

**IN THE CIRCUIT COURT OF COLE COUNTY  
STATE OF MISSOURI**

THE REPORTERS COMMITTEE FOR  
FREEDOM OF THE PRESS,  
  
AMERICAN CIVIL LIBERTIES UNION OF  
MISSOURI FOUNDATION

and

CHRISTOPHER S. MCDANIEL,

*Plaintiffs,*

v.

MISSOURI DEPARTMENT OF  
CORRECTIONS,

*Defendant.*

Case No. 14AC-CC00254

**ORDER SUSTAINING MOTION FOR SUMMARY JUDGMENT**

This Court has before it the Motion for Summary Judgment (“MSJ”) and Motion for Judgment on the Pleadings of plaintiffs, the Reporters Committee for Freedom of the Press (“Reporters Committee”), the American Civil Liberties Union of Missouri Foundation (“ACLU”), and Christopher McDaniel (“McDaniel”) (collectively, “Plaintiffs”). Both motions are fully briefed, and Plaintiffs’ MSJ and Motion for Judgment on the Pleadings were heard on January 21, 2015. For the reasons stated below, Summary Judgment should be granted on the issue of the Defendants’ compliance with the Sunshine Law, but the Court defers entry of judgment pending a resolution of the remaining issues in this case.

## **I. Background.**

Pursuant to § 610.010, *et seq.* (the “Sunshine Law”),<sup>1</sup> Plaintiffs requested information from the Missouri Department of Corrections (“Defendant” or “DOC”) concerning how the State of Missouri administers the death penalty. Plaintiffs requested, *inter alia*, records relating to the pharmacies and laboratories that compound, supply, and test the drugs used to carry out executions. Defendant refused to release these records, asserting that they are exempt from disclosure under Missouri law. This action followed.

On August 19, 2014, Plaintiffs filed a Motion for Judgment on the Pleadings. On October 31, 2014, Plaintiffs filed, concurrently with their Reply in support of their Motion for Judgment on the Pleadings, a Motion for Summary Judgment. Defendant opposed the MSJ but conceded that there were no material facts in dispute.

Defendant opposed releasing the requested records and opposed Plaintiffs’ MSJ on the basis of § 546.720.2, which states, in pertinent part:

The director of the department of corrections shall select an execution team which shall consist of those persons who administer lethal gas or lethal chemicals and those persons, such as medical personnel, who provide direct support for the administration of lethal gas or lethal chemicals. The identities of members of the execution team, as defined in the execution protocol of the department of corrections, shall be kept confidential. Notwithstanding any provision of law to the contrary, any portion of a record that could identify a person as being a current or former member of an execution team shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity, the remainder of such record shall not be privileged or closed unless protected from disclosure by law . . . .

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<sup>1</sup> All statutory references are to Missouri Revised Statutes 2000, as updated, unless otherwise noted.

It is Defendant's position that § 546.720.2 exempts from disclosure under the Sunshine Law all records relating to the pharmacies and laboratories that manufacture, compound, and test the lethal injection drugs used by the State.<sup>2</sup>

## **II. Applicable Legal Standards.**

Summary judgment is warranted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993). Where a fact is established on a summary judgment motion, the burden falls to the non-moving party to establish that a controversy remains. *Martin v. City of Washington*, 848 S.W.2d 487, 492 (Mo. banc 1993).

In evaluating whether Defendant has violated any provision of the Sunshine Law, this Court must determine: (1) whether Defendant is a "public governmental body"; (2) whether the records at issue are "public"; and (3) whether any statutory exemption cited by Defendant applies to the records at issue. *See, e.g., News-Press & Gazette Co. v. Cathcart*, 974 S.W.2d 576 (Mo. App. W.D. 1998). In this analysis, the Sunshine Law "shall be liberally construed and [its] exceptions strictly construed to promote [the] public policy" of this State that government records "be open to the public." § 610.011.1; *see also State ex rel. Mo. Local Gov't Retirement Sys. v. Bill*, 935 S.W.2d 659, 664 (Mo.App. W.D. 1996) (stating that the Sunshine Law "embodies Missouri's commitment to open government and is to be construed liberally in favor of open government").

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<sup>2</sup> "Except to the extent disclosure is otherwise required by law," the Sunshine Law permits a public governmental body to close "[r]ecords which are protected from disclosure by law." § 610.021.14.

### **III. Findings of Fact.**

The Court finds the following facts, which are not disputed by the parties:

1. Defendant is a governmental body subject to the provisions of the Sunshine Law
2. Defendant is responsible for securing drugs to be used by the State of Missouri in lethal injections.
3. Defendant's execution protocol, revised on October 18, 2013, states in part: "The execution team consists of department employees and contracted medical personnel including a physician, nurse, and pharmacist. The execution team also consists of anyone selected by the department director who provides direct support for the administration of lethal chemicals, including individuals who prescribe, compound, prepare, or otherwise supply the chemicals for use in the lethal injection procedure."
4. An October 22, 2013 press release issued by Defendant states in part that Defendant "announced that it has added a compounding pharmacy to its execution team. The compounding pharmacy will be responsible for providing pentobarbital for executions carried out under the new protocol."
5. On December 2, 2013, McDaniel submitted a public records request to Defendant seeking a copy of "the license of the pharmacy that compounded the pentobarbital for the Missouri Department of Corrections for use in its November 2013 execution."
6. Defendant initially denied McDaniel's December 2 request for public records on December 4, 2013, citing §§ 217.075 and 546.720.2, and reiterated that denial and the grounds for it in subsequent correspondence with McDaniel.
7. On January 27, 2014, McDaniel submitted three public records requests to Defendant seeking copies of:

- A. Any and all records in the possession of the Department of Corrections (DOC), regardless of who produced them, regarding correspondence with the Apothecary Shoppe for the past 8 months ending today;
  - B. Any and all records in the possession of the [DOC], regardless of who produced them, regarding payment for members of the execution team or testing laboratory over the last three months ending today; and
  - C. Any and all records in the possession of the [DOC], regardless of who produced them, regarding midazolam and hydromorphone.
8. On February 18 and 28, 2014, and March 17, 2014, Defendant denied McDaniel's requests in part, citing §§ 610.021(14), 217.075 and 546.720.2 as grounds for the denial.
9. On February 7, 2014, the Reporters Committee submitted a public records request to Defendant seeking copies of "records identifying the pharmacy (or pharmacies) producing drugs to be used in lethal injections in Missouri, and records identifying the laboratory (or laboratories) testing drugs to be used in lethal injections in Missouri."
10. Defendant denied the Reporters Committee's request for public records on February 14, 2014, citing §§ 217.075 and 546.720.2 as grounds for the denial.
11. On February 20, 2014, the ACLU submitted a public records request to Defendant seeking copies of:
- A. All records indicating DOC's current inventory of pentobarbital;
  - B. All records indicating the source of all pentobarbital in the DOC's current inventory;
  - C. All records indicating the person or persons that authorized the purchase(s) of all pentobarbital in the DOC's current inventory;
  - D. All records indicating DOC's current inventory of compounded pharmaceuticals;
  - E. All records indicating the source of all compounded pharmaceuticals in the DOC's current inventory;
  - F. All records indicating the person or persons that authorized the purchase(s) of all compounded pharmaceuticals in the DOC's current inventory;

- G. All phone records indicating calls between the DOC and any compounding pharmacy;
- H. All phone records indicating calls between the DOC and any pharmacist regarding the compounding of pharmaceuticals;
- I. All email messages between the DOC and any compounding pharmacy;
- J. All email message between the DOC and any pharmacist regarding the compounding of pharmaceuticals;
- K. All phone records indicating any calls within the DOC regarding the compounding of pharmaceuticals;
- L. All email messages within the DOC regarding the compounding of pharmaceuticals;
- M. All documents regarding the use of pentobarbital in executions; and
- N. All documents regarding the use of compounded pharmaceuticals in executions.

12. On March 14, 2014, Defendant denied the ACLU's request for public records in part, citing §§ 217.075, 546.720, and 610.021(1) as grounds for the denial.

13. On February 20, 2014, McDaniel submitted a public records request to Defendant seeking copies of "any and all records regarding the compounding pharmaceuticals for Michael Taylor's execution, scheduled currently for Feb. 26, 2014."

14. On February 21, 2014, McDaniel requested three additional pieces of information from Defendant related to Michael Taylor's execution:

- A. All records indicating any federal licensure of the pharmacy;
- B. All records indicating any state licensure of the pharmacy; and
- C. All records indicating any licensure by any non-federal or non-state entity.

15. On March 14, 2014, Defendant denied McDaniel's February 20 and 21, 2014 requests in part, citing §§ 217.075, 546.720, and 610.021(1) as grounds for the denial.

#### IV. Conclusions of Law.

##### **A. Defendant is a “governmental body” and the records at issue are “public” under the Sunshine Law.**

The Sunshine Law defines “governmental body” as including any “administrative or governmental entity created by the constitution or statutes of this state” as well as “[a]ny department or division of the state.” § 610.010.4. There is no dispute that Defendant is a government entity subject to the Sunshine Law.

The Sunshine Law defines “public record” as “any record, whether written or electronically stored, retained by or of any public governmental body.” § 610.010.6. There is no dispute that the records that are the subject of Plaintiffs’ Sunshine Law requests are “public records” within the meaning of § 610.010.6. Thus, the only dispute between the parties is whether the requested public records must be closed under the Sunshine Law. As discussed below, the records must be disclosed.

##### **B. Section 546.720.2 does not authorize the DOC to withhold records relating to pharmacies and laboratories that supply, compound, and test lethal injection drugs.**

Under the Sunshine Law, public records are “presumed open to public inspection.” *N. Kansas City Hosp. Bd. of Trs. v. St. Luke’s Northland Hosp.*, 984 S.W.2d 113, 119 (Mo. App. W.D. 1998); *see also Chasnoff v. Bd. of Police Comm’rs*, 334 S.W.3d 147, 151 (Mo. App. E.D. 2011) (noting that closure of records under the Sunshine Law is permissive, not mandatory). A public governmental body is permitted to close such records only to the extent that a statutory exception to the Sunshine Law’s disclosure requirements applies. § 610.021; *see also Scroggins v. Mo. Dep’t of Soc. Servs., Children’s Div.*, 227 S.W.3d 498, 500 (Mo. App. W.D. 2007) (finding that “public records are open to the public unless a statute protects their disclosure”). Such exceptions are to be “strictly construed” in favor of disclosure. § 610.011.1.

Here, the statute at issue is § 546.720.2. While this Court recognizes that under this statute the identities of “members of the execution team” are confidential, this Court finds that § 546.720.2 does not authorize the DOC to withhold records from the public concerning the pharmacies and laboratories that supply, compound, and/or test lethal injection drugs used by the State because it does not authorize the DOC to make those entities “members of the execution team.”

Section 546.720.2 states that the “identities of members of the execution team, as defined in the execution protocol of the department of corrections, shall be kept confidential.” This provision does not, however, empower the DOC to define the execution team as it wishes, without limitation. Section 546.720.2 expressly states that the DOC “shall select an execution team *which shall consist of* those persons who administer lethal gas or lethal chemicals and those persons, such as medical personnel, who provide direct support for the administration of lethal gas or lethal chemicals.” (Emphasis added.) The statute’s mandatory language indicates the intent of the General Assembly to require that the execution team be limited to those “persons who administer lethal gas or chemicals” and those “persons who provide direct support for the administration of lethal gas or chemicals.” *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharm.*, 208 S.W.3d 907, 909 (Mo. banc 2006) (“The goal of statutory analysis is to ascertain the intent of the legislature, as expressed in the words of the statute.”). This Court concludes that laboratories and pharmacies are not “persons who administer lethal gas or chemicals” or “persons who provide direct support for the administration of lethal gas or chemicals.”

Laboratories and pharmacies are not “persons” within the meaning of Section 546.720.2. That provision specifically cites “medical personnel” as an example of those who may be included on the execution team, and includes language making it clear that a “person” is separate



and distinct from an “entity.” § 546.720.2 (stating that “any portion of a record that could identify *a person* as being a current or former member of an execution team shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure *to any person or entity*”) (emphasis added). In light of this statutory language, and consistent with the traditional, historical purpose of such statutes to protect the personal privacy of those individuals tasked with carrying out executions, the Court construes “persons” in § 546.720.2 to mean natural persons.

In addition, neither laboratories nor pharmacies, nor the employees that work for those entities, “*administer* lethal gas or chemicals” or “provide *direct* support *for the administration* of lethal gas or chemicals.” § 546.720.2 (emphasis added). The word “direct,” when used as an adjective, means “[h]aving no intervening persons, conditions, or agencies . . . .” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2014), *available at* <http://perma.cc/Q4LJ-YJ3J>. And the word “administer” means “to mete out; dispense . . . .” *Id.*, *available at* <http://perma.cc/C7BN-R78J>. The use of this statutory language indicates that the “execution team” consists of individuals such as the DOC employee who administers the lethal injection drugs to the inmate in the execution chamber and the attending physician, who is present in the execution chamber and directly oversees the execution. This interpretation of the statute is supported by the provision’s reference to “medical personnel” in describing the type of individual whom the “execution team” is meant to include. Unlike those individuals who are present in the execution chamber, pharmacies and laboratories do not participate in the act of “administ[ering]” or dispensing lethal injection drugs to an inmate. Thus, because laboratories and pharmacies do not “administer lethal gas or chemicals” or “provide direct support for the

administration of lethal gas or chemicals,” they cannot properly be considered members of the “execution team” for purposes of § 546.720.2.

A broader reading of § 546.720.2 would lead to unreasonable results. *See Murray v. Mo. Highway & Transp. Comm’n*, 37 S.W.3d 228, 233 (Mo. banc 2001) (stating that statutes should be interpreted to “avoid unreasonable or absurd results”). Defendant’s position that a mere logical relationship, no matter how attenuated, between a State-sponsored execution and a particular entity that is within the chain of supply of a chemical used in that procedure is enough to permit the DOC to add that entity to the execution team, if adopted, would permit the DOC to add any number of private entities with whom the DOC contracts—such as the manufacturer and supplier of syringes and gurneys used during executions—to the execution team. That would, in turn, make a large swath of otherwise public information concerning those entities, including their contracts with Defendant, “privileged” and not “subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity[.]” § 546.720.2. The limiting language of § 546.720.2 demonstrates that the General Assembly did not intend this result.

The fact that Defendant’s execution protocol, revised as of October 2013, purports to name a compounding pharmacy to the “execution team” does not control whether records may be closed under the Sunshine Law. The DOC was not authorized by statute to add pharmacies or laboratories to the “execution team” that is set forth in its execution protocol. Accordingly, § 546.720.2 does not exempt public records concerning the compounding pharmacy—or any other pharmacy or laboratory that supplies, compounds and/or tests lethal injection drugs—from disclosure under the Sunshine Law.

**C. No laboratory that tests lethal injection drugs is a member of the execution team set forth in the execution protocol.**

Even if § 546.720.2 authorized Defendant to revise its execution protocol to name pharmacies and laboratories that supply, compound, and/or test lethal injection drugs to the “execution team,” which it does not, there is no dispute that Defendant’s execution protocol was revised to add only a compounding pharmacy, not laboratories. That execution protocol, on its face, does not purport to include any laboratories responsible for testing lethal injection drugs used by the State. For this reason, in addition to those set forth above, § 546.720.2 provides no basis for Defendant’s withholding of documents from Plaintiffs concerning the laboratories that test lethal injection drugs.

**V. Order**

The Court concludes that Defendants have failed, at least in part, to comply with the Sunshine Law. However, because whether or not a particular person meets the statutory definition of an execution team member and therefore whether such a person could be identified by disclosure of a record is a question of fact unresolved by this motion, Plaintiff may not be entitled to the blanket remedy they seek.

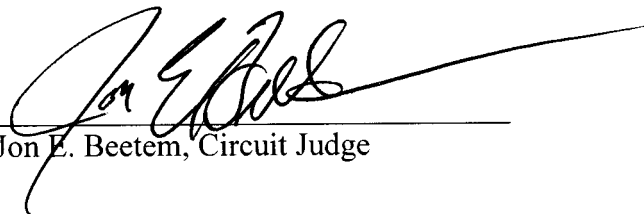
“Section 610.027 authorizes the trial court to award attorney’s fees to any party who successfully establishes a purposeful or knowing violation of the Sunshine Law.” *R.L. Polk & Co. v. Missouri Dep’t of Revenue*, 309 S.W.3d 881, 886 (Mo. App. W.D. 2010). “If the court finds that a public governmental body has knowingly violated sections 610.010 to 610.026, the court may order the governmental body to pay all costs and reasonable attorney’s fees to the prevailing party.” *Id.* (citing § 610.027.3). “If the court finds that the violation was purposeful, the court is required to order the payment of all costs and reasonable attorney’s fees.” *Id.* (citing § 610.027.4). The Court finds that the violation of the Sunshine Law here was knowingly done

because the plain language of the statutes upon which Defendants rely does not support the closure of at least some of the information requested.

The matter is continued for further proceedings on the issues of appropriate remedy, attorneys' fees and sanctions.

Case placed on the August 28, 2015 law day at 9:00 am for scheduling of further proceedings. Counsel are encouraged to schedule a telephone conference call in lieu of appearance. The Court does not conduct telephone conferences on law days.

SO ORDERED this 15<sup>th</sup> day of July, 2015.



Jon E. Beetem, Circuit Judge