existing records. The Court reasoned that although the *Jones* court recognized that public governmental bodies are not required to create a new record in response to a Sunshine request, at issue in *Jones* was a request for select information gleaned from multiple records, and then compiled into a *new, custom record that was not typically generated*. In contrast, the *Weeks* request, the Court said, only sought records that had previously been prepared on behalf of the City but had subsequently been destroyed. The *Weeks* decision refined *Jones* by holding that the Sunshine Law does not require creating atypical, “custom” records but does require providing access to “records ... typically generated and compiled ... in the usual course of business” even if that requires recreating or reproducing such records.



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In addition to diverging from *Jones*, the *Weeks* decision seems to be a qualification of the Western District's holding in *Sansone v. Governor of Missouri*, 648 S.W.3d 13, 24 (Mo. App. W.D. 2022). In *Sansone*, the Western District Court of Appeals considered whether the Governor's office violated the Sunshine Law and record retention policy by allowing employees to use a messaging application, Confide, that automatically deleted messages sent and received through the application. Sansone submitted a Sunshine request to the Governor's office for records relating to messages sent and received using the Confide application, information relating to user accounts, and dates and times messages were sent and received. Evidence demonstrated that Confide deletes messages from both the sender's and recipient's phones after a short time, and that deleted messages were not recoverable using forensic methodology. The court focused on the Sunshine Law's definition of "public record," noting that the law only requires public governmental bodies provide access to public records actually in existence and in the agency's possession or under their control at the time of the request. A record must be retained by the public governmental body to be a "public record." Since the messages were not in existence, in the custody of the Governor's office, or retrievable at the time of Sansone's request, there was no violation of the Sunshine Law for failing to provide them. The court noted that the use of ephemeral messaging applications, like Confide, has the practical effect of side-stepping the purpose of the Sunshine Law (or at least the records retention laws), but stated that updated legislation would be required to address the concerns associated with cellular phone technology.

In the end, the distinction between *Jones* (no requirement to create a record) and *Weeks* lies in the difference in the requests: *Jones* requested a custom report not typically generated while *Weeks* sought a report that the City's contractor not only generated monthly and annually but that was required to be produced to the Attorney General by law which made it a routine, relatively easy to recreate report. And the distinction between *Sansone* and *Weeks* arises from

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the fact that the evidence in *Sansone* showed the requested records were not recoverable using any forensic technique while the evidence in *Weeks* showed that data from which the records had been created still existed and the reports could be re-created in a relatively short time.

Finally, the *Weeks* decision demonstrates that Sunshine Law's reach is not just to the public governmental body's records but also records "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." Section 610.010.6 RSMo.

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