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

SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs the Reporters Committee for Freedom of the Press ("Reporters Committee"), the American Civil Liberties Union of Missouri Foundation ("ACLU"), and Christopher McDaniel have requested basic information about how the Department of Corrections ("DOC") carries out the death penalty in the State of Missouri, including the identities of the pharmacies and laboratories creating and testing the drugs used to carry out the executions. The Defendant has refused to release this information, despite the public's need to know it and the importance of the public's ability to check the operations of its government.

The facts relevant to this Motion are not in dispute. Defendant admits in its Answer that it is the governmental entity in Missouri responsible for securing drugs to be used by the state in lethal injections. Defendant also admits that it has withheld records related to the source of those drugs from Plaintiffs. Defendant has withheld the requested information based upon an asserted exemption to the Sunshine Law that purportedly protects the identities of "members of the execution team."

A motion for judgment on the pleadings should be granted if no "material issue of fact exists" and, "from the face of the pleadings, the moving party is entitled to judgment as a matter of law." *Madison Block Pharmacy, Inc. v. U.S. Fidelity & Guaranty Co.*, 620 S.W.2d 343, 345 (Mo. banc 1981). Both standards are met in this case.

I. The Missouri Sunshine Law was passed in an effort to facilitate citizen oversight of government and encourage robust and informed discussion of public issues.

The Missouri Sunshine Law, Chapter 610, was passed to extend broad public access rights to government records and meetings in the state.[1] In fact, the statute specifically indicates that the law "shall be liberally construed and [its] exceptions strictly construed to promote this public policy" of openness. § 610.011.

A. The Sunshine Law encompasses all public business, including the enforcement of criminal judgments.

Missouri's policy of openness extends to all "public business," which the statute defines as "all matters which relate in any way to the performance of the public governmental body's functions or the conduct of its business." § 610.010(3). There can be no doubt that the carrying out of a duly issued criminal sentence is part of the function of the Missouri state government. This function specifically falls to the

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[1] All statutory references are to Missouri Revised Statutes (2000), as updated, unless otherwise noted.

Department of Corrections to oversee. Further, because carrying out the death penalty is the most serious example of this government function, it must be subject to the same presumptions of openness as other government activities.

The Missouri Sunshine Law also specifies that the records of a private consultant or contractor are public records to the extent that they reveal work done on behalf of a public body. § 610.010(6). The only exception to that rule is for "personally identifiable student records[.]" *Id.* Therefore, the records at issue here, which relate to private companies contracting with the state, should be deemed public because the government has failed to overcome the strong presumption of openness and no exemption applies.

B. Non-statutory policy considerations or preferences cannot overcome the Sunshine Law's presumption of openness.

Section 610.021 contains a thorough list of records excluded from disclosure under the Sunshine Law. Defendants here claim the records are closed under section 610.021(14), which exempts from disclosure "[r]ecords which are protected from disclosure by law[.]" But only a specific law, not a mere policy, satisfies this exemption and justifies the withholding of records under that provision. In the context of Sunshine Law exemptions, "[t]he term 'law' [in section 610.021(14)] has a particular meaning . . . . It refers to statutes." *State ex rel. Mo. Local Gov't Ret. Sys. V. Bill*, 935 S.W.2d 659, 665 (Mo. App. W.D. 1996) (citing *Oregon Cnty. R-IV Sch. Dist. V. LeMon*, 739 S.W.2d 553, 557 (Mo. App. S.D. 1987)); *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").

II. Defendant's interpretation of section 546.720 is overly broad and results in the withholding of information that should be available to the public under the Sunshine Law.

Despite the clear rule that exceptions to the public records law should be applied narrowly and are strictly construed, *The News-Press and Gazette Co. v. Cathcart*, 974 S.W.2d 576, 578 (Mo. App. W.D. 1998), the DOC has adopted a reading of the execution team exemption that goes beyond not just the plain language of the statute, but also the general intent behind those types of exemptions.

A. Standard rules of statutory construction lead to the conclusion that Defendant's interpretation of the law here cannot stand.

The rules governing the manner of execution and members of the execution team are found in section 546.720. That section gives the DOC director the authority to "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." § 546.720(2). Pharmaceutical manufacturing companies and laboratories that test pharmaceuticals are certainly not "persons who administer lethal gas or lethal chemicals." Nor are they "persons . . . who provide *direct* support for the administration of lethal gas or chemicals." *Id.* (emphasis added).

The "primary rule of statutory interpretation" is to derive the intent of the legislature from the plain language of the statute. *E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 317 (Mo. banc 2011). "The plain meaning of a term may be derived from a dictionary." *Id.* (citing *Gash v. Lafayette Cnty.*, 245 S.W.3d 229, 232 (Mo. banc 2008)). Here, this Court must determine the meaning of "direct" support in section 546.729(2). Merriam-Webster's Dictionary defines "direct," in relevant part, as:

"stemming immediately from a source"; "marked by the absence of an intervening agency, instrumentality, or influence"; or "characterized by close logical, causal, or consequential relationship." Merriam-Webster Dictionary, *available at* http://www.m-w.com/dictionary/direct. All of these definitions suggest immediacy or an immediate cause and effect that is notably absent here. The manufacture of lethal drugs is significantly different and removed from their administration by the DOC and represents a process separate and apart from an execution. The pharmacies and laboratories that manufacture the lethal drugs neither administer them to the inmates who are sentenced to death nor are present during the execution. It is an employee of the DOC who administers the drugs to the inmate and a physician who oversees the execution. Thus, the DOC is an intervening agency, instrumentality, or influence between the source of the drugs—the pharmacy or laboratory—and an inmate's execution. As such, the pharmacies and laboratories do not "provide direct support for the administration" of the death sentence.

B. This type of "execution team" exemption is intended to protect the personal privacy and security of individuals, not shield the method of execution or protect companies that provide supplies but do not carry out the execution.

Executions in the United States have traditionally been public, and in fact, every state with the death penalty requires official witnesses to be present at executions. *Cal. First Amendment Coal. V. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002). That transparency has not typically extended to the executioner. "The only thing that was sometimes kept secret at early American executions was the executioner's identity." JOHN D. BESSLER, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA 25 (1997). Today's laws that exempt executioners' identities from the public record are derived

from that history and, until recently, have been properly limited to the identities of the person or people who actually carry out the execution. *Id.* at 151.

Even when laws were in place to protect the identity of executioners, the public routinely had access to information about the executioners' qualifications and the materials to be used in the executions. *See, e.g., Campbell v. Wood*, 18 F.3d 662, 684-85 (9th Cir. 1994) (describing the type of rope that would be used in a 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).[2] To suggest that suddenly the Missouri statute extends beyond the traditional notion of the "hangman's hood" to include companies that happen to produce tools used in executions strains credulity.[3]

Additionally, because the executioner exemption was meant to protect the personal privacy of the individuals tasked with carrying out executions, it is limited to individual human beings with personal privacy interests. Turning back to the rules of statutory construction, listing "medical personnel" as the only example of protected

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[2] Courts may take judicial notice of historical facts, especially when they illuminate the meaning of a statute. *Childress v. Southwest Missouri R. Co.*, 141 Mo.App. 667, 126 S.W. 169 (Mo.App. 1910) (court can take judicial notice, if necessary, of the facts of contemporary history, in order to properly construe a statute), *citing State v. Bengsch*, 170 Mo. 81, 70 S.W. 710 (Mo. 1902); *Reineman v. Larkin*, 222 Mo. 156, 121 S.W. 307 (Mo. 1909) ("Courts take judicial notice of facts of current history, of geographical and scientific facts, and of facts commonly known to all mankind."). *See* Wigmore, Evidence § 2568a (listing "official records, encyclopedias, any books or articles" as examples of authorities sufficiently reliable to be used for judicial notice).

[3] In fact, when Nevada was using the gas chamber to execute inmates, "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." *Wood v. Ryan*, No. 14-16310, 2014 WL 3563348, at *6 (9th Cir. July 19, 2014) (citing SCOTT CHRISTIANSON, THE LAST GASP: THE RISE AND FALL OF THE AMERICAN GAS CHAMBER 76-79 (2010)).

"persons" indicates coverage of individuals only, not legal entities. The United States Supreme Court has made clear that corporations do not have personal privacy rights under the analogous federal Freedom of Information Act, 5 U.S.C. section 552, *et seq.* *F.C.C. v. AT&T*, 131 S. Ct. 1177, 1182-1183 (2011) (holding that "[w]hen it comes to the word 'personal,' there is little support for the notion that it denotes corporations, even in the legal context"). Given the clear intent behind the statute to protect only those individuals traditionally granted anonymity in the execution process, this Court must read the statute in that light. The DOC has not shown any reason to believe the statute was meant to extend further.

III. Defendant's policy justifications for withholding the requested information lack foundation and do not overcome the Sunshine Law's presumption of openness.

DOC has argued that it is necessary to withhold the names of companies that produce and test lethal injection drugs in order to protect the companies from pressure from anti-death penalty groups. But it not legitimate for the government to act in secret out of the fear that if the public knew what it was doing, citizens would be upset, nor is there any evidence that such pressure would actually convince a company to stop selling drugs to the DOC.

State governments serve the public, and should not withhold the truth about government activities from the governed. "A broad dissemination of principles, ideas, and *factual information* is crucial to the robust public debate and informed citizenry that are 'the essence of self-government.' " *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 582 (1985) (emphasis added) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). Missouri's Sunshine Law was meant to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against

corruption and to hold the governors accountable to the governed." *Hyde v. City of Columbia*, 637 S.W.2d 251, 259-60, n.11 (Mo. App. W.D. 1982) (quoting *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978), to indicate similar purposes between the federal and state freedom of information laws). Specifically, the law "attest[s] to a community insistence that in a democracy the affairs of government are rightfully conducted in the open." *Id.* at 259. There are few more serious government endeavors than the taking of a life, and the goal of "hold[ing] the governors accountable to the governed" should be paramount when such high stakes exist. *Nat'l Labor Relations Bd.*, 437 U.S. at 242.

The government's argument here amounts to saying that if the public discovered where the state gets its lethal drugs, or how the state plans to administer them, then members of the public may seek to change the protocols. That is precisely the purpose behind democratic government and freedom of information laws: to give the people the knowledge to effect change in how their government operates. "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996). "A State's paternalistic assumption" about how the public will use "truthful, nonmisleading" information "cannot justify a decision to suppress it." *Id.* at 497. *See also Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (finding that "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us"). This Court should reject the argument that the public is better off not knowing what the government is doing in its name.

IV. Understanding how executions carried out in the public's name are conducted is essential to ensuring an informed citizenry and accountable government.

Freedom of information laws were meant to provide insight into "what the government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989). Even more broadly, the First Amendment established that a basic premise of this country's founding was "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Sup. Ct. for the Cnty. of Norfolk*, 457 U.S. 596, 604 (1982). Included in that assumption "is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.'" *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). It has long been the tradition in this country to include capital punishment and the process by which the government executes people among the topics related to "what the government is up to," and the subject of much "free discussion of governmental affairs." *See, e.g., Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 876 (2002) ("Independent public scrutiny . . . plays a significant role in the proper functioning of capital punishment. An informed public debate is critical in determining whether execution by lethal injection comports with the evolving standards of decency which mark the progress of a maturing society." (internal quotation marks and citation omitted)).

A. State-sponsored executions have always been open to the public, subject only to the narrowest exceptions for the actual executioner.

Since this country's founding, public executions have been "a fixture of American society," taking place in the middle of the day in "the public square." JOHN D. BESSLER, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA 23 (1997); *see also* RAYMOND

PATERNOSTER ET AL., THE DEATH PENALTY: AMERICA'S EXPERIENCE WITH CAPITAL PUNISHMENT 12 (2008). In fact, every state that still carries out the death penalty requires official witnesses to be present at executions. *Cal. First Amendment Coal.*, 299 F.3d at 875. Under this well-established tradition of openness, the government has only shielded the identity of the individual executioner, who "has been hooded—both literally and figuratively." 75 FORDHAM L. REV. 2791, 2796 (2007); *see also* BESSLER, DEATH IN THE DARK at 25 ("The only thing that was sometimes kept secret at early American executions was the executioner's identity.").

B. Former methods of execution made obvious to witnesses how the procedure was performed and where problems lay, and authors and journalists publicized the tools used and their manufacturers.

Before states turned to lethal injection to execute prisoners, hanging, electrocution, and the gas chamber were each the preferred execution method at one time. In each case, while the identities of the individual people pulling the lever or flipping the switch were shielded, the press and the public were able to learn a great deal about who supplied the materials to be used in the executions and how those materials were expected to perform.

"The materials, quality, and pedigree of the ropes seemed to be a subject of absorbing interest to the public, judging from how often they appeared in the papers and the care with which these minute details were reported." ENOUGH ROPE: THE HANGMAN'S ROPE IN THE PRESS, , *available at* http://hauntedohiobooks.com/news/enough-rope-the-hangmans-rope-in-the-press/. News reports from the early 1900s identified specific people, not just the companies who made or provided ropes for hangings. *Id.* (quoting various reports that included

details such as, "[t]he rope for the execution was borrowed from Sheriff Julian," and, "[t]he ropes with which Jackson and Walling are to be hung have been completed and delivered over to Sheriff Plummer . . . . They were made by Frank Vonderheide., the Main Street cordage dealer, and most of the work was done by Mr. Vonderheide himself"). Similarly, the maker of the standard gas chamber was also identified in news reports. *Eight States Now Are Using Gas Chambers for Executions*, SARASOTA HERALD TRIBUNE, Jan. 2, 1955, at 17 http://bit.ly/1sEWlFs (reporting that "Mississippi is the latest state—the eighth—to purchase a chamber from Eaton Metal Products Co., which holds a patent on the death machine").

Today's pharmacies and laboratories that produce and test the drugs used in lethal injections are no different from past centuries' rope and gas chamber makers. There is no reason to presume they are entitled to greater anonymity than past companies that were involved in the execution process.

C. Modern execution methods often do not allow eyewitnesses to see what, if anything, goes wrong; therefore, the public needs other ways to ensure the death penalty is carried out constitutionally.

The difference that does exist between past execution methods and the current practice of lethal injection is that today's method often does not allow an eye witness to see how, where, or if the process goes wrong. If a hangman's rope snapped or a trap door failed to open properly, witnesses could *see* that. If flipping a switch failed to produce enough electricity to kill the person in the chair, or enough gas to kill a person in a chamber, witnesses could see that as well. But where prison personnel miss a vein and begin administering lethal drugs into a prisoner's muscle instead of his bloodstream, for example, or the state administers a grossly inadequate dose of lethal

drugs, it may not be immediately apparent to witnesses where and how the execution has broken down. *See, e.g.*, *Oklahoma Execution of Clayton Lockett – Timeline of the Botched Procedure*, THE GUARDIAN, May 1, 2014, *available at* http://bit.ly/1jo3Ih9; Jeremy Pelzer, *State Prison Officials Defend Dennis McGuire's Execution but Intend to Increase Dosage of Lethal-Injection Drugs*, THE PLAIN DEALER, April 28, 2014, *available at* http://bit.ly/1uvvCvn.

Because witnessing an execution is no longer a sufficient means of holding the government accountable for a process that meets constitutional requirements, and because historically information about the suppliers of the means of execution have been public, this Court should recognize that as a policy matter, the public has the right and need to access the information Plaintiffs have requested here. As one federal court has acknowledged, "[t]o determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information about the 'initial procedures,' which are invasive, possibly painful and may give rise to serious complications." *Cal. First Amendment Coal.*, 299 F.3d at 876.

CONCLUSION

For the reasons outlined herein, Plaintiffs respectfully request that this Court grant their Motion for Judgment on the Pleadings, and that this Court enter a judgment declaring Defendant DOC to have violated the Sunshine Law, and order DOC to release to Plaintiffs the documents they requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Suggestions in Support of Plaintiffs' Motion for Judgment on the Pleadings was mailed postage prepaid and sent via email to the following this the 19th day of August, 2014.

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