December 19, 2017

The Honorable Joshua Hawley, Attorney General of Missouri
Supreme Court Building
207 W. High St.
P.O. Box 899
Jefferson City, MO 65102

Re: Request for Investigation into Governor Eric Greitens

Dear Mr. Hawley:

We respectfully request that you open an investigation into whether Governor Eric Greitens and members of his administration have violated Missouri’s Sunshine Laws by failing to retain public records created through the use of private email and text message services, by refusing to disclose those records in response to records requests, and by imposing unreasonably high fees on those seeking access to records related to Governor Greitens’ administration.

Factual Background

Since his election as Governor of Missouri in November 2016, Governor Greitens has been concealing records from the public about his administration. This lack of transparency began during his transition into the Governor’s office, when staff working on the transition discussed public business related to the transition using private email accounts.¹ Missouri news organizations requesting information related to the transition, including information on individuals and groups that donated funds to the inauguration, were told that those details were not subject to disclosure under the Sunshine Laws, because they were discussed by staff over private email and were therefore not public records.² These records remain undisclosed, and it is unknown whether any personnel retain access to these records.

Further reports have indicated that the Governor’s staff frequently use text messaging services on private cell phones to conduct official public business, and may even be using applications designed to automatically delete text messages once they are received.³ When asked to disclose these records, and if they are being preserved in accordance with Missouri public records laws, the Governor’s office has refused to respond and indicated that it will not take steps to curb the use of private phones and messaging services by the Governor’s staff.⁴

² Id.
The Governor’s office has also imposed unreasonably high fees for records requests in an attempt to deter the public from seeking information to which it is entitled, often asking for over $1,000, and on at least one occasion up to $1,600 for a single request of e-mail exchanges among members of the Governor’s staff.  

Many of the over 150 public records requests Governor Greitens’ administration has received in 2017 have remained unanswered for over a year, including records that should be readily available to staff in the Governor’s office, such as records related to the Governor’s schedule.

Legal Analysis

As Missouri’s Attorney General, you are empowered to seek judicial enforcement of the state’s Sunshine Law. Missouri’s Sunshine Law requires all government bodies to “make available for inspection and copying by the public of that body’s public records.” A “public record” includes “any record, whether written or electronically stored, retained by or of any public governmental body.” The public records law “shall be liberally construed” to ensure that “meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law.”

State government agencies are required to retain any “document, book, paper, photograph, map, sound recording or other material . . . made or received . . . in connection with the transaction of official business” according to schedules set forth by the Secretary of State. The Secretary of State has clarified that any emails or communications, regardless of form, that are related to an agency’s official duties or activities, are public records that must be preserved. Missouri law does not specify on its face whether public business conducted on private devices or over private servers creates public records that must be preserved and made available for inspection. However, other government bodies and officials across the country have recognized, and both Federal and California courts have recently determined, that officials cannot evade open records laws by using private email servers to conduct public business. Given the frequency with which Governor Greitens’ staff appear to have used both private email and private text messages to conduct public business, it is in the public interest, and consistent with the liberal construction provision of the Missouri Sunshine Laws, to require officials to preserve and make available for public inspection all communications relating to public business that fall within the scope of the public records law, even if made using private email or text message services.

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5 Hancock, supra note 1.
6 Erickson, Lack of Sunshine, supra note 4.
8 Mo. Rev. Stat. § 610.023(2).
12 Mo. Sec. of State, What is a Record?, available at https://www.sos.mo.gov/records/recmgmt/whatisrecord.
13 Competitive Enterprise Institute v. Office of Science and Technology Policy, 827 F.3d 145 (D.C. Cir. 2016); City of San Jose v. Superior Court, 389 P.3d 848 (Cal. 2017).
Though the Sunshine Law permits government bodies to charge for the copying of records, agencies may not charge any other fees beyond the cost of making copies.\textsuperscript{14} A Missouri court has recently found it improper to charge for legal research connected to open records request.\textsuperscript{15} The charges that Governor Greitens' office has been demanding for records far exceeds reasonable copying costs, and his office should be directed to cease requesting these exorbitant charges immediately.

Though you have recently clarified publicly that you believe text messages relating to state business, including those exchanged using private devices, are public records, further clarity is required regarding whether the use of private email exempts public officials from responsibility under the Sunshine Law.\textsuperscript{16} Further, your office has yet to take a position on the reasonableness of the fees requested by Governor Greitens' office, and has yet to take any action with regard to the allegations against Governor Greitens and his staff.

We respectfully request that you take immediate action to investigate these allegations, and, if appropriate, seek the intervention of the Missouri courts to correct any violation of Missouri law with regard to Governor Greitens' retention and disclosure of public records.

Sincerely,

Brad Woodhouse
455 Massachusetts Ave NW
Suite 650
Washington, D.C. 20001

District of Columbia: SS

Sworn to and subscribed before me on the 19 day of Dec, 2017

[Signature]

Notary Public's Signature
My Commission Expires 11-30-2021

\textsuperscript{14} Id. § 610.026; R.L. Polk & Co. v. Missouri Dept. of Revenue, 309 S.W. 3d 881, 884 (Mo. Ct. App, 2010) (finding an across-the-board fee of $3.82 for electronic public record violated the Sunshine Law, as it did not charge for the “actual cost” of copying the records.).

\textsuperscript{15} Hancock, supra note 1; Swaine v. McCulloch, Cause No. 15SL-CC03842 (Mo. Cir. Ct. Jan. 4, 2017).

\textsuperscript{16} Erickson, supra note 4.