IN THE CIRCUIT COURT OF BOONE COUNTY
STATE OF MISSOURI

ARME (Animal Rescue, Media, & Education), d/b/a Beagle Freedom Project,	)	
Plaintiff,	)	Case Number: 16BA-CV01710
v.	)	Circuit Judge Jeff Harris, Division 2
The Curators of the University of Missouri and Paula Barrett,	)	
Defendants.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The Court enters this Judgment in favor of Plaintiff Animal Rescue Media and Education ("ARME") d/b/a Beagle Freedom Project ("BFP") after a bench trial on Plaintiff's Petition alleging that Defendants violated the Missouri Open Records Act in responding to Plaintiff's December 2015 Open Records Act request.

SUMMARY OF FINDINGS AND CONCLUSIONS

As set forth in more detail below, the Court finds that Defendants' $82,222 cost estimate for responding to Plaintiff's records request was unreasonable. Defendants' extensive reliance on highly-compensated principal investigators and assumption that it would take them 536 hours to retrieve documents was not justified and unnecessarily increased the costs to Plaintiff. In addition, Defendants had ready access to many of the documents that Plaintiff sought. Defendants' cost estimate was contrary to the dual objectives of liberal construction and lowest cost mandated by the Open Records Act. After hearing the evidence, the Court finds that there is nothing so complex, unique or burdensome about the information sought that would require a requestor to pay in excess of $450 just to get the records for a single dog or cat.

FINDINGS OF FACT

The Parties

1. Defendant the Board of Curators of the University of Missouri ("the University") is a public governmental body under the Missouri Open Records Act.

2. Defendant Paula Barrett ("Defendant Barrett") was and is the custodian of records for Defendant University with responsibility for responding to Open Records Act requests. *Barrett testimony*, 411:14; Exh. 1-2.

3. Plaintiff Animal Rescue Media and Education, doing business as the Beagle Freedom Project ("Plaintiff BFP"), is a not-for-profit that opposes using live animals in experimentation, testing and research. *Keith testimony*, 47:19; 50:1-3; 61:16-18, 21-25.

Federal Laws and Regulations Governing Experiments Using Dogs and Cats

4. Defendant University uses dogs and cats in research, experiments and tests. *Trial testimony.*

5. Institutions such as Defendant University that use dogs and cats for research, testing and experimentation are subject to federal laws and regulations, including the Animal Welfare Act and Health Research Extension Act. *Henegar testimony*, 198:2-12.

6. The federal Animal Welfare Act contains specific requirements for animal research, tests and experiments, including recordkeeping. *Henegar testimony*, 198:23 to 199:6.

7. As a recipient of federal National Institutes of Health ("NIH") funding, Defendant University is required to comply with federal Public Health Services ("PHS") regulations and policies, including PHS's *Guide for Care and Use of Laboratory Animals* ("*The Guide*"). *Henegar testimony*, 198:13-22.

8. *The Guide* prescribes certain recordkeeping requirements. *Henegar testimony*, 205:11 to 206:1.

9. Pursuant to *The Guide*, "[r]ecords containing basic descriptive information essential for the management of colonies of large, long-lived animals should be maintained for each animal." *Henegar testimony*, 207:25 to 208:4.

10. Many of the records required to be kept pursuant to *The Guide*, such as certain types of medical records, are the same types of records required by the Animal Welfare Act. *Henegar testimony*, 208:14-17.

11. The Animal Welfare Act requires the submission of a written plan to an Institutional Animal Care and Use Committee ("IACUC") which reviews and approves the plan prior to the start of any animal research. *Beckham testimony*, 96:14-18; 116:22 to 117:1.

The "Identity Campaign"

12. In March 2015, Plaintiff BFP initiated an "Identity Campaign" to educate the public, through state Open Records Act requests, about the welfare of dogs and cats used in research, experimentation and testing. *Keith testimony*, 52:8-10; *Beckham testimony*, 81:5-23; 86:17 to 87:1; 96:2-11; Exh. 11.

13. The Identity Campaign sought to: (i) obtain information about dogs and cats used in research, testing and experimentation; (ii) identify potentially adoptable animals; (iii) determine whether institutions were complying with federal laws and regulations; and (iv) educate the public about the welfare of dogs and cats used in research, testing and experimentation. *Keith testimony*, 51:6 to 52:15; *Beckham testimony*, 82:25 to 82:20.

14. Jeremy Beckham created and managed the Identity Campaign. *Keith testimony,* 52:19 to 53:3.

15. Beckham, who has Masters degrees in Public Health and Public Administration, was conversant with federal laws and regulations governing animal research, experimentation and testing, having reviewed IACUC protocols and USDA complaint and violation reports; having personally submitted over 500 state open records requests and federal Freedom of Information Act (FOIA) requests; and having filed complaints with the USDA and other federal agencies regarding alleged animal research violations. *Beckham testimony*, 82:24 to 85:7; 93:15 to 94:6; 94:22 to 95:18.

16. Defendant University was one of at least a dozen public universities included in the Identity Campaign. *Beckham testimony*, 82:8-23.

17. Most universities in the "Identity Campaign" complied with and cooperated in responding to the document requests, with some providing records at little or no cost. Purdue and Minnesota, for example, waived costs for responding to the requests. *Beckham testimony*, including 88:21 to 89:17; 90:16-20.

18. Individual requestors provided Plaintiff BFP with thousands of pages of records that they received from public universities other than Defendant University as part of the Identity Campaign. *Beckham testimony,* 87:13-89:5; 89:12-17.

19. The public universities in the Identity Campaign included, among others, Colorado State University; the University of Florida; the University of Illinois; Kansas State University; the University of Minnesota; the Ohio State University; Purdue University; the State University of New York-Stony Brook; and the University of Wisconsin. *Beckham testimony.*

20. On or about March 6, 2015, Plaintiff BFP submitted an Open Records Act request to Defendant Barrett as custodian of records for Defendant University seeking "census data" for dogs and cats involved in research, tests and experiments at the University, as well as

corresponding IACUC-approved protocol numbers from January 1, 2014 through the date of the request. Exh. 11.

21. Plaintiff BFP remitted $289 for the documents and received the census data and corresponding IACUC-approved protocol numbers. Exh. 12 and 13.

22. From this March 2015 request, Plaintiff BFP identified 179 dogs and cats, by their USDA ID numbers and Laboratory ID numbers, involved in research, experiments and tests at Defendant University. Exh. 15.

23. Plaintiff BFP published the list of USDA numbers for these 179 dogs and cats and encouraged interested citizens to submit Open Records Act requests to Defendants for certain typical information about these dogs and cats. *Beckham testimony,* 102:5-22.

24. Based on his experience, Beckham told individual requesters to expect to pay approximately $50 for a request. *Beckham testimony*, 87:13-89:12-17.

25. From June 2015 through September 2015, Defendants received individual Open Records Act requests for 97 of the 179 dogs and cats that had been identified in the response to Plaintiff's March 6, 2015 Open Records Act request. *Fickess testimony*, 397:2-13; *Barrett testimony*, 505:21 to 506:28; Exh. 58.

26. After Identity Campaign requestors contacted Plaintiff about what the individual requestors considered to be Defendants' high fee estimates for producing documents, Plaintiff reached out to Defendants, Exh. 14, but Defendants did not respond. *Defendant's Answer to Plaintiff's Petition* 45.

Plaintiff BFP's December 26, 2015 Document Request

27. On December 26, 2015, Plaintiff BFP sent an Open Records Act request to Defendants seeking records for all 179 dogs and cats identified in response to BFP's March 6, 2015 Open Records Act request. Exh. 15.

28. The categories of documents sought in Plaintiff's December 2015 request were essentially identical to the previous requests submitted by the individual requestors, seeking documents and using terminology that corresponded with Defendant University's recordkeeping requirements under federal laws and regulations, including:

> "...any and all intake records, transfer records, daily care logs, animal health records, treatment and progress reports, veterinary reports, necropsy reports, photographs, and videos related to these animals (January 1, 2014 – present) [and] any IACUC-approved protocols for any project **to which any and/or every animal listed**...has been assigned since January 1, 2014." [*emphasis in original.]* Exh. 15; *Beckham testimony.*

29. Indeed, the documents sought were identified by terms of art that were familiar to both Plaintiff and Defendants and were not ambiguous. *Trial testimony.*

30. Plaintiff's December 2015 request also specifically identified the dogs and cats by USDA Identification number and Laboratory Identification number. Exh. 15.

31. On January 12, 2016, Defendant Barrett sent a fee estimate and demand to Plaintiff for prepayment in the amount of $82,222.33 in response to Plaintiff's December 26, 2015 request. *Barrett testimony,* 491:12-14; Exh. 17.

32. The fee estimate of $82,222.33 to Plaintiff was the largest fee estimate that Defendant Barrett had ever issued in response to an Open Records Act request. *Barrett testimony,* 447:12-14.

33. The estimate included over 1,500 hours of employee time, including 536 hours from principal investigators who were veterinarians and PhDs making over $100,000 per year. *Trial testimony.*

34. In 2017, well after the initial January 2016 $82,222 estimate, Defendants did a sample search for a single dog excluding principal investigator time and estimated the cost of producing all responsive records from Office of Animal Resources ("OAR") and from Animal Care and Quality Assurance ("ACQA") to be $50 per dog, *Barrett testimony*, 431:13 to 432:2, well below the $458 average estimate per animal in the January 2016 estimate. In June 2019, Defendants stated that the total cost of producing all OAR and ACQA records was approximately $50 per dog, for a total of $8,950. Exh. 79. Defendants, however, did not do a sample search before responding with their $82,222 estimate in January 2016 and did not do an estimate in January 2016 that would exclude principal investigator time. *Trial testimony.*

35. The second highest fee estimate ever issued by Defendant Barrett was between $10,000 and $15,000. *Barrett testimony,* 447:16-21.

36. Defendant University's published guidance for submitting an Open Records Act request states that requestors should provide contact information for issues or questions arising from a request. Exh. 2.

37. Plaintiff provided Defendants with its telephone numbers, mailing addresses and email addresses for contact. Ex. 15.

38. Yet, despite the published guidance and despite giving a fee estimate that was tens of thousands of dollars higher than Defendant Barrett had ever issued, Defendants made no effort to follow up with Plaintiff. *Barrett testimony,* 417:12-14. In fact, Defendant Barrett testified that

Plaintiff should have "picked up the phone and called me" if Plaintiff had questions about Defendants' estimate. *Barrett testimony*, 573-75.

Defendants' Fee Calculations

39. Defendants based their fee calculation in response to the December 2015 request primarily on fee calculations that were performed in response to the prior individual Identity Campaign requests, utilizing a spreadsheet that senior business specialist Shannon Fickess (formerly Shannon Dennis) created. *Fickess testimony*, 348:8-22; Exh. 62 and 72. Plaintiff's December 2015 request basically duplicated the prior requests for 97 of the 179 individual dogs and cats identified previously and sought the same types of documents that the individual requestors sought. *Fickess testimony,* 396:24-397:1.

40. In preparing the estimate in response to Plaintiff's December 2015 request, Fickess and Barrett simply added the name "Gordon" (the name of Plaintiff's former general counsel who signed Plaintiff's Open Records Act request) to their previous spreadsheet. Exh. 62 and 72.

41. When Fickess began compiling the fee estimates, she had only been in the Office of Animal Resources for a few months and by her own admission did not completely understand that the Open Records Act required government to use employees resulting in the lowest cost in responding to a request. *Fickess testimony,* 399:16-20.

42. Despite knowing that record retrieval and response time would vary based on the length of time that Defendant University had housed a dog or cat, Defendant Barrett did not determine the actual number of records or staff time required for record retrieval for any particular dog or cat, which could have been used as a basis for a cost estimate. *Barrett testimony,* 501:4-12; 501:21-502:11; Exh. 98.

43. Defendant Barrett testified that the estimates of time were not based on her firsthand or actual knowledge of the number of records or staff time required to produce the responsive records for any individual dog. Instead, Fickess provided estimates to Barrett that had been provided to Fickess. *Barrett testimony*, 502:12-19. Defendant Barrett had minimal contact with principal investigators about their time estimates, and used "standard" estimates of time in response to the individual requests. *Barrett testimony*, 496-97.

44. When Defendants received the individual requests, the principal investigators and staff members provided estimates of time to Fickess. *Fickess testimony,* 398, 407, 409, 498; *Barrett testimony*, 476; 497. Fickess then simply entered hours in the spreadsheet based on the hours provided. *Fickess testimony*, 401. Defendants multiplied a principal investigator's or staff member's estimated number of hours by salary and benefits to arrive at a calculation for each dog and cat. *Barrett testimony* 499.

Charges for Principal Investigators

45. In the estimate to Plaintiff, Defendants included 536 hours from ten principal investigators to retrieve documents for a total of $52,526.48. Exh. 72 (adding the per animal charges in column 10).

46. The principal investigators who retrieved documents were relatively well-paid veterinarians or PhDs with salaries ranging from $109,000 per year to $211,000 per year. For example, Dr. Cook earned roughly $211,000 per year; Dr. Lyons earned $192,000 and Dr. Katz earned $148,000. Exh. 72.

47. Accordingly, the rate for record retrieval by some principal investigators exceeded $100 per hour. Exh. 72. Dr. Cook's rate for document retrieval, for example, was $129 per hour. Exh. 72.

48. For all dogs and cats assigned to a particular principal investigator, Defendant Barrett charged the same number of hours across the board for each animal assigned to a particular investigator.[1] Exh. 72 (column 10); *Barrett testimony*, 499:11-23.

49. The principal investigators maintained a shared electronic computer storage system or drive for keeping and maintaining their records. *Cook testimony*, 634:18 to 635:1.

50. The principal investigators maintained their records in a manner to facilitate locating records. *Cook testimony*, 636:21-25.

51. Dr. Cook estimated that there were twelve to fifteen employees who were "paid less than" Dr. Cook who could have retrieved the responsive records, but might not know what was "appropriate" to release. *Cook testimony,* 641:16-17; 656:3-8.

52. Dr. Cook also testified that one of his staff members who was paid $79,000 per year was capable of retrieving the records. *Cook testimony,* 657:20-658:3.

53. Dr. Cook kept all of his records in electronic format. *Cook testimony,* 658:11-16.

54. At least four other principal investigators – Drs. Duan, Katz, Cohn, and Coates – maintained electronic records. *Cook testimony,* 658:21-24.

55. Of the 179 dogs and cats identified by Plaintiff, 94[2] were assigned to Drs. Cook, Duan, Katz, Cohn and Coates. Exh. 72.

56. Dr. Cook's records could be located and retrieved by anyone with a "basic rudimentary knowledge of computers," allowing them to open a project file, see the animal identification numbers and see a protocol number. *Cook testimony,* 663:24-664:2.

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[1] For example, the animals assigned to Dr. Katz included an across-the-board estimate of five (5) hours of his time per animal; Dr. Duan's animals included an across-the-board estimate of three (3) hours per animal; and likewise for each of the principal investigators, with the exception of two (2) animals assigned to Dr. Backus charged at only one (1) hour each; two animals assigned to Dr. Cook charged at five (5) hours each; and one (1) animal charged to Dr. Cook at four (4) hours.

[2] Cook – 33 animals; Duan – 24 animals; Katz – 27 animals; Cohn – 8 animals; and Coates – 2 animals. Exh. 72.

57. Dr. Cook included time for reviewing and redacting his records. *Cook testimony,* 664:17-21; 665:6-11; 665:15-17; 666:17-23.

58. To the extent that the principal investigators would have responsive records, those records would have most likely been in the form of videos and photographs. *Barrett testimony,* 441:11-17.

59. Unlike other records requested, videos and photos were not required by federal law or regulation but were left to the discretion of a principal investigator. *Henegar testimony,* 271:6-20.

60. One principal investigator, Dr. Dixon, informed Defendant Barrett that if a principal investigator did not have photographs or videos – which was not unlikely, because the taking of photos and videos was not required by federal law – then "...there is no personnel time to charge." *Barrett Testimony,* 515:12-17. Exh. 39.

61. Another principal investigator, Dr. Reinero, informed Defendant Barrett that she had no photographs or videos responsive to a request, but Defendant Barrett still included time for Dr. Reinero in her estimate to Plaintiff. *Barrett testimony,* 517:24-518:9.

62. In July 2015, an individual requestor asked for a revised fee estimate for a records request that excluded photographs and videos for an animal assigned to Dr. Cook. *Barrett testimony.,* 519:10-14; 519:20-25. In response to this individual request, Dr. Dixon stated that, "...I'm thinking zero hours if no photo or video..." *Barrett testimony,* 519:15-19; Ex. 41.

63. Dr. Cook maintained any photographs and videos separately from his other records. *Cook testimony,* 659:15-24.

64. In preparing her fee estimates, Defendant Barrett did not directly ask the principal investigators for any information or have any communication with them regarding their hours.

Barrett testimony, 460:5-11; 461:18 to 462:8. Instead, Shannon Fickess, who by her own admission did not understand that the Open Records Act required the use of the lowest cost employees, and to some extent Dr. Henegar and Dr. Dixon, communicated with the principal investigators. *Barrett testimony*, 461:25-462:8.

65. As Defendant Barrett testified at trial, "I did not ask them [the principal investigators] for information," *Barrett testimony*. "Shannon [Fickess] was the one who communicated with them." Barrett "only talked to a couple of them, and it was usually to guide them to the correct information that I needed in order to prepare an estimate." *Barrett testimony*, 461-62.

66. Defendants, then, essentially took the estimates from principal investigators at face value, used a set number of hours for each principal investigator per dog and cat, and then multiplied those hours by the principal investigators' hourly salary and benefits.

67. In June 2015, in response to individual requests, Defendant Barrett told Fickess that one principal investigator's time could be "rounded up" to "take care of the printing costs." *Barrett testimony*, 534:3-11.

68. Defendants also included 144 hours from six laboratory assistants for a total of $5,113.46. Exh. 72. Defendants assigned lab assistant time uniformly across-the-board per animal based upon the principal investigator for whom the assistant worked. Exh. 72.

Charges from the Office of Animal Resources ("OAR")

69. In her estimate to Plaintiff, Defendant Barrett included 716 hours from three OAR employees per animal for a total OAR estimate of $19,731.49. Exh. 72 (columns 12, 13 and 15).

70. For OAR charges per animal, Defendant Barrett uniformly charged $117.03 for 15 of the dogs and cats and $109.61 for the remaining 164. Exh. 72.

71. The requested documents maintained by OAR included intake records, transfer records, daily care logs, health records, treatment and progress reports, veterinary reports and necropsy reports. *Weir testimony*, 584:20 to 585:6; 587:22 to 588:8; 589:9 to 590:1; 592:19 to 593:10; 596:17 to 597:1; 598:24 to 599:9

72. OAR kept its intake and transfer records in the central OAR office and in organized binders labeled "Acquisition, Disposition, Receiving." *Weir testimony*, 587:13-18; 587:22 to 588:8; Exh. Q.

73. OAR kept its daily care logs, and possibly some veterinary records and treatment reports in specific rooms where the animals were housed. *Weir testimony*, 590:9-21.

74. OAR kept the health records in the main OAR office in a centralized filing cabinet with an individualized filing folder for each animal. *Weir testimony*, 593:11-25; Exh. R and S.

75. It was important for OAR to maintain animal health records in an accessible fashion for both USDA and Defendant University veterinary staff. *Weir testimony,* 595:9-16; 596:2-13.

76. OAR extensively tracks Defendant University's research animals and scans and records their locations on a weekly basis. *Weir testimony*, 621:11-16.

77. Ms. Weir testified that her understanding was that she was to prepare a "packet" for each dog or cat responsive to Plaintiff's request even if that resulted in making multiple copies of the same documents. *Weir testimony*, 623:18-23.

78. As described by Ms. Weir, the one (1) hour of her time per animal was to search the electronic TOPAZ system and then to review the documents actually gathered by another OAR employee for thoroughness and accuracy. *Weir testimony,* 605:10 to 606:7.

79. As described by Ms. Weir, the OAR individuals included in Defendant Barrett's estimate "knew exactly where it [i.e., the paperwork] is and can go straight to it . . ." *Weir testimony*, 609:21 to 640:7.

80. As described by Ms. Weir, OAR kept its records in a way that made it "easy for staff to . . . locate." *Weir testimony*, 613:2-4; 618:7-9.

81. As described by Ms. Weir, it was important that OAR have "easy access" to its records to comply with USDA inspections. *Weir testimony*, 618:10-11.

82. Ms. Weir estimated that if a USDA inspector requested "all of the OAR records" that were responsive to Plaintiff's request, it would take her about two hours to gather all of those records. *Weir testimony,* 619:4-19.

83. Jeffrey Henegar, current director of OAR and ACQA, estimated that it would take OAR staff about "five minutes" to produce the health and veterinary records for an individual animal to an APHIS inspector if requested. *Henegar testimony,* 228:17-21.

84. Henegar testified that some documents could be obtained simply by opening a file cabinet. *Henegar testimony.*

85. In June 2015, Dr. Dixon, Director of OAR, informed Ms. Barrett that "...we at OAR have ready access to our information that has been requested..." *Barrett testimony*, 474:18-20; Exh. 22.

86. In estimating the staff time from OAR to respond to Plaintiff's request, Defendant Barrett included two hours of time per animal for Cheryl Bolte, identified as an OAR employee. *Barrett testimony*, 492:10-18; Exh. 72 (columns 9 and 15).

87. According to Ms. Weir, the two hours of time per animal charged for Ms. Bolte was to gather the health records and "ensure the accuracy" of the records gathered. *Weir testimony,* 607:24 to 608:4.

88. At the time of Plaintiff's request, however, Bolte was no longer assigned to OAR and would not have performed any OAR work in responding to Plaintiff's request. *Fickess testimony,* 355:17-20; *Barrett testimony*, 492:10-18.

Charges from Animal Care and Quality Assurance ("ACQA")

89. In her estimate to Plaintiff, Defendant Barrett included one hour of time from a single ACQA employee per animal for a total ACQA estimate of $ 4,850.90 for the entire request. Exh. 72 (adding the per animal charges in column 14).

90. For ACQA charges per animal, Defendant Barrett included an across-the-board charge of $27.10 per animal. Exh. 72 (column 14).

91. IACUC Protocol documents would be the only responsive documents in ACQA's possession. *Henegar testimony,* 192:16-193:3.

92. IACUC documents were stored electronically using TOPAZ, a commercially available animal use software system. *Henegar testimony,* 232:10-13.

93. Dr. Henegar estimated that it would take ten minutes to locate an IACUC protocol number relating to any individual dog or cat. *Henegar testimony, J.,* 229:24-230:1.

94. An individual dog or cat can only be assigned to one protocol at a time. *Henegar testimony,* 241:4-7.

95. Multiple animals could be assigned to a single IACUC protocol. *Beckham testimony*, 186:5-18.

96. Dr. Henegar estimated that it would take approximately twenty to thirty minutes to locate and retrieve an IACUC protocol. *Henegar testimony,*228:22-25.

97. The IACUC protocols but could be accessed by ACQA and OAR staff. *Fickess testimony,* 340:12-15; 341:8-11.

98. Fickess testified that it is not difficult to download an IACUC and that she could have done so. *Fickess testimony,* 343:24-344:3.

99. At the time of Plaintiff's request, Fickess earned approximately $22 per hour, which was less than the $27.10 per earned by Ms. Nichols, who was assigned to download the IACUC protocols. *Fickess testimony.,* 344:4-7; Exh. 72 (Defendant Barrett's handwritten notes).

100. In their response, Defendants estimated a flat fee of $136.71 per animal for time from OAR and ACQA employees. *Barrett testimony*, 438:2-7.

Additional Background Information

101. Defendant Barrett and others involved in responding to the individual requests knew that the requests were part of a campaign by Plaintiff. *Trial testimony.*

102. At one point, Defendant Barrett instructed Dr. Dixon not to spend time searching for records because "[t]hese animal rights groups often do not want to put out the money..." *Barrett testimony*, 471:18 to 472:6; Exh. 22.

103. Defendant Barrett complained to Dr. Dixon that Plaintiff had "...probably duped [the individual requestors] into bothering me by providing the form in a self-addressed envelope which they can fill out thinking they are getting the records for a dog they can adopt." *Barrett testimony,* 481:20-482:2, Exh. 55.

104. At one point, Fickess – who was the person assigned to communicate with principal investigators – told a principal investigator that "[i]t's likely that the expense will prohibit most requesters from pursuing anything further." *Fickess testimony,* 363:15-20; Exh. 47.

105. OAR staff, including Dr. Dixon, Ms. Fickess and Ms. Weir, discussed the fact that costs might prohibit some requestors from pursuing their request further. *Fickess testimony,* 366:1-12; 367:7-12.

106. Ms. Fickess testified that, "a lot of time activism happens, and it's not -- if there is a cost associated, a lot of times it's just not followed through with." *Fickess testimony,* 366:16-21.

107. In Ms. Fickess's opinion, both the individual requests and Plaintiff's requests were a form of "activism." *Fickess testimony,* 369:4.

CONCLUSIONS OF LAW

1. The documents requested by Plaintiff in its December 26, 2015 Sunshine request were "public records" as defined by the Open Records Act. RSMo Section 610.010(6).

2. The Open Records Act provides that, "[i]t is the public policy of the state that . . . records . . . of public governmental bodies be open to the public unless otherwise provided by law," and further provides that this public policy of openness "shall be liberally construed" and exceptions shall be "strictly construed." RSMo Section 610.011.

3. The Open Records Act provides that documents shall be produced "using employees of the body that result in the lowest amount of charges for search, research, and duplication time." RSMo Section 610.026.1(1).

4. A "knowing" violation of the Open Records Act requires proof that the governmental body had "actual knowledge that its conduct violated a statutory provision." *Laut v. City of Arnold*, 491 S.W.3d 191, 200 (Mo. banc 2016).

5. A "purposeful" violation of the Open Records Act is a higher standard requiring a "conscious design, intent or plan" to violate the law with "awareness of the probable consequences." *Laut*, 491 S.W.3d at 199.

Defendants' Extensive Use of Principal Investigators Did Not Result in the Lowest Amount of Charges for Search and Research

6. Defendants estimated that it was necessary to use ten principal investigators to retrieve documents, and that it would take them 536 hours to do so, resulting in an estimate of roughly $52,526 worth of principal investigator time.

7. Under the facts of this case, the Court finds that it was unreasonable for Defendants to use ten principal investigators – veterinarians and PhDs making between $109,000 and $211,000 per year – to retrieve documents, and it was unreasonable to assume that it would take them over 500 hours to do so. Defendants' extensive use of principal investigators and estimate that it would take them over 500 hours to locate documents for all practical purposes prevented Plaintiff from obtaining the public documents and frustrated the twin policies of openness and lowest cost embodied in the Open Records Act.

8. As the evidence demonstrated, a principal investigator is the person in charge of a research project, akin to a lawyer in charge of a case or a doctor in charge of a patient. *Cf. Engel v. Curators of the University of Missouri, et al.*, 557 S.W. 3d 407 (Mo. App. 2018), transfer denied Oct. 30, 2018 (per curiam opinion affirming this Court's summary judgment in favor of

the University of Missouri and against faculty member who was replaced as principal investigator on a research project).

9. In this case, the Court is simply not persuaded that highly-compensated principal investigators, as opposed to lesser-paid employees, were necessary to retrieve the records to the extent estimated by Defendants. Dr. Cook, for example, testified that a person with a "rudimentary knowledge" of computers could retrieve his records that were stored electronically. He also testified that at least one employee under his supervision who was paid roughly $75,000 per year would have been capable of searching his records. Yet, it was apparent from the evidence at trial that Defendants failed to determine if there were University employees who could have been used instead of principal investigators.

10. This extensive use of principal investigators at their much higher hourly rate – for 536 hours' worth of estimated document retrieval – had a disproportionate impact on the cost to Plaintiff.

11. The difference between including and excluding principal investigator time was dramatic. Without principal investigator time, Defendants admit that they could have produced all ACQA and OAR records for a total $8,950, or roughly $50 per dog or cat. In contrast, by including 536 hours of principal investigator time for principal investigators making six figures a year (and by overestimating OAR and ACQA time, *infra*), Defendants' estimate ballooned to $82,222, or roughly $458 per dog or cat, representing a 918% increase in costs to Plaintiff.

12. The amount of time that Defendants attributed to principal investigators was simply not reasonable. The Court is not suggesting that principal investigators should have been excluded from the Open Records response, but rather that the extensive use of principal investigators and the considerable amount of time attributable to them was unreasonable and

unnecessary. As the evidence reflected, photos and videos of the dogs and cats would have been the primary responsive documents that would have been generated solely by a principal investigator. Some principal investigators opined, for example, that zero principal investigator hours would be attributable if there were no photos or videos. While a review of principal investigator files was necessary to produce responsive documents, the evidence adduced at trial demonstrated that the amounts of time allocated for doing so were substantially higher than necessary. There was no evidence adduced at trial to suggest that it was reasonable for a principal investigator to take as long as five hours to find the records for a single dog or cat. Unless a principal investigator maintained records in a Byzantine fashion – contrary both to the welfare of an animal and not contemplated by federal regulation – it is hard to fathom that the estimates from principal investigators had a substantial basis in actual practice.

13. That principal investigators maintained their records by project based on who was paying for the research rather than by dog or cat should not have resulted in extraordinarily burdensome searches, considering that the dogs and cats were identified by specific USDA and Laboratory ID numbers and considering that records should have been readily accessible under governing regulations and procedures.

14. Given the expense involved in utilizing principal investigators at rates in excess of $100 per hour[3] and given the requirement that the Open Records Act should be liberally construed using employees resulting in the lowest amount of charges, Defendants also failed to take the necessary steps to determine whether 536 hours of principal investigator time was truly necessary to comply with the request, and to determine whether the principal investigators themselves were making a good faith effort to accurately estimate their time. Defendants could

[3] The Court does not adopt Plaintiff's argument that benefits should not be included in computing an employee's hourly rate. "Actual cost" includes the cost of benefits.

have done this by using actual data, for example, or sample data, or by having more earnest or higher-level discussions with principal investigators before accepting their estimates at face value.

15. Moreover, knowing that there was mutual animus or at least suspicion between principal investigators and Plaintiff – one principal investigator questioned whether persons associated with Plaintiff were "criminals," for example (Exh. 25) – it was incumbent upon Defendants to verify the accuracy of principal investigators' cost estimates to ensure that the estimates resulted in the lowest cost. Yet in this case, a relatively junior employee unfamiliar with the lowest cost requirement, Shannon Fickess, was the person charged with communicating with principal investigators.

16. Defendants' uniform, across-the-board assignment of principal investigator hours – as well as laboratory assistant hours – based on the identity of a principal investigator compounded the problem by markedly increasing the cost to Plaintiff. While an estimate is inherently inexact, there is nonetheless an obligation on the part of government to make a diligent effort to accurately calculate costs to avoid creating a roadblock to disclosure. In this case, Defendants should have made a more accurate estimate, based on actual data, before uniformly billing the time of veterinarians and PhDs making six figures a year. Estimates of time from Drs. Backus and Katz, for example, though reduced, nonetheless bore minimal relation to their actual time for responding to Plaintiff's request.

17. An estimate, as opposed to an exact number, does not relieve government from doing due diligence to confirm the basis of an estimate, particularly when government demands pre-payment before producing public records and particularly when the estimate approaches $100,000. Ten unnecessary hours, for example, could cost a requestor over $1,000. When hours

and costs are not adequately questioned, the result can effectively stymie a taxpayer from getting government records.

18. Notably, Defendants determined well after litigation ensued that the cost of producing OAR and ACQA documents for all 179 dogs and cats was $8,950, or roughly $50 per animal. Given the 918% increase in Defendants' estimate that included an additional 536 hours from veterinarians and PhDs to retrieve whatever documents they had, it was inconsistent with the twin goals of liberal construction and lowest cost for Defendants to fail to seek some clarification from Plaintiff regarding the scope of the request. Yet, at trial, Defendant Barrett testified that it was "not my practice" to call a requestor about an estimate and questioned whether "government has an obligation to do that," and instead testified that Plaintiff should have "picked up the phone and called me" about the amount. *Barrett testimony*, 573-75. It is the government's obligation as responder, however, to liberally construe the Open Records Act and to use employees resulting in the lowest cost to the requestor, particularly when the cost of producing public records approaches $100,000.

19. The Court also notes – while recognizing that open records act laws and interpretations of requests can vary from state to state and responder to responder – that Plaintiff and its members experienced no similar difficulties in obtaining documents from the University of Florida, the University of Illinois, Purdue, the University of Minnesota, Ohio State, SUNY-Stony Brook or the University of Wisconsin, among others.

20. For all of these reasons relating to the use of principal investigators, the Court finds that Defendants violated the Open Records Act by failing to use employees that would result in the lowest cost to Plaintiff.

Defendants' OAR Cost Estimate Was Excessive

21. In her estimate to Plaintiff, Defendant Barrett included universal charges of four hours of time from three OAR employees per animal. As calculated by Defendant Barrett, this resulted in fees for OAR of $117.03 per animal for 15 of the identified dogs and cats and $109.61 for the other 164 animals. In total, the final estimate of $82,222.33 included $19,731.49 in fees from OAR.

22. The Court finds that Defendants violated the limitations on fees established in the Open Records Act in that their estimate of time and fees for research time from OAR exceeded the limitations established in Section 610.026. The responsive records that OAR maintained were standard compliance documents required under federal laws and regulations and required to be readily available for inspection by a federal regulator.

23. Based on the sample records produced in this matter, the OAR records for any individual animal were not "voluminous" and were well-organized in binders and file folders stored in accessible file cabinets. Dr. Henegar testified that simply opening a file cabinet was all that was necessary in some instances. And, in fact, based on Defendants' own sample estimate, the actual cost for producing the responsive OAR (and AQCA) records for a single animal was roughly $50, less than half of the original per animal OAR estimates to Plaintiff.

24. Had Defendants conducted a sample search at the time of the request in early 2016, they would have known what they later confirmed themselves – that OAR's records were well-organized and accessible under federal law and regulations. While Defendants contend that such a search was infeasible due to the "voluminous" nature of the request, the Court does not find that explanation credible. A search for even one or two dogs would have provided some actual basis for deriving an estimate of the actual costs of responding to Plaintiff's request.

Notably, that is exactly what was done in 2017 when Defendants conducted a sample search for records for a single dog and concluded that the cost of responding to Plaintiff's requests for that single dog with respect to *both* the OAR and ACQA estimates would have been approximately $50, or less than half of Defendants' estimate to Plaintiff. By failing to perform even a limited sample search for records, Defendants had no information as to actual volume or recordkeeping practices or estimated search time.

25. For these reasons, the Court finds that Defendants' OAR cost estimate was excessive and violated the Open Records Act.

Defendants' ACQA Cost Estimate Was Excessive

26. In her estimate to Plaintiff, Defendant Barrett included universal charges of one hour of time from an ACQA employee per animal. As calculated by Defendant Barrett, this resulted in fees for ACQA of $27.10 per animal. In total, Defendant Barrett's final estimate of $82,222.33 included $4,850.90 of fees from ACQA.

27. The only responsive documents kept by ACQA were the IACUC-approved protocols which were available through TOPAZ, a specialized software program used to maintain the University's animal records.

28. The Court finds that Defendants violated the limitation on fees established in the Open Records Act in that their estimates of time and fees for research time from ACQA exceeded the limitations established in Section 610.026. According to the testimony of Dr. Henegar, producing an IACUC protocol for an individual animal would involve a two-step process that would take approximately 30 to 40 minutes, which is far less time per animal than Defendants' estimate.

29. The Court also finds that Defendants impermissibly charged for duplicative work in estimating the cost for responding to Plaintiff's request. Multiple animals could be assigned to a single IACUC protocol and, once an IACUC protocol was located, production of that single IACUC protocol document would have satisfied Plaintiff's request for the multiple animals assigned to that protocol. Once an IACUC protocol was located and electronically transferred, either to a disc or email, therefore, there was no need to transfer it again. Based on the testimony and the chart that Defendant Barrett used in calculating her fee estimate, there were only eighteen (18) IACUC protocols to which all of the the dogs and cats included in Plaintiff's request were assigned. Yet, despite all of the dogs and cats being in these 18 IACUC protocols, Defendants instead chose to charge one hour of time per animal to retrieve the IACUC protocols, for a total of 179 hours.

30. In addition, as set forth above, Defendants' own subsequent estimate for producing both ACQA and OAR documents was $50, well below Defendants' January 2016 cost estimate to Plaintiff.

31. The Court finds that Defendants' ACQA cost estimate was unreasonable and violated the Open Records Act.

Defendants' Violations Were "Knowing"

32. Whether the actions discussed in this Judgment are considered cumulatively or independently, the Court finds by a preponderance of the evidence that Defendants' conduct amounts to a "knowing" violation of the Open Records Act. *Laut v. City of Arnold*, 491 S.W.3d 191, 198 (Mo. banc 2016); RSMo Section 610.027.3. The Court finds that Plaintiff made a single Open Records Act request and Defendants made a single response, resulting in a single violation of the Act and warranting a fine of $1,000. *Malin v. Cole County Prosecuting Attorney*, 565

S.W.3d 748, 754 n.3 (Mo. App. 2019). The Court declines to find that Defendants engaged in a scheme with the intent to violate the law that would rise to the level of a "purposeful" violation. *White v. City of Ladue*, 422 S.W.3d 439, 451 (Mo. App. 2013). The Court does not order the production of the documents without charge because Plaintiff has cited no case that would indicate the Court has the discretion or authority to do so.

33. In addition to the $1,000 fine, the Court finds that Plaintiff is entitled to its reasonable attorneys' fees and costs. For a "knowing" violation, an award of attorneys' fees is discretionary, but in this case, the Court believes such an award is warranted. Defendants' unjustified $82,222 cost estimate blocked Plaintiff from getting the requested documents, leaving Plaintiff with no recourse except to file this lawsuit. Plaintiff sought public records generated by government employees in taxpayer-funded laboratories. The Open Records Act requires a liberal construction and requires using employees resulting in the lowest cost to the requestor. The cost estimate in this case was tantamount to a denial of the request. The Court therefore orders Defendants to pay Plaintiff's reasonable attorneys' fees and costs.

CONCLUSION

For the reasons set forth above, Judgment is entered in favor of Plaintiff and against Defendants as follows:

1. Defendants knowingly violated the Open Records Act;
2. Defendants are ordered to pay a civil penalty of $1,000 to Plaintiff; and
3. Defendants are ordered to pay Plaintiff's reasonable attorneys' fees and costs.

Dated this 8TH day of NOVEMBER, 2019.

COURT SEAL OF

CIRCUIT COURT OF MISSOURI

BOONE COUNTY

Judge Jeff Harris, Division 2