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for purposes of identification.*

February 11, 2015

Speaker William J. Howell
Virginia House of Delegates
General Assembly Building, Suite 635
201 North 9th Street
Richmond, Virginia 23219

VIA EMAIL AND U.S. MAIL

Re: Senate Bill 1393

Dear Speaker Howell,

The Reporters Committee for Freedom of the Press (the “Reporters Committee”) writes to express its concerns regarding Senate Bill 1393,¹ which is currently before the House. If passed, the bill would exempt certain key information related to executions carried out by the Commonwealth from disclosure under Virginia’s Freedom of Information Act, Va. Code Ann. § 2.2-3700, *et seq.* (“Virginia FOIA”), and, thus, significantly curtail the right of the press and the public to obtain information about the actions of government. By shielding from public scrutiny crucial information related to the implementation of the death penalty, the bill endangers the ability of Virginians to meaningfully participate in democratic governance. The bill is especially concerning given the recent nationwide public debate surrounding the efficacy and quality of lethal injection drugs used in executions. We strongly urge the House of Delegates to reject this measure.

Since the death penalty was reinstated, there has been robust debate across our nation regarding the methods by which it is carried out. Specific attention has been paid to the drugs used in lethal injections, which have come under increased scrutiny as sources for their procurement have reportedly diminished.² These concerns have been heightened by a number of botched executions in recent years, where it has been reported that condemned inmates have experienced severe pain.³ Indeed, Ohio has postponed all executions this year after concerns were raised

¹ Available at <http://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+SB1393S2+pdf>.

² See Manny Fernandez, *Executions Stall as States Seek Different Drugs*, The New York Times (Nov. 8, 2013), <http://www.nytimes.com/2013/11/09/us/executions-stall-as-states-seek-different-drugs.html>; Andrew Cohen, *The Secrecy Behind the Drugs Used to Carry Out the Death Penalty*, The Atlantic (Jan. 26, 2014), <http://www.theatlantic.com/national/archive/2014/01/the-secrecy-behind-the-drugs-used-to-carry-out-the-death-penalty/283348/>.

³ See, e.g., Michael Radelet, *Examples of Post-Furman Botched Executions*, The Death Penalty Information Center (updated Jul. 24, 2014), <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions>.

about the drugs used in several mishandled executions.⁴ And, most recently, the United States Supreme Court has stayed three pending executions in Oklahoma in order to hear a challenge to the constitutionality of the three-drug cocktail currently used for lethal injections in that state.⁵ These incidents underscore the significant public interest in the administration of the death penalty; the drugs used in executions, the manner in which they are administered, and investigations into their efficacy are properly the subjects of intense public debate and scrutiny. Reporters around the nation rely on open government laws, such as the Virginia FOIA, to gather and report information concerning the death penalty, and to ensure that the public is able to meaningfully participate in these discussions.

Promoting informed debate among Virginians is one of the core purposes of the Virginia FOIA. In enacting the law, the Assembly expressed its desire “to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.” Va. Code Ann. § 2.2-3700. It was designed to prevent the affairs of government from being conducted “in an atmosphere of secrecy.” *Id.* Yet that is exactly what will result if Senate Bill 1393 is enacted.

If passed, Senate Bill 1393 would impede public discussion regarding the administration of the death penalty in several troubling ways. First, Section 53.1-233 would exempt from the Virginia FOIA, as well as civil discovery,

the identities of persons or entities engaged to compound drug products for use in the execution, the identities of persons or entities engaged to manufacture or supply the materials used to compound drug products for use in the execution, the name of the materials or components used to compound drug products for use in the execution

SB 1393, lines 101–05. Exempting this information from public disclosure is unwarranted. The entities that produce the supplies used in executions have, historically, not been shielded from public view. Indeed, even when laws were implemented to protect the identity of the individual executioners themselves, the public still had access to information about the materials used to carry out the executions, including who produced and supplied those materials.⁶ Exempting such information from public disclosure under the Virginia FOIA will make it impossible for Virginians to evaluate whether the decisions of their government in choosing execution drugs, as well as the source of those drugs, are proper. This is the very type of government secrecy the Virginia FOIA was enacted to prevent.

⁴ Mark Berman, *Ohio delays all executions scheduled for 2015*, The Washington Post (Jan. 31, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/01/31/ohio-delays-all-executions-scheduled-for-2015/>.

⁵ Warren Richey, *Supreme Court halts Oklahoma executions pending lethal injection case*, The Christian Science Monitor (Jan. 28, 2015), <http://www.csmonitor.com/USA/Justice/2015/0128/Supreme-Court-halts-Oklahoma-executions-pending-lethal-injection-case-video>.

⁶ See *Campbell v. Wood*, 18 F.3d 62, 684-85 (9th Cir. 1994) (describing the type of rope that would be used in hanging, as well as the position of the knot and the length of the drop); CHRIS WOODYARD, ENOUGH ROPE: THE HANGMAN’S ROPE IN THE PRESS, HAUNTED OHIO (Jan. 19, 2013), available at <http://hauntedohiobooks.com/news/enough-rope-the-hangmans-rope-in-the-press/> (citing news stories on the types of ropes used in hangings and the suppliers who produced them); *Wood v. Ryan*, 759 F.3d 1076, 1083 (9th Cir. 2014) (noting that “the company that produced the cyanide used in Nevada’s gas chambers, California Cyanide Company, publicly contracted with the state, and the identities of many of the officials who handled the chemical up until the point of execution were a matter of public record.” (citing SCOTT CHRISTIANSON, THE LAST GASP: THE RISE AND FALL OF THE AMERICAN GAS CHAMBER 100-01 (2010)).

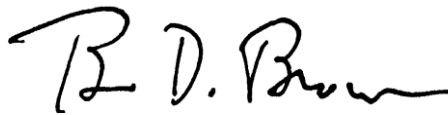
The Reporters Committee is also troubled by the last part of Section 53.1-233, which exempts any inspection or investigation of a pharmacy or compounding pharmacy conducted by the Board of Pharmacy from the Virginia FOIA. SB 1393, lines 110–15. This provision appears intended to shield from public scrutiny information that is especially crucial for citizens of the Commonwealth to receive—namely, information regarding whether such pharmacies are conducting their businesses in accordance with state and federal law, and whether they are taking required measures to ensure the quality of drugs to be used in executions. As “[t]axpayers who provide the funds that pay for the drugs used in lethal injections,” Virginians “deserve to know when mishaps occur.”⁷ But Senate Bill 1393 will hide this information, and will inhibit the ability of the press to perform its constitutionally recognized role in informing the public on the workings of its government.

As Thomas Jefferson once wrote:

The functionaries of every government have propensities to command at will the liberty and property of their constituents. There is no safe deposit for these but with the people themselves; nor can they be safe with them without information. Where the press is free, and every man able to read, all is safe.⁸

The Reporters Committee urges you and your colleagues to reaffirm these principles, and to reject Senate Bill 1393, the purpose and effect of which would be to deprive the people of Virginia of information about the actions of their government.

Sincerely,

A handwritten signature in black ink, reading "B. D. Brown". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Bruce D. Brown
Executive Director
Reporters Committee for Freedom of the Press

⁷ Editorial Board, *After botched executions, states add secrecy to the lethal injection process*, THE WASHINGTON POST (Jan. 27, 2015), http://www.washingtonpost.com/opinions/after-botched-executions-states-add-secrecy-to-the-lethal-injection-process/2015/01/27/4a763f78-a592-11e4-a06b-9df2002b86a0_story.html.

⁸ Letter from Thomas Jefferson to Colonel Charles Yancey (Jan. 6, 1816), *available at* <http://oll.libertyfund.org/titles/807/88152>