IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI
ASSOCIATE DIVISION

PH

Petitioner,

vs.

ST. LOUIS COUNTY BOARD OF POLICE COMMISSIONERS

Respondent.

Div. 36

ORDER DENYING RESPONDENT'S REQUEST TO FILE RECORD UNDER SEAL

COMES NOW the court, having called and heard arguments by all parties regarding Respondent's Board's Motion to File the Record Under Seal on August 5, 2016 after having taken the matter under submission, to review the transcripts and exhibits offered by Respondent to be viewed in camera, the pleadings filed by the parties, as well as the entire court file, now enters its order DENYING Respondent's Request to File the Record Under Seal.

FINDINGS OF FACTS

On March 22, 2016, Petitioner filed his Petition for Review with four exhibits attached. Exhibit A was the Report of Finding of Facts, Conclusion of Law and Recommendation drafted and offered by the hearing officer to the St. Louis County Police Board of Police Commissioners for their consideration. That report contained 80 pages summarizing the testimony of witnesses and the evidence that was presented over eleven days spanning five months. Every testimonial witness is referenced in the hearing officer's report.

The hearing officer recommended the Board to overturn and set aside Chief of Police TF's termination of employment of Lt. PH. The hearing officer further recommended the Board to fully reinstate Lt. PH to full employment with no reduction in rank.

In addition to Exhibit A, Exhibit B attached was Chief of Police Colonel JB's letter dated March 21, 2016 advising Police Officer PH that the Board directed the chief to restore Officer PH to a position of employment with the St. Louis County Police Department with a reduction in rank to police officer.

Exhibit D attached to the petition was the breakdown of the Commissioners' votes in coming to their decision.

The petition and its exhibits referenced above are an open record. No request has been made to close these records.

On 7/22/2016, Respondent Board filed its Motion for Leave to File Record under Seal and emailed the court the proposed record consisting of approximately 3,000 pages for in camera review.

On 7/28/2016, Petitioner filed his Memorandum in Opposition.

On August 5, 2016, a hearing was held on the issue and all parties were present. No witnesses or testimony were offered. The parties offered only their pleadings, oral arguments, and the proposed record for in camera review for the Court's consideration in ruling on this matter.

ARGUMENT OF RESPONDENT

In its argument to the court, the Respondent Board took two positions.

One, the record as a whole should be sealed pursuant to §610.021(3) and (13) RSMO as identifiable personnel records. This court finds that portions of the record also meet the definition of investigative report as defined by §610.100.1(5) RSMO.

Two, the record is replete with allegations relating to multiple police personnel and if the record is not sealed, these employees will be subject to substantial invasion of privacy.

The Respondent Board offered no testimony from anyone on the issue of invasion of privacy nor any case law providing guidance that such a record may invade the privacy of public employees.

The Respondent Board did not attempt to separate out from the record any exempt portion of the records under Section 610.021 RSMO from non-exempt portions of the record under Section 610.010 RSMO.

LAW OF OPEN COURT AND RECORDS

In Missouri, section 109.180 codifies the presumption in favor of openness, stating the following: "Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen." In re *Transit Casualty v. Pulitzer Publishing Co.* 435.S.W.3d 293, 300 (Mo en banc 2001).

The public policy behind open records and the public right of access is well-established in Missouri. The rule has been mandated legislatively in numerous contexts. *See, e.g., sec. 610.011* ("It is the public policy of this state that meetings, records, votes, actions and deliberations of public governmental bodies be open to the public unless otherwise provided by law."); *sec. 610.021(13)* (providing that names, salaries, and other information about public officials and employees are generally open); Id. "In all instances where, by law or regulation, a document is required to be filed in a public office, it is a public record and the public has a right to inspect it." State ex rel. *Kavanaugh v. Henderson*, 350 Mo. 968, 169 S.W.2d 389, 392 (1943); *See also Disabled Police Veterans Club V. Long*, 279 S.W.2d 220, 223 (Mo.App.1955); *Hyde v. City of Columbia.* 637 S.W.2d 251, 258 (Mo.App.1982). "Citizens of Missouri have the right to

inspect and copy any public record even if there is no apparent 'legal interest to be subserved...'" *State ex rel. Gray v. Brigham,* 622 S.W.2d 734, 735 (Mo.App.1981).

"The public's right to inspect court and other public records comes not from any personal interest in the subject matter of the records. Rather, the right stems from the public's presumed interest in the integrity and impartiality of its government." *Transit Casualty* at 301 citing *Gray* at 622 S.W.2d at 735. It is simply beyond dispute that public records are freely accessible to ensure confidence in the impartiality and fairness of the judicial system, and generally to discourage bias and corruption in public service. "Without publicity, all other checks are insufficient..." *Transit Casualty* at 301 citing *1 J. Bentham, Rationale of Judicial Evidence 524 (1827).*

"In accordance with this long-established legal tradition, this Court in 1998 adopted Court Operating Rule 2, (formerly Administrative Rule 2) which governs public access to the records of the judicial department. It also provides for exceptions to the general rule of openness. The general policy of Rule 2 is set out in Rule 2.02, which states in pertinent part:

> 'Records of all courts are presumed to be open to any member of the public for purposes of inspection or copying during the regular business hours of the court having custody of the records. The policy does not apply to records that are confidential pursuant to statute, court rules or court order; judicial or judicial staff work product; memoranda or drafts; or appellate judicial assignments.'" *Id.*

"Justice is best served when it is done within full view of those to whom all courts are ultimately responsible—the public." *Id.*

"In order to close court or other public records, however, a court in its order must identify specific and tangible threats to important values in order to override the importance of public right of access." See *United States v. Antar*, 38 F.3d 1348, 1351 (3rd Cir. 1994). "Vague or

uncertain threats claimed by one party normally would not justify closure." *Transit Casualty* 43 S.W.3d at 302.

"Missouri rules of civil procedure demand more than mere conclusions that the pleader alleges without supporting facts." *Sofka v. Thal*, 662 S.W.2d 502, 508 (Mo. banc 1983). See also *Rule 55.05*.

"All public employees enter public service knowing that their names, positions, compensation, and terms of service will be accessible by any person." *Transit Casualty* at 303 relying on *Laut v. City of Arnold*, 417 S.W.3d 315, 322 (Mo.App.E.D.2014). See also *Sec. 610.021(13).*

"In *Guyer v. City of Kirkwood*, the Missouri Supreme Court specifically considered the question of whether an internal police report fell under Section 610.100.2 (investigative report open once investigation inactive) or Section 610.021 (personnel records exempt from disclosure). 38 S.W.2d 412 [Mo banc 2001]. There, a police officer who had been under investigation regarding a complaint of criminal conduct, which the department had concluded was unfounded, requested the records of the investigation under the Sunshine Law. *Id.* at 413. The Missouri Supreme Court noted that the requested documents at issue, which were not part of the record on appeal, could qualify as both as investigative reports and personnel records. *Id.* at 414."

The Court went on to note: "The Supreme Court examined the two sections above and found that, based on the permissive language of Section 610.021's exemptions (allowing public governmental body to close records "[e]xcept to the extent disclosure is otherwise required by law") and the express public policy statement of the Sunshine Law in favor of open records (Section 610.011.1), this public policy 'should be used as a tiebreaker in favor of disclosure when records fit equally well under two specific but opposite provisions of the Sunshine Law.' *Id.*

The court concluded that the requirement of open investigative reports in Section 610.100.2 (investigative reports are open records once investigation is inactive) overrides the permissive exemption for personnel records in Section 610.021. *Id.*" *Laut,* 417 S.W.3d at 322.

"Again, Section 610.010 contains the definition of a "public records" and applies to the term "as used in this chapter." The definition is quite broad, encompassing "any record ... retained by or of any public governmental body." An investigative report is "a record...," Section 610.100(5), retained by a type of public governmental body; a law enforcement agency. Thus, an investigative report is a type of public record under the statute. See also *Guyer*, 38 S.W.3d at 414 (Section 610.100 discusses 'specific type of public record')." *Laut,* 417 S.W.3d at 323.

"According to the Missouri Supreme court there, where a document "fits equally" under an exemption and a provision requiring disclosure, the document should be disclosed, notwithstanding the fact that an exemption would otherwise apply. *Guyer*, 38 S.W.3d at 414. Thus, to the extent an internal police report, or portions thereof, can equally be considered both a personnel record and an investigative report, it, or those portions, should be disclosed." *Id.*

"Records are presumptively open to public inspection and copying absent a compelling justification for their closure. It is up to the objecting party to plead and prove convincing reasons to rebut the presumption of openness." *In re Transit Cas. Co.* 43 S.W.2d at 303-304.

CONCLUSION

It is up to the Respondent Board to plead and prove convincing reasons to rebut the presumption of openness. It is also incumbent of the Respondent Board to separate any exempt and non-exempt portions of the record and to disclose the latter. See *Laut v. City of Arnold* 417 S.W.3d, 315, 323 (Mo.App E.D. 2014). Mere conclusion that the pleader alleges without supporting facts is insufficient. *Transit Casualty,* 43 S.W.3d at 302.

In both respects, the Respondent Board has failed.

As stated in *Guyer v. City of Kirkwood*, investigative reports are open records once investigation is inactive and overrides the permissive exception for personnel records. In this case, the record provided by Respondent for the Court to view in camera contains investigative reports as defined by Section 610.100.2 RSMO. Respondent Board has made no attempt to separate non-exempt portions of the record from potentially exempt portions of the records.

When a court exercises its discretion pursuant to Rule 2 and removes certain records from public view, the court *must* cite the specific reasons for closure upon which it relies. (See *In re Transit Cas. Co.* 43 S.W.3d at 304.)

In this case, based upon the record as a whole, the Respondent has failed to provide any specific reasons for closure. The Respondent has taken the position it wants the whole record closed, yet the public record already shows two different decisions being rendered in Petitioner's disciplinary action, as well as a third alternative decision, although rejected, offered by the hearing officer.

Given that the pleadings and exhibits filed by the Petitioner are already open to the public together with the vast amount of information already referred to in the hearing officer's report, closing the record at this time would run afoul of the public policy to ensure confidence in the impartiality and fairness of the judicial system. The public would not be provided the complete original record but an incomplete, summarized record. This could potentially be misleading to the public. Such incomplete information runs the risk of having part of the record taken out of context and would undermine the impartiality and fairness of the judicial system public policy seeks to protect.

Wherefore all the foregoing reasons, Respondent Board's Motion for Leave to File Record Under Seal is DENIED.

Pursuant to §536.130(4), the record to be filed shall be transmitted by the Respondent Board directly to the clerk of the court within fourteen (14) days of this order.

SO ORDERED.

[redacted] Division 36

Judge 9-9-2016