

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

GUARDIAN NEWS & MEDIA LLC,)	
et al.,)	
)	
Plaintiffs,)	
)	Case No. 14AC-CC00251
v.)	
)	
MISSOURI DEPARTMENT OF)	
CORRECTIONS,)	
)	
Defendant.)	

ORDER SUSTAINING MOTION FOR SUMMARY JUDGMENT

On January 21, 2015, this matter came before the Court for a hearing on cross-motions for summary judgment by the parties. Specifically, both Plaintiffs and Defendant sought summary judgment as to Counts I, II, III and V of Plaintiffs’ Amended Petition. The Court heard argument on these motions at the same time it heard arguments on the cross-motions for summary judgment by the parties in Joan Bray v. George Lombardi, et al., Case No. 14AC-CC00044 (the “Bray” lawsuit), and The Reporters Committee for Freedom of the Press et al. v. Missouri Dept. of Corrections, Case No. 14AC-CC00254 (the “RFCP” lawsuit). The Court announced it was hearing the motions in the three cases on a consolidated record, and no objection was made.

Being fully advised in the premises, and following arguments by all interested parties, the Court finds that the Plaintiff’s motion for summary judgment should be granted on the issue of the Defendants’ compliance with the Sunshine Law, but defers entry of judgment pending a resolution of the remaining issues in this case.

FINDINGS OF FACT

1. Defendant the Missouri Department of Corrections (“DOC”) is a public governmental body created by the statutes of the State of Missouri. (Def. Resp. to Fact ¶ 17.)

DOC’s Execution Protocol

2. Prior to October 18, 2013, each of DOC’s execution protocols defined the execution team as follows: “The execution team consists of contracted medical personnel and department employees.” (Def. Resp. to Facts ¶¶ 1-2; Def. Resp. to Bray Facts ¶¶ 9-12.)

3. Those medical personnel contracted by DOC who are members of the execution team are present in person at all executions. (Def. Resp. to Fact ¶ 7.)

4. Those DOC employees who are members of the execution team are present in person at all executions. (Def. Resp. to Fact ¶ 6.)

5. On October 18, 2013, DOC adopted its current execution protocol, which includes a new and broader definition of execution team than included in any previous protocols. (Def. Resp. to Fact ¶ 5.)

6. Specifically, DOC’s execution protocol of October 18, 2013, defines the execution team as follows: “The execution team consists of department employees and contracted medical personnel including a physician, nurse, and pharmacist. The execution team also consists of anyone selected by the department director who provides direct support for the administration of lethal chemicals, including individuals who prescribe, compound, prepare, or otherwise supply the chemicals for use in the lethal injection procedure.” (Def. Resp. to Fact ¶ 5.)

7. The person or persons who prescribe, compound, or otherwise supply chemicals for use in lethal injection executions are **not** present in person at executions. (Def. Resp. to Fact ¶ 8.)

8. Prior to October 18, 2013, DOC's execution protocols never defined any persons who were not present at an execution as members of the execution team, and specifically never defined the persons who prescribe, compound, or otherwise supply chemicals for use in lethal injection executions as members of the execution team. (Def. Resp. to Facts ¶¶ 1-2; Def. Resp. to Bray Facts ¶¶ 9-12.)

Sunshine Law Requests

9. On April 15, 2014, Guardian US submitted a written request by email to the DOC's custodian of records seeking access to records relating to the State of Missouri's use of lethal injection drugs to execute Missouri inmates. (Def. Resp. to Fact ¶ 9.)

10. The request submitted by the Guardian US sought the following five categories of records: (i) "[t]he name, chemical composition, concentration, and source of the drugs approved for use in lethal injection executions pursuant to the DOC's October 22, 2013 execution protocol;" (ii) "[t]he 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;" (iii) "[t]he 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;" (iv) "[t]he qualifications of DOC contractors and/or employees involved in the procurement, testing or administration of an Execution Drugs;" and (v) "[p]olicy statements, regulations, or memoranda reflecting the assessment or approval of drugs for use in lethal injection executions." (Def. Resp. to Fact ¶9, Exhibit 4.)

11. On April 17, 2014, DOC confirmed the receipt of the Sunshine Law request and stated that a response would be forthcoming. (Def. Resp. to Fact ¶ 10.)

12. On April 25, 2014, DOC, through its deputy general counsel, Matthew Breisacher, responded to the Sunshine Law request submitted by Guardian US stating that DOC would not release records that could be used to identify members of the execution team as defined in the October 18, 2013 execution protocol. (Def. Resp. to Fact ¶ 11.) DOC cited Missouri's execution statute, Mo. Rev. Stat. § 546.720, as authorizing it to deny Plaintiffs' requests pursuant to the Sunshine Law exemption that permits records to be withheld that "are protected from disclosure by law." Mo. Rev. Stat. § 610.021(14). DOC also cited Mo. Rev. Stat. § 217.075 as grounds for withholding the requested records as "relating to institutional security." Mo. Rev. Stat. § 610.021(14).

13. The only record disclosed by DOC in response to the request submitted by the Guardian US was the public portion of the October 18, 2013, execution protocol. (Def. Resp. to Fact ¶ 11, Exhibit 6.)

14. On May 2, 2014, AP submitted a records request identical to the request submitted by Guardian US. (Def. Resp. to Fact ¶ 12.)

15. On May 2, 2014, DOC, through its deputy general counsel, Matthew Breisacher, confirmed receipt of the AP's Sunshine Law request. (Def. Resp. to Fact ¶ 13.)

16. On May 9, 2014, The Kansas City Star, The St. Louis Post-Dispatch, and The Springfield News-Leader submitted records requests identical to the request submitted by Guardian US. (Def. Resp. to Fact ¶ 14.)

17. On May 12, 2014, DOC replied to the requests submitted by the AP, The Star, The Post-Dispatch, and The News-Leader with a response that was identical in all relevant respects to that received by Guardian US on April 25, 2014. DOC cited the same statutory provisions in its denial of Plaintiffs' requests, attached the same pages from the open portion of

the execution protocol, and refused to release records that could be used to identify a member of the execution team as defined in the October 18, 2013 protocol. (Def. Resp. to Fact ¶ 15.)

18. DOC has produced no responsive records to any Plaintiff apart from the publicly available execution protocol. DOC has not produced records identifying the chemical composition, concentration, quantity, expiration date, or source of the execution drugs. Nor has it produced records identifying the results of quality tests performed by or for DOC concerning the execution drugs, or the qualifications of DOC contractors or employees involved in the administration of any execution drugs. It also has not released policy statements, regulations, or memoranda concerning execution drugs. (Def. Resp. to Facts ¶¶ 11, 15.)

19. Undisclosed records responsive to Plaintiffs' requests were in existence and in DOC's possession prior to any of Plaintiffs' Sunshine Law requests. Specifically, DOC possessed documents reflecting quality testing conducted on its lethal injection drugs, along with records reflecting the qualifications of DOC contractors and employees. (*See* Def. Resp. to Bray Facts ¶¶ 5-6 & 9, Exhibits 2 & 4.)

20. The parties stipulated that DOC "refused to release records that could be used to identify members of the execution team as defined in the October 18, 2013 execution protocol." (*See* Pl. Resp. to DOC Facts ¶ 1.) The parties did *not* stipulate that *all* records not disclosed could be used to identify members of the execution team.

Availability and Supply of Lethal Injection Drugs

21. Pentobarbital, the drug Missouri uses for executions, is a common drug produced in the United States and abroad. (*See* RCFP Resp. to Def. Facts ¶ 6) There are approximately 3,000 pharmacies in the United States that provide sterile compounding services. (*Id.*)

22. The State of Missouri can, as proposed by DOC'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. (Pl. Resp. to Def. Facts ¶ 5.)

CONCLUSIONS OF LAW

23. The Missouri Sunshine Law, Mo. Rev. Stat. § 610.0, applies to the Missouri Department of Corrections (DOC), as a public governmental body. Under the Sunshine Law, all of DOC's records are presumptively open to the public "unless otherwise provided by law." Mo. Rev. Stat. § 610.011.1.

24. Under the Sunshine Law, the records Plaintiffs requested are presumptively open to the public. *See* Mo. Rev. Stat. § 610.011.

25. DOC may withhold these records from the public only if an enumerated exemption to the Sunshine Law, narrowly construed, authorizes withholding. *Guyer v. City of Kirkwood*, 38 S.W.3d 412, 414 (Mo. banc 2001).

The "Execution Team" Exemption

26. Missouri's execution statute, Mo. Rev. Stat. § 546.720 grants DOC the authority to "select an execution team which **shall consist** of those persons who administer lethal gas or lethal chemicals and those persons, such as medical personnel, who provide direct support for the administration of lethal gas or lethal chemicals." Mo. Rev. Stat. § 546.720.2 (emphasis added). Under this provision, DOC is permitted to keep confidential only the identities of "the members of the execution team" as that "execution team" is defined in the statute.

27. The Legislature set specific limits on who may be selected to be part of the "execution team" in § 546.720. In particular, the statute defines the execution team to include

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.”

28. Because the legislature omitted any other categories of persons from membership on the execution team, the statute should be read to exclude such categories of persons. *See, e.g., Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346 (Mo. banc 2001) (applying the maxim of *expressio unius est exclusio alterius*).

29. The drug suppliers do not themselves administer the lethal chemicals, nor do they provide direct support for the administration of the lethal injection drugs. Words in a statute must be given their plain meaning, and “[t]he plain meaning is found in the dictionary.” *Delta Air Lines, Inc. v. Dir. of Revenue, State of Mo.*, 908 S.W.2d 353, 356 (Mo. 1995). The dictionary definition of “direct” is “marked by absence of an intervening agency, instrumentality, or influence.” *Direct definition*, <http://www.merriam-webster.com/dictionary/direct> (last visited Feb. 3, 2015). The supplier of the lethal injection drugs provides the drugs to DOC, which then acts through its own employees and contracted medical personnel to administer the drugs. The suppliers’ involvement is not direct.

30. Nor do the suppliers provide “support” for the “administration” of lethal chemicals. To support is to “assist or reinforce in an action,” *Support definition*, <http://www.oed.com/view/Entry/194674>, and administration is “[t]he application of a medicine, drug, treatment, etc.” *Administration definition*, <http://www.oed.com/view/Entry/2541>. To provide “support” for the “administration” of lethal chemicals therefore requires assisting or reinforcing the actual process of injecting the lethal drugs into the condemned. Drug suppliers are not present to assist in the “administration” of the drugs. The role of the drug suppliers ends

weeks, months, or years before an execution when they manufacture the chemicals and sell them to DOC. The drug suppliers do not assist in the administration of the lethal injection chemicals.

31. Pharmaceutical manufacturers and compounding pharmacies, which provide the chemicals to DOC well before they are used in an execution, are not involved at the time of execution; they do not administer the lethal chemicals to the condemned and they do not provide direct support to those administering the lethal chemicals.

32. Because the suppliers of the lethal injection drugs neither administer nor provide direct support for the administration of lethal injection chemicals, they fall outside the scope of the “execution team” as proscribed by the legislature in § 546.720.

33. This conclusion is further supported by the Missouri Supreme Court’s decision in *Middleton v. Missouri Dep’t of Corrections*, 278 S.W.3d 193, 197 (Mo. 2009), where the court held that the execution protocol was exempt from notice and comment rulemaking procedures.

34. In its opinion, the court explained that “the execution protocol describes the technical duties of an execution team consisting of DOC employees and medical personnel.” *Id.* at 195. The court further explained that the protocol “concerns the technical procedures that guide medical personnel who are members of an ‘execution team’ in preparing chemicals for lethal injection and supervising their administration.” *Id.* at 196.

35. The court then went on to distinguish the members of the execution team from execution witnesses, noting that the witnesses do not participate in any of “the procedural directives outlined in the [execution] protocol: preparing chemicals, using intravenous lines, medically monitoring the prisoner, and administering and documenting chemicals.” *Id.* at 197.

36. The same is true for pharmaceutical manufacturers and compounding pharmacies, *i.e.*, they do not participate in any of “the procedural directives outlined in the [execution]

protocol: preparing chemicals, using intravenous lines, medically monitoring the prisoner, and administrating and documenting chemicals.”.

37. This construction of the execution statute is also consistent with its legislative history. The statute was enacted specifically to shield the identities of medical personnel and those directly involved in the process of administering lethal chemicals to the inmate during the execution process itself.

38. This construction of the execution statute is also consistent with DOC’s long-standing interpretation of its provisions from the time of its enactment through 2013. Until 2013, DOC never defined the execution team to include pharmacists, pharmacies, or any other persons not present and providing direct support during an execution.

39. DOC’s October 2013 administrative expansion of the term “execution team” to include lethal injection drug suppliers exceeds the authority granted to it by the legislature and is therefore contrary to law.

40. Because DOC’s October 18, 2013 protocol including the suppliers of the lethal injection drugs as members of the execution team is contrary to law, it cannot trigger the Sunshine Law exemption that applies to those records “protected from disclosure by law.” Mo. Rev. Stat. § 610.021(14). Only a statute may expand the categories of records exempted from disclosure under the Sunshine Law. *State ex rel. Goodman v. St. Louis Bd. Of Police Comm’rs*, 181 S.W.3d 156, 159 (Mo. Ct. App. 2005); *Oregon Cnty. R-IV School Dist. v. LeMon*, 739 S.W.2d 553, 557 (Mo. Ct. App. 1987).

41. Additionally, DOC’s interpretation of “execution team” is not entitled to deference. Courts do not defer to agency interpretations that are inconsistent with the plain and ordinary meaning of a statute. *See Fugate v. Jackson Hewitt, Inc.*, 347 S.W.3d 81, 87 (Mo. Ct.

App. 2011) (“[I]t would be inappropriate for this court 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.”).

42. DOC’s reliance on § 546.720 in its denial of Plaintiffs’ Sunshine Law requests was misplaced. Section 546.720 does not authorize such non-disclosure of responsive records.

The “Institutional Security” Exemption

43. DOC cited § 217.075 as authorizing the non-disclosure of the suppliers of the lethal injection chemicals because the records relate to institutional security. The records do not relate to institutional security.

44. The records requested by Plaintiffs are not offender records and, in any case, do not fall into one of the three categories of “offender records” protected from disclosure by statute. *See* Mo. Rev. Stat. § 217.075.1. The requested records do not contain information about any offender’s personal medical history or institutional security, nor are they otherwise protected from disclosure by law.

Records Other Than Those Identifying the Pharmacist

45. Defendant has not offered any adequate justification for its failure to produce records in response to Plaintiffs’ request for records that do not name or identify the pharmacist.

46. Such undisclosed records, which are responsive to the remainder of Plaintiffs’ requests, are properly before this Court. The parties have stipulated that DOC failed to disclose records that could reveal the identity of execution team members. The parties have *not* stipulated that *all* records DOC failed to disclose could be used to identify the identity of execution team members. Therefore, the Court may order DOC to disclose such records. (*See* Pl. Resp. to DOC Facts ¶ 1.)

47. With respect to Plaintiffs' request for records relating to quality testing of lethal drugs, Defendant's bare, conclusory assertion that disclosure of the laboratory that may have tested the lethal chemicals would identify the pharmacist is insufficient to justify withholding for three reasons. First, it assumes that the role of the pharmacist in the execution qualifies as a member of the execution team, as if not, it would not be properly withheld. Second, even if the identity of the pharmacist were properly withheld, Defendant has failed to show that disclosure of quality test records could lead to identification of pharmacist. Third, even if disclosure of the quality testing laboratory could somehow lead to the identification of the pharmacist, Defendant has failed to explain why the records in question may not be produced with appropriate redactions.

48. DOC has an obligation to redact responsive records rather than withholding them in their entirety. "If 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." *Tuft v. City of St. Louis*, 936 S.W.2d 113, 119 (Mo. Ct. App. 1996). DOC failed to properly redact and produce responsive records—including, at least, records placed before the court by Plaintiff Joan Bray on this consolidated record describing the quality testing of DOC's drugs and qualifications of DOC's employees.

49. With respect to Plaintiffs' request for records relating to the qualifications of personnel involved in procurement, testing, or administration of lethal drugs, Defendant has failed to offer any justification whatsoever for its failure to disclose such records or to produce such records with appropriate redactions.

50. With respect to Plaintiffs' request for records relating to policy statements, regulations, or memoranda reflecting the assessment or approval of drugs for use in lethal injection executions, Defendant has failed to offer any justification whatsoever for its failure to disclose such records or to produce such records with appropriate redactions.

Remaining Exemptions Cited by DOC

51. The records requested by Plaintiffs are not litigation records under Missouri Revised Statutes § 610.021(1). Records containing information about the source, composition, and quality of lethal injection drugs, as well as the qualifications of the personnel who administer them, do not become protected legal files or work product simply because they may be the subject of unrelated litigation. *See St. Louis Little Rock Hospital v. Gaertner*, 682 S.W.2d 146 (Mo. Ct. App. 1985) (applying analogous logic in a case concerning attorney-client privilege). In any case, Defendant has waived this exemption by failing to pursue it in its submissions on the present cross-motions for summary judgment.

52. While Defendant's response to Plaintiffs' request invoked a supposed exemption for "state secrets" and asserted that disclosure would violate the separation of powers, Defendant has failed to pursue these arguments in its submissions on the present cross-motions for summary judgment. These arguments are therefore waived.

Sanctions for DOC's Failure to Timely Identify Its Claimed Exemptions

53. The Sunshine Law requires governmental bodies to respond to requests within three days by disclosing responsive documents; by providing an explanation for why disclosure would be delayed, along with a timeline for such disclosure; or by denying the request. Mo. Rev. Stat. § 610.023.3. A governmental agency may not act upon a request within the meaning of § 610.021.3 by merely acknowledging receipt of the request.

54. Additionally, upon request, a governmental body must provide a written explanation of the grounds for non-disclosure within three days of any denial. Mo. Rev. Stat. § 610.023.4.

55. DOC violated the response deadlines required by the Sunshine Law by failing to disclose or explain its non disclosures within three days of Plaintiffs' requests, *i.e.*, by failing to identify the specific Sunshine Law exemptions DOC now relies on.

56. DOC's obligations under section 546.720 did not prevent it from responding to Plaintiffs' requests in a timely manner.

57. By failing to identify within three days of Plaintiffs' requests the grounds DOC was relying on to deny Plaintiffs' requests, DOC violated the Sunshine Law.

Attorney Fees

58. The Missouri Sunshine Law provides that a Court may impose civil penalties upon a public governmental body for a knowing violation of its obligations to provide access to public records. *See* Mo. Rev. Stat. § 610.027.3.

59. The Missouri Sunshine Law also permits a Court to order a public governmental body to pay all costs and reasonable attorney fees to any party successfully establishing a knowing violation. *See* Mo. Rev. Stat. § 610.027.3.

CONCLUSION

As set forth above, Plaintiff has established that Defendants have knowingly failed, at least in part, to comply with the Sunshine Law. However, because whether or not a particular person meets the statutory definition of an execution team member and therefore whether such a person could be identified by disclosure of a record is a question of fact unresolved by this motion, Plaintiff may not be entitled to the blanket remedy of an un-redacted disclosure.

As announced earlier, the Court does not rule on Count IV of Plaintiffs' petition.

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

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

SO ORDERED this 15th day of July, 2015.



Jon E. Beetem
Circuit Court Judge, Division I