WD79893

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JOAN BRAY,
GUARDIAN NEWS AND MEDIA LLC, et al.,
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al.,

Respondents,

v.

GEORGE LOMBARDI, et al.,

Appellants.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon Beetem, Circuit Judge

BRIEF OF RESPONDENTS GUARDIAN NEWS AND MEDIA, LLC., THE ASSOCIATED PRESS, CYPRESS MEDIA, LLC, GANNETT MISSOURI PUBLISHING, INC., AND THE ST. LOUIS POST-DISPATCH LLC

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PRELIMINARY STATEMENT

Missouri's so-called "black hood" law, Mo. Rev. Stat. § 546.720, allows the state to shield from public disclosure the identities of those persons who "administer" lethal injection drugs to condemned prisoners, as well as those persons who provide "direct support for the administration" of the drugs. The circuit court ruled that the Missouri Department of Corrections ("DOC") improperly relied on this statute to deny Respondents' Sunshine Law requests for public records identifying the suppliers of the lethal injection drugs, finding that the suppliers—who are **not** present at the time and place of the executions—neither "administer" the drugs, nor provide "direct support for the administration" of the drugs. The circuit court further held that DOC's interpretation of the statute to apply to drug suppliers—whose role can end years before an execution—effectively writes the term "direct support for the administration" out of the statute. Federal courts have repeatedly agreed with the circuit court's reading of the black hood law.

The circuit court also found that DOC's refusal to provide the requested records was a knowing and purposeful violation of the Sunshine Law for a host of reasons, including the fact that from the time section 546.720 was enacted until October 2013, DOC routinely released records identifying the suppliers of its lethal injection drugs. Only in the last two years has DOC impermissibly attempted to expand the scope of the statutory exemption unilaterally.

Accordingly, this Court should affirm both the circuit court's plain reading of section 546.720, and its award of attorneys' fees.

STATEMENT OF FACTS

This appeal arises out of the Missouri Department of Corrections' denial of Sunshine Law requests by various national and state news organizations[1] seeking public records concerning the source and quality of lethal injection drugs used in state-sponsored executions.

A. Development of a Written Protocol for Lethal Injections In Missouri

The Legislature first authorized executions by lethal injection in 1988. Mo. Rev. Stat. § 546.720; *see* 1988 Mo. Legis. Serv. H.B. 1340 & 1348 (West). Between 1988 and 2005, the state executed sixty-six prisoners by lethal injection,[2] with little oversight and no written guidance.

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[1] Plaintiffs-Respondents are Guardian News and Media, LLC ("Guardian US"), the Associated Press, Cypress Media, LLC, d/b/a *The Kansas City Star*, Gannett Missouri Publishing, Inc., d/b/a *The Springfield News-Leader*, and The St. Louis Post-Dispatch LLC. This is an appeal from three cases for which summary judgment was granted on a consolidated record. *See* Appellants' Br. App. ("DOC's App.") at A23-A36.

[2] *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Prisoners Executed Under Civil Authority in the United States, by Year, Region, and Jurisdiction*,

In 2006, a federal court held that the state's execution practices were unconstitutional, subjecting individuals to unnecessary risk of pain and suffering in violation of the Eighth Amendment. *See Taylor v. Crawford*, No. 05-4173-CV-C-FLG, 2006 WL 1779035 (W.D. Mo. June 26, 2006). Among the problems identified by the court was the lack of a written protocol "describ[ing] which drugs w[ould] be administered, in what amounts and defin[ing] how they w[ould] be administered." *Id.* at *7. The court also expressed concern regarding "John Doe I," the doctor present for the executions who determined the proper lethal injection drug solution for each inmate prior to execution, mixed the drugs, and monitored the anesthetic depth of inmates during executions. *Id.* at *7-8. The court found that John Doe I possessed total discretion over the execution protocol and would make ad hoc adjustments to the lethal injection formula without any oversight. *Id.* at *7. The lack of oversight especially troubled the court because John Doe I acknowledged that he was dyslexic and often made mistakes. *Id.* To remedy the problem, the court ordered DOC to submit a written execution protocol and stayed all executions pending approval of the protocol. *Id.* at *9.

On July 14, 2006, DOC submitted a written execution protocol. This protocol included a section titled "Execution team members," stating that:

1997-2013. *Available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2079 (last visited Oct. 19, 2016).

1. The execution team consists of contracted medical personnel and department employees.
2. A physician, nurse, or pharmacist prepares the chemicals used during the lethal injection.
3. A physical, nurse, or emergency medical technician (EMT-intermediate or EMT-paramedic) inserts intravenous lines, monitors the prisoner, and supervises the injection of lethal chemicals by nonmedical members of the execution team.
4. Two department employees inject the chemicals into the prisoner.

LF at 80. The protocol also contained a section titled "Administration of chemicals" which stated, in part, that "[u]pon order of the department director, the chemicals are injected into the prisoner by the execution team members under the observation of medical personnel." *Id.* at 81.

B. The Legislature Amends § 546.720 To Protect The Identities of The Execution Team, As Defined By DOC's July 14, 2006, Execution Protocol

Shortly after the judge in *Taylor* expressed his concerns about the qualifications of John Doe I, the *St. Louis Post-Dispatch* published a front-page news report, identifying John Doe I as Dr. Alan Doerhoff. *See* Jeremy Kohler,

Behind the Mask of the Execution Doctor, St. Louis Post-Dispatch, July 30, 2006, at A1 (available on Westlaw at 2006 WLNR 13165651).[3] The newspaper further reported that Dr. Doerhoff had been sued for malpractice more than twenty times, had been publicly reprimanded by Missouri's Board of Healing Arts, had his privileges suspended by two Missouri hospitals, and had twice testified falsely about his qualifications. *Id.*

The following February, Representative Danielle Moore introduced a bill in the General Assembly that would keep the identities of the members of the "execution team" confidential. When the bill was introduced, it was summarized as requiring DOC "to select an execution team consisting of individuals who administer lethal gas or chemicals and medical support personnel." Summary of the Introduced Bill, H.B. 820, 2007 Sess. (Mo. 2007).[4] Similarly, in committee, proponents of the bill stated that it would "require the Director of the Department of Corrections to select an execution team consisting of medical support personnel

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[3] *See Colvin v. Carr*, 799 S.W.2d 153, 158 (Mo. App. E.D. 1990) (approving judicial notice of fact of publication of *Post-Dispatch* news report); *see also* W. Schroder, *Missouri Judicial Notice*, 48 Mo. L. Rev. 893, 924-27 (1983) (noting that Missouri courts allow judicial notice of facts to show legislative history).

[4] *Available at* http://www.house.mo.gov/content.aspx?info=/bills071/billsum/intro/sHB820I.htm (last visited Oct. 10, 2016).

and individuals who administer lethal gas or chemicals." Summary of the Committee Version of the Bill, H.B. 820, 2007 Sess. (Mo. 2007).[5] The bill's supporters — DOC and Representative Moore — argued in committee that "the bill [was] needed to provide protection to the members of the execution team and their families from retaliation and ridicule." *Id.*; *see* Matt Tilden, *Status of Death Penalty Remains Uncertain*, Mo. Digital News (Apr. 4, 2007), https://www.mdn.org/ 2007/STORIES/DPFEAT.HTM.[6] While the legislature was concerned about retributive professional disciplinary action, "much of the legislative debate in Missouri addressed concerns about retaliation by prisoners rather than medical boards." Nadia N. Sawicki, *Doctors, Discipline, and the Death Penalty: Professional Implications of Safe Harbor Policies*, 27 Yale L. & Pol'y Rev. 107, 129 n.104 (2008).

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[5] *Available at* http://www.house.mo.gov/content.aspx?info=/bills071/billsum/commit/sHB820C.htm (last visited Oct. 9, 2016).

[6] One proponent of the bill, Missouri Corrections Officers Association Executive Director Gary Gross, said that his organization supported H.B. 820 because they were "in support of any bill that helps protect employees *who work inside of a prison*, especially those involved in the execution process." Mo. Gov. Mess., 7/2/2007 (emphasis added).

The bill was passed, and took effect on August 28, 2007. Mo. House of Representatives, H.B. 820.[7] As enacted, the bill adds the following subsection to the execution statute:

> 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.

Mo. Rev. Stat. § 546.720(2).

At the time of its enactment, DOC understood that § 546.720(2) did not render confidential identities of its vendors of lethal injection drugs, and until October 2013, these vendors were known to the public. *See* Tr. at 132.[8] From the

[7] *Available at* http://www.house.mo.gov/content.aspx?info=/bills071/bills/HB820.htm (last visited Oct. 14, 2016).

[8] For example, between 1988 and 2011, Missouri obtained a key lethal injection drug from Hospira. Kelsey Proud, et al., *Timeline: A Recent History of Missouri's Execution Process*, St. Louis Pub. Radio, *available at*

time of § 546.720(2)'s enactment until 2013, DOC's execution protocol tracked the statute and defined the execution team to include only those medical personnel contracted by DOC who were present in person at executions. LF at 283 ¶ 7, DOC's App. at A24 ¶¶ 2-4, A40 ¶ 5. Accordingly, DOC released on request information about the source of its execution drugs — as recently as October 18, 2013, the DOC released records revealing the source of its lethal injection drugs. LF at 248, ¶ 3.

C. Absent Any Legislative Change, DOC Unilaterally Changes Its Definition of the Execution Team

On October 18, 2013, without any corresponding legislative action or court order, DOC expanded the definition of the execution team in its protocol. LF 248 ¶ 5; LF 258-59; *see* Tr. at 74, lines 8-20. As revised, the execution protocol now reads:

> The execution team consists of department employees and contracted medical personnel including a physician, nurse,

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http://news.stlpublicradio.org/post/timeline-recent-history-missouris-execution-process (last visited Oct. 14, 2016). In addition, DOC had agreements at different points with Morris & Dickson and Mercer Medical LLC Colin Reischman to obtain propofol. *The Mystery Behind Missouri's Execution Drugs*, The Missouri Times, *available at* http://themissouritimes.com/7439/mystery-behind-missouris-execution-drugs/ (last visited Oct. 14, 2016).

> 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*.

LF at 258 (emphasis added).[9] Since the October 18, 2013, revision went into effect, DOC has reversed its reading of § 546.720(2) and refused to disclose the sources of the drugs it uses for lethal injection executions.

D. Press Requests Under the Sunshine Law and the Resulting Litigation

On April 15, 2014, Guardian US submitted an e-mail request to the DOC's custodian of records seeking access to certain public records relating to the State of Missouri's use of lethal injection drugs to execute inmates. LF at 261. Guardian US requested "records sufficient to disclose":

> 1. The name, chemical composition, concentration, and source of the drugs approved for use in lethal injection executions pursuant to

[9] Oddly, the revised execution protocol did not alter DOC's description of the administration of chemicals, which still provides that the chemicals are "injected into the prisoner by the execution team members." LF at 259.

the DOC's October 22, 2013 execution protocol (the "Execution Drugs").

2. The name, chemical composition, concentration, quantity, expiration date, and source of all Execution Drugs, including Execution Drugs currently in the possession of, or on order by, DOC.

3. The results of all quality tests performed by or for DOC on any Execution Drugs, including Execution Drugs currently in the possession of, or on order by, DOC.

4. The qualifications of DOC contractors and/or employees involved in the procurement, testing, or administration of any Execution Drugs.

5. Policy statements, regulations, or memoranda reflecting the assessment or approval of drugs for use in lethal injection executions.

Id. On April 17, 2014, DOC acknowledged receipt of Guardian's request by e-mail and indicated that legal counsel would respond "soon." LF at 263; *see* DOC's App. at A25. On April 25, 2014, DOC produced a single document, the public portions of the execution protocol, and otherwise denied Guardian's request:

> Please be advised that some of the information you have requested is a closed record pursuant to sections 217.075, 546.720 and 610.021(1) and (14), RSMo. Additionally, some of the records are also closed pursuant to the state secret doctrine. Attached please find a copy of the Department's execution protocol.

LF at 264-65.

On May 2, 2014, the Associated Press (AP) submitted a Sunshine Law request identical to the Guardian's April 15 request. LF 249, ¶ 12. That same day, May 2, 2014, DOC replied to AP's request with a letter saying, "It will take approximately three weeks to respond to your request," but cited no specific statutory provisions to justify the delay. LF at 249, ¶ 13; *see* LF at 268.

On May 9, *The Star*, the *Post-Dispatch*, and the *News-Leader* submitted Sunshine Law requests that were identical to the requests previously submitted by AP and the Guardian. LF at 249, ¶ 14. On May 12, 2014, DOC replied to each request with a response that was identical in all relevant respects to that received by Guardian US on April 25, 2014. LF at 250, ¶ 15; *see* LF at 269. DOC cited the same statutory provisions in its denial of the May 9 requests, attached the same execution protocol, and otherwise refused to release the requested documents. LF at 250-69.

On May 15, 2014, Respondents filed a petition in the Circuit Court of Cole County, alleging violations of the Sunshine Law and the public's constitutional

right of access to government proceedings and records. *See* LF at 198. Respondents filed the operative Amended Petition on August 12, 2014, adding a fifth count seeking declaratory judgment regarding the DOC's interpretation of "execution team" to include the pharmacist. LF at 224-28; *see* LF at 199. In a conference call on August 26, 2014, the parties agreed to bifurcate the case between the Sunshine Law claims and the rest of Respondents' claims.[10]

On December 3, 2014, Respondents moved for summary judgment on their Sunshine Law claims (Counts I, II, III, and V of Respondents' Amended Petition), and on December 19, 2014, DOC cross-moved for summary judgment on these same claims. LF at 270-72, 277-78; *see* LF at 200-01. The Circuit Court of Cole County (Beetem, J.) heard these summary judgment cross-motions along with summary judgment cross-motions in the two cases consolidated here on appeal, *Bray v. Lombardi*, Case No. 14AC-CC00044 (the "Bray" lawsuit) and *Reporters Committee for Freedom of the Press v. Missouri Department of Corrections*, Case

[10] Only Counts I, II, III, and V, Appellee's allegations below regarding DOC's noncompliance with the Sunshine Law, are at issue in this appeal. *See* Brief of Appellants at 16-18; *see also* DOC's App. at A45 ("It is further ORDERED that, given that Plaintiffs have been awarded all of the relief they have requested, Count IV of Plaintiffs' Amended Petition is dismissed without prejudice.").

No. 14AC-CC00254 (the "RCFP" lawsuit), on a consolidated record. DOC's App. at A23.

Below, DOC asserted that Missouri's execution statute, Mo. Rev. Stat. § 546.720(2), authorized DOC to withhold some responsive documents under the Sunshine Law exemption that permits those records to be withheld that "are protected from disclosure by law." Mo. Rev. Stat. § 610.021(14); *see* LF at 280 ¶ 4. Other responsive documents, DOC asserted, could be withheld under the Sunshine Law's exemption for privileged information. Mo. Rev. Stat. § 610.021(1); *see* LF at 280 ¶ 4. DOC further argued that a law protecting "offender records" created grounds for withholding other responsive documents as "internal administrative report[s] or document[s] relating to institutional security." Mo. Rev. Stat. § 217.075; s*ee* LF at 280, ¶ 4.

E. The Circuit Court's Decisions

On July 15, 2015, the Circuit Court of Cole County issued an order sustaining Respondents' motion for summary judgment. DOC's App. at A23-A36. The court found, as a factual matter, that DOC possessed records responsive to Respondents' Sunshine Law requests at the time the requests were submitted, including documents reflecting quality testing conducted on DOC's drugs and the qualifications of DOC contractors and personnel. DOC's App. at A26-A27.[11] The

[11] Notably, the circuit court further found that the State of Missouri's assertion that private suppliers are necessary in order to obtain execution drugs

court then held that the Sunshine Law required DOC to produce those documents. DOC's App. at A27.

On the merits, the court first held that § 546.720(2) does not grant DOC authority to withhold records identifying its drug suppliers. DOC's App. at A28-A30 ¶¶ 26-32. Instead, the court held that the plain language of the statute only protects the identities of "those persons — and only those persons — who either (1) 'administer lethal gas or lethal chemicals' or (2) 'provide direct support for the administration of lethal gas or lethal chemicals.'" DOC's App. at A28-A29 ¶ 27. Accordingly, the statute does not protect the identities of DOC's "drug suppliers" because they "do not themselves administer the lethal chemicals, nor do they provide direct support for the administration of the lethal injection drugs."[12] DOC's App. at A29. The court did not order DOC immediately to produce the records it withheld under § 546.720(2), recognizing that a fuller record was needed

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was not supported by the evidence. DOC's App. at A28. Instead, citing a statement from the state's attorney general, the court found that Missouri could "explore establishing its own laboratory to produce chemicals for use in lethal injection executions as an alternative to keeping the identity of the providers secret." *Id.*

[12] Indeed, as the circuit court found, the suppliers' role can end years before an execution is carried out. DOC's App. at A29-A30 ¶ 30.

to determine which individuals' identities DOC could protect. DOC's App. at A35-A36.

The circuit court went on to reject DOC's additional arguments for withholding documents, including its invocations of the "institutional security" exemption under Mo. Rev. Stat. § 217.075(1) and the litigation records exemption under § 610.021(1), finding these arguments entirely frivolous and lacking any factual support. DOC's App. at A32 ¶¶ 43-44, A34 ¶ 51. The circuit court also held that DOC had improperly withheld other records that did not identify its pharmacists without "any adequate justification." DOC's App. at A32 ¶ 45. This included records containing (1) quality testing of lethal injection drugs, DOC's App. at A33 ¶ 47; (2) qualifications of personnel involved in procuring, testing, or administering the drugs, DOC's App. at A33 ¶ 49; and (3) policy statements, regulations, or memoranda reflecting the assessment or approval of lethal injection drugs, DOC's App. at A34 ¶ 50. On the motion for attorneys' fees, the circuit court held that sanctions were appropriate for DOC's failure to comply with the Sunshine Law's response deadlines. DOC's App. at A34-A35, ¶¶ 53-57.

Following the circuit court's initial order, the DOC provided a privilege log identifying those documents responsive to Respondents' Sunshine Law requests that DOC claimed to be exempt from disclosure. LF at 317. The log identified thirty records called for by Respondents' requests and the reason each was withheld. *Id.* The log, however, failed to address all of the categories of records requested. *See* LF at 315-18.

On September 10, 2015, Plaintiffs-Respondents submitted a "Notice of Deficiencies in Defendant's Privilege Log." LF at 315-21. In response, DOC provided an addendum identifying five "additional records requested by Plaintiffs" that DOC had previously excluded from its privilege log without explanation. LF at 411; *see* LF at 412. Yet even with these additional records, there still remained numerous omissions in DOC's privilege log, as the circuit court recognized. DOC's App. at A41 ¶¶ 23-24, A42-A43 ¶¶ 31-32.

On September 17, 2015, the circuit court conducted an evidentiary hearing to determine which individuals meet the statutory definition of an execution team member under § 546.720(2). Tr. at 1-137. At the hearing, DOC identified eight "entities" whose identities it argues are protected by the statute. DOC's App. at A38 ¶¶ 2-3. Those individuals include three non-medical DOC personnel (designated "NM1," "NM2," and "NM3" by DOC); a nurse who participates in the executions ("M2"); an anesthesiologist who participates in the executions ("M3"); a physician who prescribed the lethal injection drugs ("M5"); and four pharmacists who provided DOC with the lethal injection drugs ("M6" and "M7").[13] *Id.*

Matthew Briesacher, Deputy General Counsel for DOC, testified about the respective roles each anonymous entity plays in lethal injection executions. LF at 314, DOC's App. at A37; *see generally* Tr. 9-136. Relevant to this appeal,

[13] Only records identifying M6 and M7 are at issue in this appeal. *See* Appellants' Br. 19-27.

Briesacher testified that Missouri's lethal injection drug suppliers, M6 and M7, are not "on site" at the correctional center during executions and do not prepare chemicals in the execution room. Tr. 123:23-124:12; 131:17-19. Indeed, to Briesacher's knowledge, M6 and M7 may never have visited the correctional center in Bonne Terre where the executions are conducted. Tr. at 124:4-10.

Following the evidentiary hearing, the circuit court issued its final judgment on May 21, 2016. DOC's App. at A37-A45. Based on Briesacher's testimony, the court held that NM1, NM2, NM3, M2, M3, and M5 are members of the execution team. DOC's App. at A39 ¶ 9. It found that the pharmacists providing DOC with pentobarbital, M6 and M7, are not present during executions, do not administer the lethal injections, and do not provide "direct support for the administration" of the lethal injections. DOC's App. at A38-A39 ¶¶ 4-5. Moreover, M6 and M7's involvement in executions ends "weeks, months, or years" before an execution. DOC's App. at A30 ¶ 30. Accordingly, the court held that "M6 and M7 are not members of the execution team," DOC's App. at A39 ¶ 6, and that DOC may not withhold documents identifying them. DOC's App. at A44 ¶ 41.

Reviewing DOC's amended privilege log, the court found that only five documents "identify a member of the execution team," and concluded that many of the withheld documents are in the public domain. DOC's App. at A42-A43 ¶¶ 28-32. More troubling still, the court found that "DOC omitted from its Privilege Log categories of documents that were responsive to Plaintiffs' requests," DOC's

App. at A43 ¶ 36. Accordingly, the circuit court ordered DOC to produce (1) twenty-nine of the documents on its privilege log, redacting only M5's identity; and (2)

> all records responsive to Plaintiffs' requests, including records identifying the source of lethal chemicals in Defendant's possession, the results of quality tests on such chemicals, the qualifications of those involved in procurement, testing or administration of lethal chemicals, the qualifications of those involved in procurement, testing or administration of lethal chemicals, and policy statements, regulations, or memoranda reflecting the assessment or approval of drugs for use in executions.[14]

DOC's App. at A45.

[14] The court stayed its order requiring DOC to make available the records responsive to Respondents' requests that were identified in DOC's privilege log, but ordered that "[t]his stay does not apply to the production of records which are responsive to the Plaintiff's requests and are not listed on Defendant's privilege logs." DOC's App. at A45. Despite the clear mandate of this order, to date, DOC has made none of these records available.

The court further awarded Respondents attorneys' fees, finding that DOC knowingly and purposefully violated the Sunshine Law. DOC's App. at A45. Specifically, the court concluded that DOC "knowingly violated the Sunshine Law by failing to comply with statutory time limits, withholding whole categories of requested documents without justification, refusing to provide redacted records, and citing irrelevant exceptions to the Sunshine Law to justify withholding responsive documents." DOC's App. at A43. The court further concluded that DOC "knowingly violated the Sunshine Law by refusing to disclose records that would reveal the suppliers of lethal injection drugs, because its refusal was based on an interpretation of Missouri Revised Statutes section 546.720 that was clearly contrary to law . . . [and that] DOC purposely refused to disclose responsive documents that were publicly available." DOC's App. at A43 ¶¶ 34-35. Thus, the court awarded Respondents costs and reasonable attorneys' fees of $73,335.41. DOC's App. at A44-A45 ¶ 45.

F. DOC Appeals The Circuit Court's Decision

On July 21, 2016, DOC appealed the circuit court's decision in this case and in two related cases, *Reporters Committee, v. DOC*, Case No. 14AC-CC00254 (Circuit Court, Cole County) and *Bray v. Lombardi*, Case No. 14AC-CC00044 (Circuit Court, Cole County). LF at 435-37. On July 26, this Court granted DOC's motion to consolidate the three cases on appeal. DOC's App. at 15.

To date, DOC has produced no records responsive to Respondents' requests, other than the publically available portion of its execution protocol.

ARGUMENT

This Court should uphold the circuit court's careful findings and well-reasoned decision. Contrary to DOC's revised interpretation, the plain language of § 546.720.2 does not permit DOC to withhold records identifying M6 and M7. Rather, that statute expressly permits DOC to withhold only those documents identifying the individuals who actually carry out executions on behalf of the state. Nor did the circuit court err in finding that DOC knowingly and purposefully violated the Sunshine Law by withholding entire categories of requested documents without so much as identifying them, let alone citing any exemption in support of their withholding; refusing to produce redacted records; failing to comply with the Missouri Sunshine Law's statutory time limits; and citing irrelevant exceptions to the Sunshine Law.

I. MISSOURI REVISED STATUTES § 546.720(2) DOES NOT SHIELD FROM PUBLIC DISCLOSURE RECORDS IDENTIFYING SUPPLIERS OF LETHAL INJECTION DRUGS BECAUSE IT ONLY SHIELDS THE IDENTITY OF THOSE PERSONS WHO "ADMINISTER" LETHAL INJECTION DRUGS, OR WHO PROVIDE "DIRECT SUPPORT" FOR THE ADMINISTRATION OF SUCH DRUGS, AND DRUG SUPPLIERS DO NEITHER (Responding to Point Relied On I)

Standard of Review

The judgment of the trial court must be affirmed on appeal unless "it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law." *Nat'l Council of Teachers Quality, Inc. v. Curators of the Univ. of Mo.*, 446 S.W.3d 723, 725 (Mo. App. W.D. 2014). This Court reviews questions of law, including a circuit court's interpretation and application of a statute, *de novo*. *McKinney v. State Farm Mut. Ins.*, 123 S.W.3d 242, 245 (Mo. App. W.D. 2003).

Analysis

The circuit court correctly held that the Missouri Sunshine Law requires DOC to disclose records identifying the suppliers of its lethal injection drugs. The Sunshine Law requires that "all public records of public governmental bodies . . . be open to the public," unless the record is closed under one of the law's narrow exemptions. Mo. Rev. Stat. § 610.011(1) (requiring "exceptions [to be] strictly construed"). As the circuit court correctly concluded, the records identifying Missouri's lethal drug suppliers fall within none of those exemptions, and DOC must accordingly produce those records.

DOC argues that Mo. Rev. Stat. § 610.021(14) allows the closure of "[r]ecords which are protected from disclosure by law," and invokes § 546.720(2) as prohibiting the disclosure of records identifying M6 and M7. But as the circuit court correctly held, "Missouri Revised Statutes section 546.720 does *not* create a Sunshine Law exemption for records that identity or that might identify the entities

that supply the execution drugs." DOC's App. at A44. DOC's claim to the contrary contravenes the plain text, history, and purpose of § 546.720's "execution team" provision, as well as DOC's own contemporaneous interpretation. This Court owes no deference to DOC's revised reading, given the clarity of § 546.720(2).

A. The Text of § 546.720(2) Is Clear.

This Court need look no further than the text of § 546.720(2) to reject DOC's contention that it may withhold records identifying its lethal drug suppliers thereunder. "The seminal rule of statutory construction is to ascertain the intent of the legislature from the language used and to consider the words used in their plain and ordinary meaning." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 665 (Mo. banc 2010). And "[w]here a statute's language is clear, courts must give effect to its plain meaning and refrain from applying rules of construction unless there is some ambiguity." *Ross v. Dir. of Revenue*, 311 S.W.3d 732, 735 (Mo. banc 2010).

Relevantly, the black hood law provides as follows:

> 2. 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.

Mo. Rev. Stat. § 546.720(2) (emphases added). As DOC now concedes, the Missouri legislature explicitly limited the composition of the "execution team" to two specific groups of individuals: (1) those who actually administer lethal gas or drugs; and (2) those who provide "direct support for the administration" of lethal gas or drugs. *See* Appellants' Br. at 21. There is no dispute that M6 and M7 do not actually administer lethal injections—indeed, they are not even present at executions. *See* DOC's App. at A24 ¶ 7. Nor, for the reasons below, do M6 and M7 provide direct support for the administration of lethal injections within the plain meaning of the statute.

1. The plain meaning of § 546.720(2) only protects the identities of those who directly assist in the injection of lethal drugs.

Construing "direct support for the administration of . . . lethal chemicals" according to that its plain and ordinary meaning, it covers only those individuals who assist in the actual process of injecting the lethal drugs in individual executions without intervening agency. When construing the text of a statute, "[t]he plain meaning is found in the dictionary." *Delta Air Lines, Inc. v. Dir. of Revenue*, 908 S.W.2d 353, 356 (Mo. banc 1995) (citing *Asbury v. Lombardi*, 846

S.W.2d 196 (Mo. banc 1993)). According to the Merriam-Webster Dictionary, "direct" ordinarily means "marked by absence of an intervening agency, instrumentality, or influence;" "characterized by close logical, causal, or consequential relationship;" "stemming immediately from a source;" or "proceeding from one point to another in time or space without deviation or interruption." *Direct*, Merriam-Webster, http://www.merriam-webster.com/dictionary/direct (last visited Oct. 19, 2016). "Support" means "to give help or assistance to." *Support*, Merriam-Webster, http://www.merriam-webster.com/dictionary/support (last visited Oct. 19, 2016). "Administer," in turn, means "to manage or supervise the execution, use, or conduct of." *Administer*, Merriam-Webster, http://www.merriam-webster.com/dictionary/administer (last visited Oct. 19, 2016). Consequently, to provide direct support for the administration of chemicals, a person must closely assist the injection of lethal chemicals without intervening agency, instrumentality, or influence.

As the circuit court correctly held, that means the individual must either be physically present in the facility and participating in executions, or otherwise directly involved in individual executions. *See* DOC's App. at A29-A30, A44. Missouri law requires that a judgment of death must be executed "within the walls of a correctional facility of the department of corrections." Mo. Rev. Stat. § 546.720(1). And DOC's execution protocol describes the "Administration of Chemicals" as follows: "Upon order of the department director, the chemicals shall be injected into the prisoner by the execution team members under the

observation of medical personnel." DOC's App. at A64. Accordingly, to closely assist the injection of lethal chemicals without intervening agency, instrumentality, or influence, an individual must be present at the execution or otherwise directly involved in individual executions.

Helpfully, the Missouri legislature provided an example of individuals that directly support lethal injections: the medical personnel who are present at executions, who do administer drugs to the inmates, and who support that administration by inserting intravenous lines or applying restraints. Mo. Rev. Stat. § 546.720(2); LF at 249 ¶¶ 6-7.

In stark contrast, the manufacturers and pharmacies that supply lethal injection drugs are not present at executions, do not administer drugs to inmates, and do not support that administration by inserting intravenous lines or applying restraints, as DOC has stipulated. *See* LF at 249 ¶ 8. The circuit court correctly noted that pharmaceutical manufacturers and suppliers of lethal injection drugs "do not participate in any of 'the procedural directives outlined in the [execution] protocol," DOC's App. at A30-31, any more than do the witnesses to the execution. Indeed, as the circuit court found, a drug supplier's role can end years before an execution is carried out. *See supra* at p. 17. The circuit court was plainly correct in holding that drug suppliers do not directly support the administration of lethal chemicals within the plain meaning of § 546.720(2).

2. Other courts confirm this plain reading of § 546.720(2).

Other courts have recognized that § 546.720(2) plainly applies its protection only to those who directly assist in the injection of lethal drugs. In *Middleton v. Missouri Department of Corrections*, 278 S.W.3d 193 (Mo. banc 2009), the Missouri Supreme Court closely scrutinized both the statutory language and DOC's previous protocols. As the circuit court recognized, the Missouri Supreme Court unambiguously found that the "execution team" consists of "DOC employees and medical personnel" involved in "preparing syringes and the proper quantities of injection chemicals" and "supervising their administration." *Middleton*, 278 S.W.3d at 195-96; *see also* DOC's App. at A30-31 ¶¶ 33-36.

Numerous federal courts have reached the same conclusion.[15] Indeed, all five federal judges who have considered DOC's October 2013 re-interpretation of the § 546.720(2) "execution team" provision have rejected it. Most recently, in *Missouri Department of Corrections v. Jordan*, Guardian's App.[16] at A1-17, Judge Stephen R. Bough of the U.S. District Court for the Western District of Missouri not only rejected DOC's expansive protocol, he explicitly endorsed the circuit court's holding below, explaining that both legislative intent and plain meaning, as

[15] The decisions of federal judges, while not binding on this Court, are "persuasive authority." *Jordan v. Greene*, 903 S.W.2d 252, 256 (Mo. App. W.D. 1995).

[16] "Guardian's App." refers to the Guardian Respondents' Appendix.

evidenced by dictionary definitions, supported the circuit court's construction of "execution team." *Id.* at A12-13.

In *Zink v. Lombardi*, Judge Nanette Laughrey of the same court agreed. *Id.* at A20-21. In holding that § 546.720(2) does not protect the identities of Missouri's pharmacists, Judge Laughrey observed that "at the time the statute was passed there was no evidence the issues in this law suit existed; the state was acquiring drugs from foreign manufacturers who did not require the protection of their identities." *Id* at A20. Judge Laughrey then compared Missouri's execution statute with the Florida execution statute, which was enacted seven years prior to § 546.720(2) and expressly includes "'any person prescribing, preparing, compounding, dispensing, or administering a lethal injection.'" *Id.* at A20-21. Judge Laughrey reasoned that

> [i]f the Missouri Legislature intended to shield the identity of persons prescribing or compounding the drugs, it could have done so like Florida, but instead, the legislature chose to narrowly define "members of the execution team" as those people who administer the drug or provide direct support in administration of the drug.

Id. at A21. Because "[t]he pharmacist, physician, and laboratory do neither of these things," Judge Laughrey held that their identity is not protected by Missouri's execution statute. *Id.*[17]

Informed by the persuasive reasoning of not only these five federal judges—the only federal judges who have directly considered DOC's argument—but also the well-founded opinion of Judge Beetem in the circuit court below, this Court should reject DOC's arguments on appeal. The ubiquitous reading of § 546.720's plain meaning across courts is that § 546.720(2) does not include drug suppliers within the scope of the execution team, meaning that § 546.720(2) provides no legal basis for DOC to withhold the requested records.

B. Legislative History Confirms the Plain Text of § 546.720(2).

The plain text of § 546.720(2) provides no protection for the identities of M6 and M7, and this Court need look no further than the text to affirm the circuit court's decision. But to the extent that this court sees fit to look behind the text,

[17] On appeal, the Eighth Circuit reversed Judge Laughrey on the narrow ground that the identities of the pharmacist, lab, and physician were not relevant to plaintiff's underlying claims. *See In re Lombardi*, 741 F.3d 888 (8th Cir. 2014). Three judges on the court, however, disagreed with the majority's narrow ruling that the discovery was not relevant and, in their dissent, reached and rejected DOC's argument that the execution statute applied. *Id.* at 901 (Bye, J. , dissenting).

the legislative history of the execution statute only confirms the propriety of the circuit court's decision. Courts can "seek to gather the intent of the legislature" by "considering the whole Act and its legislative history, and if necessary, considering also the circumstances and the usages of the time; and [courts] must seek to promote the purpose and objects of the statute, and to avoid any strained or absurd meaning." *St. Louis Sw. Ry. Co. v. Loeb*, 318 S.W.2d 246, 252 (Mo. banc 1958); *see also United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 911-12 (Mo. banc 2006). The legislative history of § 546.720(2) confirms that it was not intended to reach DOC's drug suppliers.

As detailed above, the execution statute was passed to protect the identity of others like Dr. Doerhoff, an anesthesiologist present at the executions. *See supra*, at p. 5. Proponents of the law advocated for it with the clear purpose of protecting anesthesiologists and other such medical personnel who are present in the facility and assist in the injection of lethal drugs. *See supra* at pp. 5-6 & n.6 (describing the law being passed to "protect employees who work inside of a prison, especially those involved in the execution process"). And, at the time the statute was passed and until October 2013, the identities of Missouri's lethal drug suppliers were well known to the public. *See supra* at pp. 7-8. In short, the execution team provision was intended to protect medical personnel who directly

participate in lethal injections, not pharmacists whose participation can end years in advance.[18]

DOC argues that "the legislature intended to protect the identities of those essential to the execution process" because of the "many vocal opponents" of the death penalty. Appellants' Br. at 23. Yet DOC cites no material from legislative debate, legislative amendments, or legislative history to support this assertion. There is nothing in the legislative history to suggest that this narrow exemption was intended to protect the identities of pharmacies that choose to engage in commercial business contracts with DOC and who do not participate in the actual execution. The statute does not protect the records of lethal drug suppliers, and provides no legal grounds for DOC to withhold the records sought.

C. DOC's Reading of § 546.720(2) Contravenes Its Plain Meaning.

DOC's arguments in support of its interpretation find no basis in the text of § 546.720(2). DOC offers two main points. First, it argues that chapter 546 was intended by the legislature to protect the identities of those "essential" to the execution process. *See* Appellants' Br. at 23. Second, DOC argues that §§

[18] In fact, the identity of lethal drug suppliers was well known, both when the law was passed, and for many years after, *see supra* at pp. 7-8, further demonstrating that the law was concerned with protecting those who participate in the injection of lethal drugs, not those who supply them.

546.720(3) and 546.720(4) could apply to drug suppliers, and that this somehow changes the plain meaning of § 546.720.2.[19]

DOC's first claim fails under both the plain text of the statute and the facts of this case. The "seminal rule of statutory construction is to ascertain the intent

[19] DOC also asserts that Section 546.720(2) "gives no limits to the director on what professions or types of individuals can be selected to the execution team." Appellants' Br. 21. Confusingly, DOC then immediately concedes that the legislature, in fact, did impose "limits" on the types of individuals that may be selected to the execution team. *Id.* Specifically, the legislature limited the composition of the execution team to two types of individuals: (1) those who administer the drugs, and (2) those who provide direct support for the administration of the drugs. *Id.*

DOC's "no limits" argument is entirely irrelevant. No party, including Respondents, argues that the legislature limited the execution team to specific types of professionals. If DOC employed a pharmacist to insert intravenous lines during executions, there could be no dispute that that pharmacist provided "direct support" for lethal injection executions. Respondents' argument is not that pharmacists, in general, may not be members of DOC's execution team because they are pharmacists; Respondents' argument is that M6 and M7 are not members of DOC's execution team because M6 and M7 do not provide direct support for the administration of lethal chemicals within the plain meaning of § 546.720(2).

of the legislature *from the language used*." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d at 665 (emphasis added). The statute's language does not say that it protects the identity of those "essential" to the more general "execution" process– it states that it protects the identity of those who provide *direct support* for the *administration* of lethal injection drugs. Mo. Rev. Stat. § 546.720(2). DOC attempts to replace the words "direct support" in the statute with the word "necessary," claiming that *any* service within the chain of events leading up to the execution constitutes "direct support for the administration" of lethal injection drugs. This argument would expand the statute far beyond its plain meaning, allowing the Director to declare any number of other vendors as members of the execution team.

But DOC's argument fails even on its own terms—DOC's claim that the drug suppliers are "essential" to carrying out executions is contradicted by the record in this case. The Missouri Attorney General has stated, and the circuit court made a factual finding below, that DOC may establish its own laboratory to produce chemicals for use in lethal injection executions as an alternative to keeping the identity of the providers secret. *See* LF at 292 ¶ 3, DOC's App. at A28 ¶ 22. Since the state could manufacture its own supply of lethal injection drugs, M6 and M7 are not "essential" to carrying out executions, even if that were the standard under § 546.720(2).

DOC's second argument is that §§ 546.720(3) and 546.720(4) reveal the legislature's intent to protect the identities of lethal drug suppliers. Subsection

546.720(3) grants members of the execution team a civil remedy against anyone who discloses their identity. Subsection 546.720(4) shields members of the execution team from any professional sanctions for participating in executions. Reasoning backwards, DOC contends that because M6 and M7 will only provide lethal injection drugs to DOC if they benefit from the protections afforded by §§ 546.720(3) and 546.720(4), they must be members of the execution team. Appellants' Br. at 24-25.

Again, DOC's reasoning falls short as a matter of law and on the facts. Legally, the fact that M6 and M7 will only provide DOC with drugs if granted the protections afforded execution team members does not therefore make them members of the execution team. DOC's proposition to the contrary is an example of the formal logical fallacy known as "affirming the consequent," or "fallacy of the converse."[20] Indeed, accepting DOC's contention would read the statute's narrow shield provision far too broadly, encompassing any individual who

[20] "The fallacy is often expressed as 'If p, then q; q; therefore p.' The statement is not true because there may be things other than p that also occur with q." *City of Green Ridge v. Kreisel*, 25 S.W.3d 559, 563 n.2 (Mo. App. W.D. 2000). In *Kreisel*, this Court provided the following example of the logical fallacy: "If Bacon wrote *Hamlet,* then Bacon was a great writer. Bacon was a great writer. Therefore Bacon wrote *Hamlet.*" *Id.*

demands anonymity as a condition of doing business with the state that has even the most attenuated relation to DOC's executions.

Moreover, like DOC's first argument, DOC's second argument fails on its own terms. Even if § 546.720(2) did reach every individual whose services are necessary for DOC to conduct executions but who would only participate if granted the benefits of §§ 546.720(3) and 546.720(4), it would not reach M6 and M7. M6 and M7 are, on the factual record in this case, not necessary for DOC to carry out its executions. *See supra* at pp. 13-14 n.11.

In sum, the plain text of § 546.720(2) provides no privilege to records concerning the suppliers of lethal injection drugs, and provides no legitimate basis for DOC to withhold the records sought in this case.

D. No Deference Is Due to DOC's Unilateral and Unjustified Reinterpretation of § 546.720(2).

Contrary to DOC's argument, neither this Court nor the circuit court owe DOC's revised interpretation of § 546.720(2) any deference. "Courts do not look to agency interpretations when a statute is unambiguous." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 669 n.9 (Mo. banc 2010). Courts only need defer to agency interpretations "[w]hen there is ambiguity as to the meaning of a statute." *In re Union Elec. Co.*, 422 S.W.3d 358, 366 (Mo. App. W.D. 2013). And, notably, "[t]he plain and unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is

different from that expressed in a statute's clear and unambiguous language." *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). As explained above, the plain language of § 546.720 makes clear that it does not render the identities of M6 and M7 confidential. *See supra* at pp. 21-28, 30-33; Mo. Rev. Stat. § 546.720(2). Accordingly, this Court owes DOC's construction of § 546.720(2) no deference.

But even if this Court were to conclude that § 546.720(2) is ambiguous, it should not defer to DOC's proffered interpretation. No amount of deference can overcome a fundamental inconsistency between an agency interpretation and the plainly intended meaning of the statute. *See Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys.*, 912 S.W.2d 574, 576 (Mo. App. W.D. 1995). Only reasonable interpretations that do not exceed an agency's statutory authority merit deference. *Id.* Moreover, it is inappropriate for courts "to defer to an agency's interpretation of a statute that expands, narrows, or is inconsistent with the plain and ordinary meaning of the words of the statute." *Fugate v. Jackson Hewitt, Inc.*, 347 S.W.3d 81, 87 (Mo. App. W.D. 2011). And in any event, an agency's statutory interpretation is not binding on the judiciary. *State ex rel. Competitive Telecomms. v. Mo. Pub. Serv. Comm'n*, 886 S.W.2d 34, 39 (Mo. App. W.D. 1994); *see State ex rel. Mo. Energy Dev. Ass'n v. Pub. Serv. Comm'n*, 386 S.W.3d 165, 170 (Mo. App. W.D. 2012).

Here, DOC's gloss on § 546.720(2) clearly contravenes that statute's text. DOC argues that § 546.720(2) places "no limits" on its authority to define the

makeup of the execution team, Appellants' Br. at 21, but this argument contravenes the plain text of the first sentence of § 546.720(2). *See supra* at p. 22.

Moreover, DOC's contemporaneous interpretation of § 546.720(2) at the time it was passed undermines its new gloss on the statute. As Judge Beetem observed, DOC's "current interpretation of the statute is rendered even more questionable by its novelty." DOC's App. at A8-9. When a statute is ambiguous, "consideration may be accorded to the contemporaneous and practical construction placed on laws over long periods by those charged with their construction and administration." *Lemasters v. Willman*, 281 S.W.2d 580, 588 (Mo. App. St. Louis 1955). Here, as the circuit court observed, before 2013 "DOC never defined the execution team to include pharmacists, pharmacies, or any other persons not present and providing direct support during an execution." DOC's App. at A31 ¶ 38. DOC's consistent definition of the "execution team" for years after § 546.720(2) was passed is entitled to greater weight than DOC's unilateral October 18, 2013 re-interpretation, which was prompted by no legislative action and contravenes plan statutory text. *Id.* ¶¶ 39-40.

II. DOC HAS WAIVED ANY ARGUMENT THAT IT MAY WITHHOLD DOCUMENTS THAT DO NOT IDENTIFY M6 AND M7

While challenging that portion of the circuit court's judgment requiring it to produce documents identifying M6 and M7, DOC fails to challenge that portion of

the circuit court's judgment requiring it to produce other responsive documents which do not identify M6 and M7. To preserve an argument on appeal, a party must raise it before the circuit court and argue the issue on appeal. *Mayes v. St. Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 267 (Mo. banc 2014). The circuit court found that DOC possesses records that are responsive to Respondents' request but do not identify M6, M7, or any member of DOC's execution team, including records reflecting the qualifications of the nurse and anesthesiologist present at the execution, and records reflecting policy statements, regulation, or memoranda regarding the use of lethal injection drugs. *See* DOC's App. at A27 ¶¶ 18-20, A41 ¶¶ 23-24. DOC does not contest the circuit court's holding that it must produce those records, and has therefore waived that argument and must produce those records.

III. THE CIRCUIT COURT CORRECTLY AWARDED ATTORNEY'S FEES TO RESPONDENTS BECAUSE THE RECORD SHOWS THAT DOC ACTED BOTH KNOWINGLY AND PURPOSEFULLY BY WITHHOLDING DOCUMENTS NOT SUBJECT TO ANY CLAIMED EXEMPTION, FAILING TO PROVIDE REDACTED RECORDS, VIOLATING THE SUNSHINE LAW'S THREE-DAY REQUIREMENT, FAILING TO PROVIDE RECORDS ALREADY PRODUCED PUBLICLY TO OTHERS, RELYING ON FRIVOLOUS EXEMPTIONS, AND IMPROPERLY WITHHOLDING RECORDS

IDENTIFYING LETHAL DRUG SUPPLIERS (Responding to Points Relied On II, III and IV)

Standard of Review

A circuit court's decision to grant attorney's fees involves a mixed finding of law and fact. The meaning of the terms "purposeful" and "knowing" under sections 610.027(3) and 610.027(4) is an issue of statutory interpretation that presents a question of law for this Court. *See Laut v. City of Arnold*, 491 S.W.3d 191, 196 (Mo. banc 2016). Such considerations are reviewed *de novo*. *See McKinney v. State Farm Mut. Ins.*, 123 S.W.3d 242, 245 (Mo. App. W.D. 2003). Conversely, "[w]hether the conduct of the [government entity] brings it within the scope of the statutory definitions of knowing or purposeful conduct is a question of fact." *Laut*, 491 S.W.3d at 196. As such, the trial court's judgment should be affirmed "unless there is no substantial evidence to support it [or] it is against the weight of the evidence." *Pasternak v. Pasternak*, 467 S.W.3d 264, 268 (Mo. banc 2015); *see Laut*, 491 S.W.3d at 197.[21]

[21] A trial court's judgment is not supported by substantial evidence when "there is no evidence in the record tending to prove a fact that is necessary to sustain the circuit court's judgment as a matter of law." *Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. banc 2014). A judgment is against the weight of the evidence "only if the circuit court could not have reasonably found, from the record at trial, the existence of a fact that is necessary to sustain the judgment." *Id.* at 206.

Analysis

The Sunshine Law provides for attorney's fees where a government agency is found to have knowingly or purposefully violated its provisions. Mo. Rev. Stat. § 610.027. A public entity acts knowingly when it has actual knowledge of its conduct violating the Sunshine Law. *See Laut*, 491 S.W.3d at 200. A court may infer actual knowledge of a Sunshine Law violation from the party's conduct and the circumstances surrounding its failure to comply with the Sunshine Law. *See Chasnoff v. Mokwa*, 466 S.W.3d 571, 584 (Mo. App. E.D. 2015). A public entity acts purposefully to violate the Sunshine Law when it does so with "conscious design, intent, or plan to violate the law and . . . with awareness of the probable consequences." *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. banc 1998) (internal quotation marks omitted).

A. DOC Knowingly and Purposefully Violated Numerous Provisions of the Sunshine Law, Apart from the Execution Team Exemption.

The circuit court concluded that "DOC knowingly violated the Sunshine Law by failing to comply with statutory time limits, withholding whole categories of requested documents without justification, refusing to provide redacted records, and citing irrelevant exceptions to the Sunshine Law to justify withholding responsive documents." DOC's App. at A43 ¶ 33; *see* DOC's App. at A32-A34 ¶¶ 43-52, A35 ¶¶ 55-57. Of these conclusions, DOC only contests the circuit court's

conclusion that it asserted "frivolous" or "irrelevant" exceptions to the Sunshine Law. *See* Appellants' Br. at 30. Yet each of the grounds established by the circuit court still stands as evidence of a knowing or purposeful violation of the Sunshine Law that merits an award of attorney's fees.

DOC withheld documents not subject to any of its claimed exemptions. As the circuit court found, "DOC has produced no responsive documents during this litigation other than the publicly available portion of the execution protocol." DOC's App. at A40 ¶ 16; *see* DOC's App. at A27 ¶ 18. This includes "records identifying the chemical composition, concentration, quantity, expiration date, or source of the execution drugs," as well as "records identifying the results of quality tests," "the qualifications of DOC contractors or employees involved in the administration of any execution drugs," and "policy statements, regulations, or memoranda concerning execution drugs." DOC's App. at A27 ¶ 18. When asked to explain its decision to withhold certain documents, DOC claimed that the documents could conceivably be used to identify members of the execution team, but was unable to explain how the documents would do so or why a redacted form of the document would not be enough. *See* Tr. at 101-05.

Moreover, in DOC's Privilege Log, DOC did not even include responsive documents relevant to some of Respondents' requests, let alone an explanation for why these documents would be exempted from production under the Sunshine Law. DOC's App. at A41 ¶¶ 23-24. As the circuit court found, neither DOC nor

Respondents ever suggested that all requested records were exempted under the statutory provisions cited. *See* DOC's App. at A27 ¶ 20.

Yet, over the course of this litigation and even now, DOC has patently failed to identify and disclose records its possesses which are responsive to Respondents' requests, without offering any sufficient statutory exception that could justify this refusal. This Court has previously found that "[a] public official's intentionally forestalling production of public records until the requester sues would be a purposeful violation" of a statutory requirement. *Buckner v. Burnett*, 908 S.W.2d 908, 911 (Mo. App. W.D. 1995). As the circuit court correctly held, this failure constitutes a *purposeful* violation of the Sunshine Law, as well as a knowing violation. *See* DOC's App. at A44-A45 ¶ 45.

DOC failed to provide redacted records. Section 610.024 of the Sunshine Law provides that when "a public record contains material which is not exempt from disclosure as well as material which is exempt from disclosure, the public governmental body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." Mo. Rev. Stat. § 610.024(1); *see also Tuft v. City of St. Louis*, 936 S.W.2d 113, 119 (Mo. App. E.D. 1996); *State ex rel. Mo. Local Gov't Ret. Sys. v. Bill*, 935 S.W.2d 659, 664 (Mo. App. W.D. 1996). The same section of the Sunshine Law provides that the public governmental body shall "facilitate" this separation to the extent practicable. Mo. Rev. Stat. § 610.024(2).

As the circuit court found, DOC has made *no* attempt to redact the requested documents to satisfy its obligations under section 610.024. *See* DOC's App. at A33 ¶ 48. In the fact-finding hearing, DOC claimed that even redacted documents could be used to identify members of the execution team, but acknowledged that no effort had been made to determine whether the documents would be identifying even in their redacted form. *See* Tr. at 93-94.

DOC violated the Sunshine Law's unambiguous statutory deadlines. The Sunshine Law requires that each public records request "shall be acted upon as soon as possible, but in no event later than the end of the third business day following the date the request is received." Mo. Rev. Stat. § 610.023(3). It further provides that grounds for denial of a request should be furnished no later than the end of the third business day after the request. *Id.* at § 610.023(4). As the circuit court noted multiple times, "DOC did not disclose records or explain its non-disclosures within three days of Plaintiffs' requests." DOC's App. at A40 ¶ 15; *see* DOC's App. at A35 ¶¶ 55, 57. This alone provided sufficient evidence for the circuit court to find that DOC knowingly violated the Sunshine Law.

DOC failed to provide records already in the public record. The circuit court correctly found that DOC purposefully "withheld from Plaintiffs . . . several responsive documents that it had already made public in redacted form," demonstrating that "the Missouri Department of Corrections purposely violated the Sunshine Law." DOC's App. at A42 ¶ 30, A43 ¶ 37. DOC claims that there is no "public domain rule" that opens privileged government records, Appellants' Br.

at 39-39, but DOC misreads the circuit court's ruling. The circuit court did not determine that withholding a document that is already available in the public domain itself constitutes a violation of the Sunshine Law. Instead, the circuit court referenced DOC's prior disclosure to highlight (1) DOC's knowing failure to even identify some records responsive to Respondents' requests; and (2) DOC's knowledge that it could disclose the relevant records in redacted form, that it did so in prior litigation, and that it purposefully refused to do so now. DOC's App. at A42 ¶¶ 29-31, A43 ¶¶ 35-37.

DOC's purposeful refusal to produce responsive documents that it already produced publicly demonstrates a purposeful violation of the Sunshine Law. DOC's comparison to social security numbers is inappropriate because it was not some third party "hacker" who produced these documents in the public domain—it was the DOC itself that willingly produced several of these documents to the public. DOC's App. at A42 ¶¶ 29-30. Nor has DOC taken steps to remedy its prior productions. Since DOC produced these redacted documents in federal litigation, Fed. R. Civ. P. 5.2(d) permits a court to place filings under seal, but DOC made no effort to seal its filings despite its claim that the public disclosure of those records would allegedly violate § 546.720(2). DOC's decision not to seal such documents after their disclosure indicates DOC's full awareness that these forms could legitimately be disclosed in redacted form. Its refusal to disclose those same forms now reflects their knowing and purposeful violation of the Sunshine Law.

DOC cited irrelevant or frivolous exemptions to justify its refusal to withhold the requested records. Section 610.023(4) of the Sunshine Law requires a custodian of records to "cite the specific provision of law under which access is denied." Mo. Rev. Stat. § 610.023(4). DOC originally offered a panoply of exemptions to justify its withholdings in this case. These included claims that the requested documents were litigation records exempt under section 610.021(1), and that the identities of drug suppliers were exempt as "state secrets." *See* LF at 289, ¶ 44; DOC's App. at A34 ¶ 52. DOC also argued that compelled disclosure would violate the separation of powers. DOC's App. at A34 ¶ 52. The trial court promptly rejected all of these clearly unsupportable positions, and DOC did not attempt to continue to raise most of them over the course of the litigation. *See* DOC's App. at A34 ¶¶ 51-52. Accordingly, the circuit court was fully justified in finding that the invocation of these "irrelevant" exemptions constituted knowing violation of the Sunshine Law. *See* DOC's App. at A43 ¶ 33.

DOC's current attempt to defend its invocation of section 217.075 of the Sunshine Law, on the grounds that the records are offender records relating to institutional security, is unavailing. Most blatantly, DOC attempts to justify the invocation of this exemption while failing to provide a justification for any of the other irrelevant exemptions it put forth before the trial court. *See* Appellants' Br. at 32-33. DOC further fails to explain why this exemption justified the withholding of any records beyond those which would identify execution team members, even under DOC's flawed definition of the execution team. *See id.*

Even regarding the specific question of whether the invocation of section 217.075 constituted an irrelevant or frivolous exemption to the Sunshine Law, DOC has failed to adequately contest the trial court's reasoning. The trial court found that the requested records could not even potentially fall under the ambit of section 217.075 because "[t]he records requested by Plaintiffs are not offender records." DOC's App. at A32 ¶ 44.

Nor, contrary to DOC's briefing, would penalizing DOC for invoking frivolous exemptions in this case set a precedent of penalizing an agency for merely asserting, in good faith, an inapplicable exemption in response to a Sunshine Law request. Here, DOC's original decision to provide a host of irrelevant exemptions, in combination with the numerous other knowing violations of the Sunshine Law detailed above, constituted more than a good faith "mistake." *See* Appellants' Br. at 33. Instead, it evidences a deliberate refusal to recognize the Sunshine Law's statutory mandate that exceptions must be "strictly construed" to promote the public policy of open government. *See* Mo. Rev. Stat. § 610.011.

Indeed, even on appeal, DOC has utterly failed to engage with many of the violations of the Sunshine Law, including regarding how they relate to the question of attorney fees. DOC's halfhearted attempt to show that *one* of the several exemptions it cited was not frivolous ignores the fact that a court may reasonably infer purposeful violation from an agency's actions, including its intent to forestall disclosure of records. DOC has offered no reason to reject the trial court's findings that DOC either purposefully violated the Sunshine Law or

knowingly violated the Sunshine Law, especially since "[w]hen the evidence supports two reasonable but different inferences, [appellate courts are] obligated to defer to the circuit court's assessment of the evidence." *Blanchette v. Blanchette*, 476 S.W.3d 273, 278 n.1 (Mo. banc 2015).

B. DOC Also Knowingly Violated Sunshine Law Requirements by Withholding Records Under the Missouri Execution Statute.

Contrary to DOC's assertion that it did not have actual knowledge that section 546.720 did not apply to the requested records, there was ample evidence to support the trial court's finding that DOC knowingly violated the Sunshine Law by withholding records under that section. DOC's App. at A43 ¶ 34. *First*, DOC's re-interpretation of "execution team" contravenes the statute's plain and ordinary meaning, particularly in light of the legislative history, purpose, and DOC's prior interpretation with respect to records identifying M6 and M7. *See supra* at pp. 21-33. The Missouri Supreme Court had previously reinforced this conclusion long before DOC claimed exemptions under section 546.720 in the present case. *See supra* at p. 25 (discussing *Middleton*). The circuit court therefore had ample evidence that DOC was fully aware that its novel interpretation of the execution team fell outside the boundaries of statutory permission. *Second*, DOC invoked § 546.720 far too broadly to withhold all responsive records, including those that never reference M6 or M7 and those that do, but could be redacted.

Because the circuit court's decision was consistent with and amply supported by the evidence, and because awarding attorney's fees to Respondents

would reflect the seriousness of violations like the ones DOC committed, this Court should affirm the circuit court's decision to award fees.

CONCLUSION

For the reasons included herein, Plaintiffs-Respondents respectfully request that this Court affirm the circuit court's judgment.

Respectfully submitted,

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* This brief was prepared by the Media Freedom and Information Access Clinic, a program of the Abrams Institute for Freedom of Expression at Yale Law School. Nothing in this memorandum should be construed to represent the official views of the law school.

CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief includes the information required by Rule 55.03;

2. This brief complies with the limitations contained in Rule 84.06(b) and Local Rule XLI(A); and

3. According to the word count function of counsel's word processing software (Microsoft Word) and excluding those portions of the brief as permitted by Rule 84.06(b) and Local Rule XLI(D), this brief contains 10,736 words.

s/ Bernard J. Rhodes
Attorney for Respondents

CERTIFICATE OF SERVICE

This is to certify that, on this 21st day of October, 2016, this Brief of Respondents was electronically filed and served by use of the Case.net filing system on the below named counsel:

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APPENDIX TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

MISSOURI DEPARTMENT OF CORRECTIONS, Movant, v. RICHARD JORDAN and RICKY CHASE, Respondents.	)	Case No. 16-MC-09005-SRB Related: 3:15-CV-00295 (S.D. Miss.)

ORDER

Before the Court is Motion to Quash Third-Party Subpoena (Doc. #1) filed by Movant/subpoena-recipient Missouri Department of Corrections. Based upon consideration of the parties' written filings and the arguments made at the in-person hearing on July 1, 2016, and for the reasons stated more fully below, the motion is DENIED.

I. Background

Respondents Jordan and Chase are Mississippi death-row inmates who Mississippi proposes to execute by the serial intravenous injection of three drugs: midazolam, vecuronium bromide (a chemical paralytic agent), and potassium chloride. In a case presently pending in Mississippi federal court, Respondents are challenging their proposed executions as cruel and unusual punishment under the Eighth Amendment. In their Mississippi federal case, Respondents survived a motion to dismiss and are now actively engaged in discovery and moving toward trial.

Movant admits that it has employed a single-drug protocol using pentobarbital in its most recent executions. In an effort to satisfy their evidentiary burden to plead and prove the

existence of "a known and available alternative method of execution," *Glossip v. Gross*, 135 S.Ct. 2726, 2738 (2015), Respondents served on Movant a subpoena for documents and a Federal Rule of Civil Procedure 30(b)(6) deposition focused on: "(1) the availability of pentobarbital; (2) the factors considered in determining to abandon the three-drug protocol; and (3) the feasibility of the single-drug protocol as an alternative method of execution." (Doc. #16, p. 5).

Movant agreed to produce only a public copy of Missouri's execution protocol and asks the Court to quash the subpoena in its entirety. Movant raises three primary arguments in favor of quashing the subpoena: 1) sovereign immunity prevents enforcement of the subpoena; 2) enforcement of the subpoena would pose an undue burden on the State of Missouri; and 3) the subpoena requests information that is privileged pursuant to Missouri statute, the common law state secrets privilege, and the common law deliberative process privilege. None of Movant's arguments require quashing the subpoena.

II. Legal Standard

Federal Rule of Civil Procedure 45 governs subpoenas. Movant does not challenge Respondents' method of serving the subpoena or the timeframe for responding. Rather, Movant challenges the propriety of Respondents' requests. In relevant part Rule 45(d)(3) provides "the Court for the district where compliance is required must quash or modify a subpoena that: . . . (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden."

III. Discussion

During the July 1 hearing, the Court and Respondents' counsel discussed in detail modifications to Respondents' document requests, particularly a narrowing of the requests. As a

result of this discussion, Respondents' counsel distilled the subpoena requests to five categories of documents:

1. Documents that identify the supplier(s) of all pentobarbital (either Nembutal or pentobarbital compounded from API) purchased for use in executions in Missouri;

2. Documents that identify whether each amount of pentobarbital purchased for use in executions in Missouri was a manufactured or compounded drug;

3. Documents that identify the process by which any supplier or other entity determined the purity and/or integrity of each amount of pentobarbital purchased for use in executions in Missouri;

4. Documents that identify the proper administration of each amount of pentobarbital purchased for use in executions in Missouri, whether from the supplier(s) or any other entity; and

5. Documents regarding why the decision was made to change to a single lethal dose of barbiturate rather than a three-drug series including the use of a paralytic agent and potassium chloride, and/or regarding the process by which such decision was made.

(Tr. July 1, 2016, Hearing pp. 42, 46).

Though the discussion between Respondents' counsel and the Court focused on document requests, the same narrowing applies to the Rule 30(b)(6) deposition notice included with the subpoena. Neither party argued that a different analysis applies to the document requests versus the Rule 30(b)(6) deposition notice. Therefore, the Court will consider Movant's arguments in favor of quashing the subpoena in the context of the preceding five categories of

information requests – *i.e.* the document requests as listed as well as requests for Rule 30(b)(6) testimony on the same topics – to which Respondents agreed.[1]

A. Sovereign Immunity

Movant argues it is protected by sovereign immunity because Respondents' information requests threaten Missouri's autonomy by interfering with Missouri's ability to conduct lawful executions. (Doc. #3, p. 9). After recognizing that "no court has considered a sovereign immunity defense from a subpoena that seeks confidential information and documents about lethal chemicals used in executions[,]" Movant directs the Court to *Alltel Commc'ns, LLC. v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012), and *In re Missouri Dep't. of Natural Resources*, 105 F.3d 434 (8th Cir. 1997) (*MDNR*), and asks the Court to infer from the language therein "that sovereign immunity protection is appropriate when Missouri shows "'how production of these documents infringes on the State of Missouri's autonomy.'" (Doc. #3, pp. 11, 13) (citing *MDNR*, 105 F.3d at 436). The Court declines to infer such an expansion of clear Eighth Circuit precedent.

In MDNR, the Eighth Circuit denied mandamus relief to MDNR after the district court denied MDNR's motion to quash a third-party subpoena upon finding that the Eleventh Amendment did not shield MDNR from discovery in federal court. The Eighth Circuit held, "There is simply no authority for the position that the Eleventh Amendment shields government entities from discovery in federal court." *MDNR*, 105 F.3d at 436. In *Alltel* the Eighth Circuit found that tribal immunity prevented an Indian tribe and leader from having to respond to a third-party subpoena. 675 F.3d at 1106. In so holding the Eighth Circuit recognized that if it

[1] Movant does not state any specific objection to the timeframe stated in the subpoena (2010 to present) nor to the definitions used in the subpoena. Accordingly, the Court finds both to be appropriate unless otherwise modified herein.

sided with the Tribe, "tribal immunity, a federal common law doctrine, may well confer greater immunity than that enjoyed by . . . *the States*, whose sovereign immunity is protected by the Eleventh Amendment." *Id.* at 1104 (citing *MDNR*, 105 F.3d at 436) (emphasis added). The Court simply cannot read *MDNR* and *Alltel* to hold that sovereign immunity may protect states from having to respond to third-party subpoenas.

Movant focuses primarily on the following statement in *Alltel*: "[G]iven the public policy underlying sovereign immunity summarized in the above-quoted portion of the opinion in [*Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949)], we are unwilling to predict how the Supreme Court would decide a case in which disruptive third-party subpoenas that would clearly be barred in a State's own courts are served on a state agency in private federal court civil litigation." 675 F.3d at 1104-05. Clearly, the preceding statement makes no pronouncement of law, but even if it did, the Court finds that this case does not meet the criteria contemplated in *Alltel*. The level of disruption predicted by Movant is unproven as discussed more fully in Part B below. Further, it is far from a foregone conclusion that Respondents' subpoena would be barred by a Missouri court given that a Cole County Circuit Court Judge recently ordered production of "records identifying the source of lethal chemicals in [Movant's] possession, the results of quality tests on such chemicals, the qualifications of those involved in procurement, testing or administration of lethal chemicals, and policy statements, regulations or memoranda reflecting the assessment of approval of drugs for use in executions." *Guardian News & Media, LLC, et al. v. Missouri Dep't. of Corrections*, Case No. 14AC-CC00251, at *9 (March 21, 2016). The Eleventh Amendment does not shield Movant from Respondents' information requests.

B. Undue Burden

Movant next argues that the subpoena should be quashed because it poses an undue burden on the State of Missouri. "In determining whether a subpoena poses an undue burden, the court should balance the relevance of the testimony sought and the requesting party's need for the testimony against the potential hardship to the party subject to the subpoena." *Tyler v. Rahe*, No. 08-CV-00129-DW, 2014 WL 1875257, at *1 (W.D. Mo. May 9, 2014) (citations omitted). "The burden of proving that a subpoena poses an undue burden rests with the party moving to quash and is a heavy one." *Id.* (citations omitted). "'[C]oncern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs.'" *Enviropak Corp. v. Zenfinity Cap., LLC*, No. 4:14-CV-00754-ERW, 2014 WL 4715384, at *5 (E.D. Mo. Sept. 22, 2014) (quoting *Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2*, 197 F.3d 922, 925 (8th Cir. 1999)).

1. Relevance

The Court finds Respondents' information requests are directly relevant to Respondents' Mississippi federal case. "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Fed. R. Civ. P. 26(b)(1). In *Glossip*, the Supreme Court agreed with the Eighth Circuit's decision in *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015), and held that prisoners asserting an Eighth Amendment challenge to a state's method of execution must "satisfy their burden of establishing that any risk of harm was substantial when compared to a known and available alternative method of execution." 135 S.Ct. at 2738. Accordingly, Respondents' federal complaint identifies Missouri's use of pentobarbital as a "feasible and available" alternative. (Doc. #16, p. 10) (quoting Ex. 1, pp. 34-35). Furthermore, the Mississippi Defendants served interrogatories

on Respondents requesting identification of "each duly licensed pharmacy, compounding pharmacy, or other supplier from which Defendants can legally obtain a FDA-approved form of [pentobarbital] for use in executions." (Doc. #16, p. 11) (quoting Ex. 7, p. 7). Other examples of how Respondents' information requests are relevant to the disputed issues in their federal case, i.e. the availability of pentobarbital and the feasibility of a one-drug execution protocol, are provided in Respondents' briefing. (Doc. #16, pp. 8-15).

Movant challenges the relevance of Respondents' information requests:

> If federal courts force Missouri to reveal this information to third parties, then Missouri will lose its execution team members and Missouri will lose its source of lethal chemical. In short, if the method of execution becomes known to Mississippi and Jordan and Chase, then it will not be available to them. Moreover, if the source of the lethal chemical or the identity of the execution team is revealed, then Missouri's method of execution will be neither feasible nor readily available. Thus, the information Jordan and Chase have requested cannot be relevant.

(Doc. #3, p. 33). Movant's arguments fail on this record. Initially, Movant assumes that pentobarbital suppliers are "execution team members," but this Court finds as stated more fully in Part 3 below that the Missouri Supreme Court would construe Mo. Rev. Stat. § 546.720.2 to not include suppliers as part of the "execution team" defined in the statute. Even so, there is no admissible evidence in the record before the Court to establish that if Missouri's pentobarbital supplier is revealed to Respondents, the supplier will no longer sell pentobarbital to Missouri or another state.

In support of its argument that the name of Missouri's pentobarbital supplier would not be relevant to Respondents because identification of the supplier would cause the supplier to stop supplying pentobarbital, Movant relies on Director Lombardi's affidavit. Director Lombardi attests, "It has been widely reported by the news media that many manufacturers and suppliers have, under pressure from death-penalty opponents, refused to sell or manufacture lethal

chemicals for use in lawful executions. In my experience, this has been because manufacturers and suppliers fear financial, legal, and physical threats from those who oppose the death penalty." (Doc. #1-2, ¶ 4). Director Lombardi's statements are general and do not refer to Missouri's actual supplier. Director Lombardi further attests, "The only suppliers the Department found that will provide the chemicals require the assurance of confidentiality." (Doc. #1-2, ¶ 5). Director Lombardi's statement is a bare, hearsay assertion unsupported by record evidence. Director Lombardi does not refer the Court to any agreement between the Department and supplier requiring confidentiality. This hearsay statement is insufficient to establish that Missouri's supplier will no longer supply pentobarbital to Missouri if identified to Respondents. Respondents' information requests are relevant to their Mississippi federal case, and Movant's arguments to the contrary fail on this record.

2. Respondents' Need Versus Movant's Potential Hardship

Movant's counsel opened the July 1 hearing with the following statement, "Your Honor, what's at stake in this litigation is nothing less than Missouri's ability to continue to carry out capital punishment." (Tr. p. 5, lines 2-4). No record evidence establishes such a potential hardship to Missouri. For the reasons already detailed, Director Lombardi's affidavit does not establish that Missouri's supplier of pentobarbital would stop supplying the drug if its identity is revealed to Respondents. Furthermore, no record evidence establishes that Movant would be unable to locate another source of pentobarbital even if the present supplier stopped supplying the drug.

Judge Beteem, Circuit Court Judge in Cole County, Missouri, has handled several cases involving similar issues in the context of Movant's refusal to produce many of the same documents at issue here in response to Missouri Sunshine Law requests. *Guardian News*, *supra*,

p. 5; *Bray v. Lombardi, et al.*, Case No. 14AC-CC00044, at *1-2 (Cole Cty. Circuit Court March 25, 2016) (ordering production of "requested records . . . relating to pharmacies and laboratories that compound, supply and test the drugs used to carry out executions in Missouri" but staying obligation to comply until final); *Winfield v. Lombardi*, Case No. 14AC-CC00263, at *2 (Cole Cty. Circuit Court June 6, 2014) (denying motion to enforce Sunshine Law request by preliminary injunction based on finding a low likelihood of success on the merits but stating "this order is not to be construed as a finding to that effect"). On July 15, 2015, Judge Beteem issued a summary judgment order in *Guardian News* making the following fact finding, "The State of Missouri can, as proposed by [the Department's] own counsel, Attorney General Chris Koster, explore establishing its own laboratory to produce chemicals for use in lethal injection executions as an alternative to keeping the identity of the providers secret." Case No. 14AC-CC00251, at *6 (July 15, 2015) (Doc. #25-1, p. 6, ¶ 2). The Court finds Movant's purported hardship is unfounded based on record evidence.

In contrast, Respondents' need for the information is tangible, established, and immediate. Respondents allege in their federal case that Missouri's use of pentobarbital represents a "feasible and readily implemented" alternative to Mississippi's three-drug protocol. It is publicly known that Missouri has used pentobarbital in its most recent executions, but without information responsive to Respondents' information requests as narrowed herein, Respondents will be unable to carry their evidentiary burden in the Mississippi federal case.

In finding that Respondents' information requests do not pose an undue burden on Movant, the Court gives due weight to the fact that Movant is a non-party to the Mississippi federal case. Movant argues that Judge Phillips in *Ringo v. Lombardi*, Case No. 09-CV-4095-BP (Doc. #317), held that "revealing the identities has the serious potential to expose them to

threats and harassment, and will compromise Missouri's ability to carry out its lawful obligations." (Doc. #3, p. 34). Movant argues that the Court must consider this holding as evidence of the unwanted burden thrust upon Missouri as a non-party to the Mississippi suit. *Id.* While there are numerous differences between the *Ringo* case and this one, three differences are of primary importance. First, Respondents' interest weighed against any potential harm to Movant is greater in this case than in *Ringo* where Intervenor did not have evidentiary burdens it was attempting to satisfy. Second, *Ringo* concerned the identity of an anesthesiologist who is present at executions and a member of the "execution team" whereas Missouri's pentobarbital supplier is not part of the "execution team" as described in Part 3 below. Finally the evidentiary record before this Court is different than the record before Judge Phillips in *Ringo* making a direct comparison inappropriate. Movant has not carried its burden to establish that Respondents' information requests pose an undue burden on Movant.

C. Privilege

Movant argues three separate privileges shield it from providing information responsive to Respondents' information requests: 1) a privilege derived directly from Mo. Rev. Stat. § 546.720.2; 2) the federal common law state secrets privilege; and 3) the federal common law deliberative process privilege.

1. Mo. Rev. Stat. § 546.720.2

Movant asks the Court to find that section 546.720.2 creates a privilege against production in federal court. Movant argues that "[t]he Eighth Circuit has explained that federal courts undertake a two-step analysis[]" in determining whether a state statute creates a privilege in federal court. (Doc. #3, p. 17). "First, would the state courts recognize that their statute creates a privilege? Second, is the privilege meritorious in the federal court's judgment?" *Id.*

(citations omitted). The Court need not decide whether section 546.720.2 creates a privilege, however, because even if it does create a privilege, that privilege only applies to the identities of "execution team" members, and the Court finds the Missouri Supreme Court would hold that pentobarbital suppliers are not "execution team" members.

Section 546.720.2 provides:

> 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. The section of an execution protocol that directly relates to the administration of lethal gas or lethal chemicals is an open record, the remainder of any execution protocol of the department of corrections is a closed record.

(emphasis added). Movant admits it was not until October 18, 2013, that the director defined "execution team" to include "a pharmacist" and "individuals who prescribe, compound, prepare, or otherwise supply the chemicals for use in the lethal injection procedure." (Doc. #1-2, ¶ 3). Movant has no basis to argue that documents or testimony identifying Missouri's pentobarbital supplier prior to October 18, 2013, are shielded from disclosure. Setting aside that prior to October 18, 2013, the director did not include "a pharmacist" in the definition of "execution team," the Court finds the directors' October definition includes persons beyond the bounds of the statutory language because "a pharmacist" and individuals who supply chemicals for use in lethal injection procedures do not "provide direct support for the administration of lethal gas or lethal chemicals."

"In applying state law, federal courts are bound to apply the law of the state as articulated by the state's highest court." *Travelers Prop. Cas. Ins. Co. of Am. v. Nat'l Union Ins. Co. of Pittsburg, PA.*, 621 F.3d 697, 707 (8th Cir. 2010) (citation omitted). "When the state's highest court has not spoken, our job is to predict how the state's highest court would resolve the issue." *Id.* Only one court – state or federal – has decided this issue.

In *Guardian News* Judge Beteem held, "M6 and M7 [each representing two pharmacists who provided pentobarbital for use in executions] are not present during the execution. . . . M6 and M7 do not administer or provide direct support for the administration of lethal injection drugs during executions. . . . M6 and M7 are not members of the execution team." Case No. 14AC-CC00251, at *2-3 (March 21, 2016) (Doc. #16-8, pp. 2-3). The Court further found that a nurse and anesthesiologist who both participate in executions, a physician who prescribes pentobarbital for use in executions, and three non-medical individuals who are present for and participate in executions, are all members of the "execution team." *Id.* at 3. Respondents specifically disclaimed at the July 1 hearing any attempt to obtain information about the identities of any of these individuals. (Tr. p. 67, lines 18-23).

Guardian News is not binding on this Court, and as Movant points out, the March 21, 2016, order is not final. Even so, the Court, based on its independent analysis, agrees with Judge Beteem's holding and finds the Missouri Supreme Court would so hold as well. "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. 1988) (en banc) (citation omitted). "'The plain and ordinary meaning of a word is derived from the dictionary.'" *State ex re. Nixon v. QuikTri Corp.*, 133 S.W.3d 33, 37 (Mo. 2004) (en banc) (quoting *Hemeyer v.*

KRCG-TV, 6 S.W.3d 880, 881 (Mo. 1999) (en banc)). Merriam-Webster online dictionary defines "direct" when used as an adjective as "stemming immediately from a source" and "marked by absence of an intervening agency, instrumentality, or influence[.]" http://www.merriam-webster.com/dictionary/direct (last visited July 12, 2016). The same dictionary defines "administration" in the medical context as "the act of giving medication[.]" http://www.merriam-webster.com/dictionary/administration#medicalDictionary (last visited July 12, 2016).

Missouri's pentobarbital suppliers do not participate in the act of giving medication nor do they provide immediate support for the act of giving medication. Pentobarbital suppliers do not, therefore, "provide direct support for the administration" of lethal chemicals. Section 546.720.2 does not shield Movant from responding to Respondents' information requests because the requests do not seek information regarding any "execution team" member.

2. State Secrets Privilege

Director Lombardi attests, "I have personally determined that it is necessary to invoke the state's secrets privilege with respect to all responsive documents sought by the subpoena." (Doc. #1-2, ¶15). Movant argues, "The state secrets privilege is designed to protect official information from disclosure when disclosing the information would endanger the public interest." (Doc #3, p. 23) (citing *United States v. Reynolds*, 345 U.S. 1, 5-6 (1953)). Movant does not cite any Eighth Circuit cases on this issue. Even so, the Court finds that the cases cited by Movant do not compel the conclusion that the state secrets privilege applies here.

Movant argues, "Protecting the documents Jordan and Chase seek is necessary because disclosing the documents is likely to endanger execution team members and is likely to interfere with Missouri's ability to carry out the death penalty." (Doc. #3, p. 24). Movant's arguments in

favor of applying the state secrets privilege are the same arguments already made in connection with the undue burden argument and Missouri statutory privilege argument. For all the reasons previously discussed, the Court finds Respondents' information requests do not seek identification of any "execution team" members nor is there any evidence in the record before the Court to establish a threat to Missouri's ability to continue carrying out the death penalty. Movant once again refers the Court to *Ringo*, but that case is distinguishable for all the reasons previously outlined.

3. Deliberative Process Privilege

Director Lombardi attests, "Furthermore, the subpoena seeks documents that inquire into the process of selecting a lethal chemical for Missouri's current protocol. The responsive documents and testimony contain information that is completely intertwined with the Department's deliberations. As a result, after personal consideration, I am invoking the Deliberative Process Privilege with respect to request for documents 1, 4, 5, 6, 7, and 8 and deposition topics 1, 2, 3, 4, 6, 7, 8, and 9." (Doc. #1-2, ¶ 14). As modified herein the invocation of the deliberative process privilege would apply to document request number five (5) and the corresponding deposition topic.

"The purpose of the deliberative process privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny." *State of Missouri ex rel. Shorr v. United States Army Corps of Engineers*, 147 F.3d 708, 710 (8th Cir. 1998) (citation omitted). The Eastern District of Missouri in analyzing the deliberative process privilege found instructive the First Circuit's decision in *Texas Puerto Rico, Inc. v. Dept. of Consumer Affairs*, which states:

> The Supreme Court has restricted the deliberative process privilege to material that are both predecisional and deliberative. . . . In other words, to qualify

> for the privilege, a document must be (1) predecisional, that is, "antecedent to the adoption of agency policy," and (2) deliberative, that is, actually "related to the process by which policies are formulated." . . . Because the deliberative process privilege is restricted to the intra-governmental exchange of thoughts that actively contribute to the agency's decisionmaking process, factual statements or post-decisional documents explaining or justifying a decision already made are not shielded.
>
> Even if a document satisfies the criteria for protection under the deliberative process privilege, nondisclosure is not automatic. The privilege "is a qualified one," . . . Thus in determining whether to honor an assertion of privilege, a court must weigh competing interests. . . .
>
> At bottom, then, the deliberative process privilege is "a discretionary one." . . . In deciding how to exercise its discretion, an inquiring court should consider, among other things, the interests of the litigants, society's interest in the accuracy and integrity of factfinding, and the public's interest in honest, effective government. . . .

Scott v. City of St. Louis, 196 F.R.D. 551, 555 (E.D. Mo. 2000) (citing *Texas Puerto Rico, Inc. v. Dep't. of Consumer Affairs*, 60 F.3d 867, 884-885 (1st Cir. 1995) (internal citations omitted)). "Other factors to be considered in the exercise of the Court's discretion include the relevance of the evidence, the availability of other evidence, the government's role in the case, and the extent to which disclosure would hinder frank and independent discussion of the pending decision." *Id.* (citation omitted).

As narrowed herein, information request number five (5) seeks documents and deposition testimony regarding Missouri's decision to change to a pentobarbital protocol, including predecisional and deliberative information. In weighing the competing interests, the Court finds that why Missouri chose to change protocols is not as central to Respondents' case as is Missouri's source of pentobarbital, which is necessary for Respondents to carry their burden to establish a "known and available alternative." This lesser (albeit still relevant) interest in the information coupled with the potential of chilling Movant's "frank and independent discussion"

of similar issues in the future, leads the Court to conclude that the deliberative process privilege should partially apply in this case.

As previously stated, however, the privilege only covers predecisional information, not "post-decisional documents explaining or justifying a decision already made." To the extent such documents exist, they must be produced to Respondents. Accordingly, information request number five (5) as stated herein is further modified to include documents *from the date the decision was made to present* regarding why the decision was made to change to a single lethal dose of barbiturate rather than a three-drug series including the use of a paralytic agent and potassium chloride, and/or regarding the process by which such decision was made. The corresponding Rule 30(b)(6) deposition topic is similarly narrowed. Further, Movant is directed to serve on Respondents an updated privilege log listing each document withheld on the basis of the deliberative process privilege in sufficient detail to allow Respondents to evaluate the propriety of the privilege claimed.

IV. Conclusion

For the foregoing reasons, it is hereby ORDERED

1. Movant/subpoena-recipient Missouri Department of Corrections' Motion to Quash Third-Party Subpoena (Doc. #1) is DENIED.
2. Pursuant to Rule 45 and based on Respondents' agreement, Respondents' subpoena is narrowed to include the following five requests: 1) documents that identify the supplier(s) of all pentobarbital (either Nembutal or pentobarbital compounded from API) purchased for use in executions in Missouri; 2) documents that identify whether each amount of pentobarbital purchased for use in executions in Missouri was a manufactured or compounded drug; 3) documents that identify the process by which any supplier or other

entity determined the purity and/or integrity of each amount of pentobarbital purchased for use in executions in Missouri; 4) documents that identify the proper administration of each amount of pentobarbital purchased for use in executions in Missouri, whether from the supplier(s) or any other entity; and 5) documents from the date the decision was made to present regarding why the decision was made to change to a single lethal dose of barbiturate rather than a three-drug series including the use of a paralytic agent and potassium chloride, and/or regarding the process by which such decision was made.

3. Respondents' Rule 30(b)(6) deposition notice is also narrowed to include testimony regarding the five topics listed above.

4. Responsive documents and an updated privilege log should be produced within fourteen (14) days after resolution of any writ of mandamus Movant files with the Eighth Circuit so long as the writ of mandamus is filed within seven (7) business days of the date of this Order. Otherwise, responsive documents and an updated privilege log should be produced within fourteen (14) days of the date of this Order.

5. The Rule 30(b)(6) deposition should take place at a mutually agreeable time and place within fourteen (14) days after responsive documents are produced.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: July 14, 2016

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

DAVID ZINK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2:12-CV-4209-NKL
	)	
GEORGE A. LOMBARDI, et al.,	)	
	)	
Defendants.	)	

ORDER

On December 12, 2013, this Court ordered Defendants to disclose to Joseph Luby and Cheryl Pilate, counsel for Plaintiffs, the identities of the pharmacist who compounds the pentobarbital used in executions, the physician who provides a prescription for the drug, and the laboratory that tests the drug. [Doc. 203]. Defendants were ordered to produce this information by no later than December 16, 2013. [Doc. 204]. The Court also denied Defendants' Motion for a Protective Order regarding the same information. [Doc. 205]. Defendants have subsequently filed a petition for writ of prohibition or mandamus in the United States Court of Appeals for the Eighth Circuit, asking that court to prohibit this Court from enforcing the orders contained within docket entries 203, 204, and 205. Before the Court is Defendants' Motion to Stay this Court's Orders [Doc. 206] pending resolution of their current petition before the Eighth Circuit. For the reasons set forth below, Defendants' Motion to Stay is DENIED.

I. Background

On December 12, 2013, the Court held a teleconference to resolve a dispute between the Parties as to whether Defendants were required to disclose the identities of the pharmacist who compounds the pentobarbital used in executions, the physician who provides a prescription for the drug, and the laboratory that tests the drug. After careful consideration of the Parties respective arguments, the Court concluded that section 546.730 RSMo, Missouri's death penalty statute, does not prohibit disclosure of the identities of these individuals. The Court further concluded that the common law state secrets privilege does not apply. The Court ordered Defendants to reveal the identities of the compounding pharmacist, investigative laboratory, and prescribing physician to Plaintiffs by no later than December 16, 2013. Recognizing the sensitivity of the information, the Court took measures to limit disclosure of the identity of these individuals, including:

1) The Court limited disclosure to only two of Plaintiffs' numerous attorneys, Joseph Luby and Cheryl Pilate.
2) The Court required Mr. Luby and Ms. Pilate to seek leave of the Court before disclosing the information to Plaintiffs' additional attorneys.
3) The Court ordered Mr. Luby and Ms. Pilate to refrain from directly identifying to any other person the pharmacist, physician, or laboratory as individuals who are assisting the state in the execution of prisoners.
4) The Court ordered Defendants to work with Plaintiffs to maintain confidentiality when the investigation involves state organizations.
5) The Court ordered Plaintiffs to secure a written agreement with any third party from whom information is sought requiring the identity of the pharmacist, physician, or laboratory to remain confidential. Plaintiffs and Defendants were ordered to confer on the wording of the confidentiality agreement.

II. Discussion

When presented with a motion to stay an order pending appeal, the Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Standard Havens Prods., Inc. v. Gencor Industr., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990) (stay pending appeal); *U.S. S.E.C. v. Citigroup Global Mkts. Inc.*, 673 F.3d 158, 162 (2d Cir. 2012) (applying the same factors in consideration of a motion to stay district court proceedings pending resolution of a mandamus petition).

A. Likelihood of Success on the Merits

Defendants have not made a strong showing of likelihood of success on the merits. First, disclosure of the identities of these individuals is not covered by Missouri's death penalty statute. Section 546.720 RSMo protects the identities of "members of the execution team," who are specifically defined as "those persons who administer lethal gas or lethal chemical and those person, such as medical personnel, who provide direct support for the administration of the lethal gas or lethal chemicals." The pharmacist, laboratory, and prescribing physician clearly do not administer the drug, so the only issue is whether they provide "direct support" for the administration of the drug. The current use of this protection is for the nurse and anesthesiologist who are present at the time of the execution. Further, at the time the statute was passed there was no evidence the issues in this law suit existed; the state was acquiring drugs from foreign manufacturers who did not require protection of their identities. Missouri's statute is in direct contrast with, for

instance, Florida's confidentiality statute, Fl. Stat. Ann. § 945.10(1)(g), which classifies as confidential "information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection." If the Missouri Legislature intended to shield the identity of persons prescribing or compounding the drug, it could have done so like Florida, but instead, the legislature chose to narrowly define "members of the execution team" as those people who administer the drug or provide direct support in administration of the drug. The pharmacist, physician, and laboratory do neither of these things.

Second, the common law state secrets privilege is also inapplicable. The most compelling reason this information is not protected by the state secrets privilege is because it is not protected by section 546.720 RSMo, a statute designed to address this very subject matter. Though Defendants point to case law applying the state secrets doctrine to departments of corrections, *Taylor v. Nix*, 451 F.Supp.2d 1351 (N.D.Ga. 2006), and *Pack v. Beyer*, 157 F.R.D. 226 (D.N.J. 1994), these cases are distinguished from this case. *Taylor* involved a statute with broader protection than Missouri's statute. It required "all information" received by a parole board to "be classified as confidential state secrets." *Taylor*, 451 F.Supp.2d at 1352. Such a statute does not exist in Missouri, and as discussed above, § 546.720 RSMo is not as broad. In *Pack*, the plaintiffs were prisoners who were placed in a maximum control unit due to their affiliation with a terrorist organization. The prisoners filed a lawsuit alleging racial discrimination and sought to compel production of Internal Affairs documents relating to their placement in the maximum control unit. The Court denied the motion to compel, citing to concerns

with prison safety. Here, Defendants have presented no evidence of any danger of physical injury. Further, Defendants' contention that these individuals will be boycotted by the public is not the kind of injury the state secrets privilege was meant to prevent. *See U.S. v. Reynolds*, 345 U.S. 1, 5-6 (1953) (first describing the state secrets privilege and prohibiting disclosure of an accident report containing military secrets because at the time it was being compelled, during the Korean War, disclosure would be detrimental to the security of the United States). Regardless, Defendants' argument that boycotts will prevent them from obtaining a supply of drugs to use in executions is speculative. *See Schad v. Brewer*, 2013 WL 5551668 (D.Ariz. 2013) (considering arguments very similar to those asserted by Defendants in this case, including evidence nearly identical to that proffered by Defendants, and holding that Defendants failed to offer admissible evidence supporting a claim that they would lose the ability to obtain future execution drugs and revealing the manufacturer of the drugs would not frustrate the states' interest). Calls and letters do not prevent a corporation from operating and are not so disruptive as to force the business to refuse to sell its product to the Missouri Department of Corrections. *See id.* Accordingly, Defendants have not shown a likelihood of success under either § 546.720 RSMo or the common law state secrets privilege.

B. Irreparable Injury Absent a Stay

Even if the Court were to find a significant risk of harm accompanying disclosure of this information, which it does not as discussed above, the Court has taken several measures to limit disclosure of the identities of these individuals. The Court has ordered disclosure to only two of Plaintiffs' attorneys, has prohibited direct identification of these

individuals as assisting in the state's execution protocol, and has required Plaintiffs to secure a confidentiality agreement with any party from whom Plaintiffs seek information. Defendants have also been afforded the opportunity to confer with Plaintiffs regarding the substance of this confidentiality agreement. Defendants cite Plaintiffs' Amended Complaint for their contention that one of the reasons Plaintiffs seek the information is to promote censure and boycott of the compounding pharmacy. Plaintiffs' Amended Complaint does not support the proposition that Plaintiffs aim to promote boycott and censure, but even if it did, this Court's ordered protections prevent disclosure to the general public and allow for only very limited disclosure protected by a confidentiality agreement. Accordingly, Defendants have failed to show irreparable injury and have failed to show how the Court's safeguards are inadequate.

C. Substantial Injury to Plaintiffs

A stay further delaying disclosure of the identities of the pharmacist, physician, and laboratory would substantially impair Plaintiffs' ability to litigate their case. Plaintiffs Franklin and Nicklasson were denied stays of execution because they could not show a demonstrated risk of severe pain from the pentobarbital used in their executions. However, because of the secrecy of the parties involved in compounding and testing the drugs, Plaintiffs have been unable to conduct the discovery needed to present proof of a demonstrated risk of severe pain. The next execution is set for January 29, 2014. The identities of these individuals are essential to Plaintiffs' claim that the drug used in carrying out executions is improperly manufactured and tested. Any further delay in disclosure of this information prevents Plaintiffs from fully and fairly litigating their case.

D. Public Interest

The public has an interest in a transparent government and in full, fair, and open litigation. The public has an interest in executions carried out in compliance with the United States Constitution and the laws of the United States and the State of Missouri. Though this Court recognizes the interest in maintaining the safety and well-being of those individuals whose identities the Court ordered to be disclosed, the Court has taken adequate measures to safeguard their identities while still providing Plaintiffs the opportunity to fairly litigate their case.

Defendants have failed to meet their burden as to why this Court should stay its orders pending resolution of Defendants' pending petition for writ of mandamus.

III. Conclusion

For the reasons set forth above, Defendants' Motion to Stay is DENIED.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: December 16, 2013
Jefferson City, Missouri