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.	)	

MEMORANDUM OPINION AND JUDGMENT

On September 17, 2015, this matter came before the Court for a hearing on issues not resolved by the Court's Order of July 15, 2015 ("July 15 Order") granting Plaintiffs' motion for summary judgment. Specifically, the parties heard testimony from Matthew Briesacher, Deputy General Counsel for Defendant Missouri Department of Corrections ("DOC"), to resolve which persons meet the statutory definition of "execution team" under Missouri Revised Statutes section 546.720 and, therefore, whether disclosure of any particular document would identify a member of the execution team. The hearing also addressed issues in two other similar cases, where motions for summary judgment were considered concurrently, *Joan Bray v. George Lombardi, et al.*, Case No. 14AC-CC00044, and *Reporters Committee for Freedom of the Press et al. v. Missouri Dept. of Corrections*, Case No. 14AC-CC00254.

Being fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Members of the "Execution Team"

1. The court previously has held that Missouri Revised Statutes section 546.720 limits the execution team to those persons present during the execution who administer or provide direct support for the administration of the lethal chemicals. (July 15 Order ¶¶ 26-42.)

2. DOC has identified five designated "medical" entities it considers to be members of the execution team, which it has labeled M2, M3, M5, M6, and M7. A brief description of each follows:

M2: Nurse who participates in the execution;

M3: Anesthesiologist who participates in the execution;

M5: Physician who prescribed the pentobarbital for use in executions;

M6: Two pharmacists who provided pentobarbital for use in executions; and

M7: Two pharmacists who provided pentobarbital for use in executions.

(Execution Team Litigation Designations, Def.'s Ex. 3, Sept. 17, 2015 Hearing; Sept. 17, 2015 Hearing Tr. ("Tr.") 17:19-18:14, 54:3-6; 55:23-56:12; 87:24-88:8; 102:22-103:2.)

3. In addition, DOC has identified three "non-medical" members of the execution team, which it has labeled NM1, NM2, and NM3, each of whom are DOC employees that are present for, and participate in, the execution. (Execution Team Litigation Designations, Def.'s Ex. 3, Sept. 17, 2015 Hearing; Tr. 17:19-18:14, 131:6-13.)

4. M6 and M7 are not present during the execution. (Tr. 101:6-9; 108:25-109:1; 123:23-124:20; 131:20-22.)

5. M6 and M7 do not administer or provide direct support for the administration of lethal injection drugs during executions. (Tr. 75:14-23; 101:6-9; 108:25-109:1; 123:23-124:20; 131:20-24.)

6. M6 and M7 are not members of the execution team.

7. The Court finds that the role of M5, while not present during the execution, does provide direct support for the administration of lethal chemicals.

8. DOC concedes the laboratories that conduct quality tests on the lethal injection drugs are not members of the execution team. (Tr. 39:23-40:1.)

9. Accordingly, the only members of the "execution team," as that term is used in section 546.720 are NM1, NM2 NM3, M2, M3 and M5.

Whether the Members of the Execution Team Will Be Disclosed by the Records Plaintiffs Seek

10. On April 15, 2014, Guardian US submitted a written request to the DOC's custodian of records seeking access to records sufficient to disclose: (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." (July 15 Order ¶¶ 9-10.)

11. In May 2014, AP (May 2, 2014) and The Kansas City Star, The St. Louis Post-Dispatch, and The Springfield News-Leader (May 9, 2014) submitted records requests identical to the request submitted by Guardian US. (July 15 Order ¶¶ 14, 16.)

12. The relevant time period covered by Plaintiffs' Sunshine Law requests is the period between October 18, 2013, the date the most recent execution protocol was enacted, and May 9, 2014, the date of the last requests by any of the Plaintiffs. (October 18, 2013 Execution Protocol, Def.'s Ex. 1, Sept. 17, 2015 Hearing; Tr. 25:17-20.)

13. DOC executed six persons during the relevant time period: Joseph Paul Franklin, Allen L. Nicklasson, Herbert Smulls, Michael Anthony Taylor, Jeffrey R. Ferguson, and William Lewis Rousan. (Tr. 59:6-13; 104:21-105:1.)

14. Plaintiffs' Sunshine Law requests sought, *inter alia*, records relating to drugs used in each of these six executions. (July 15 Order ¶¶ 10, 14, 16.)

15. DOC did not disclose records or explain its non-disclosures within three days of Plaintiffs' requests. (July 15 Order ¶ 55.)

16. DOC has produced no responsive documents during this litigation other than the publicly available portion of the execution protocol. (July 15 Order ¶¶ 13, 17-18.)

17. DOC has made no attempt to provide Plaintiffs with any redacted documents. (July 15 Order ¶¶ 18, 48.)

18. During a status conference held on July 29, 2015, DOC agreed to provide Plaintiffs with a Privilege Log of documents that were responsive to Plaintiffs' requests, but which DOC claimed were exempt from production under the Sunshine Law.

19. On August 28, 2015, DOC submitted its Privilege Log. (Def.'s Privilege Log, Aug. 28, 2015.)

20. The Privilege Log contained 34 entries, numbered DOC 001 through DOC 034; each of the documents on the Privilege Log except DOC 005-DOC 008 are identified on the log as being responsive to Plaintiffs' requests. (Def.'s Privilege Log, Aug. 28, 2015.)

21. Each document in the log falls into one of five categories: (a) qualifications of "execution team" members; (b) records relating to the drug supply for executions of Franklin, Nicklasson, and Smulls; (c) records relating to the drug supply for executions of Taylor, Ferguson, and Rousan; (d) records relating to drug testing for executions of Franklin, Nicklasson, and Smulls; and (e) bid information for drugs purchased by DOC. (Def.'s Privilege Log, Aug. 28, 2015.)

22. DOC's Privilege Log purports to justify withholding each of the listed documents by alleging that the documents identify or "could identify" M5, M6, and M7. (Def.'s Privilege Log, Aug. 28, 2015.)

23. DOC did not produce or include in its Privilege Log any responsive documents concerning the qualifications of the nurse (M2) or the anesthesiologist (M3) who are present during the execution. (Def.'s Privilege Log, Aug. 28, 2015.)

24. DOC did not produce or include in its Privilege Log any records responsive to Plaintiffs' request for policy statements, regulations, or memoranda regarding the use of lethal injection drugs. (Def.'s Privilege Log, Aug. 28, 2015.)

25. No document included in DOC's Privilege Log identifies or could identify a member of the execution team as defined by the July 15 Order, *i.e.*, NM1, NM2, NM3, M2 or M3. (Def.'s Privilege Log, Aug. 28, 2015; Tr. 75:14-23; 92:11-94:13, 94:3-13; 95:8-20; 101:6-9; 108:25-109:1; 123:23-124:20; 131:20-24; July 15 Order ¶¶ 26-42.)

26. On September 11, 2015, DOC submitted an addendum to its Privilege Log that identified five additional documents called for by Plaintiffs' requests. (Privilege Log Addendum & Obj., Sept. 11, 2015.)

27. These five documents, DOC 035-039, identify M2, M3, and the three non-medical DOC personnel who participate in the execution, *i.e.*, NM1, NM2 and NM3; these documents therefore do identify a member of the execution team as defined by the July 15 Order. (Privilege Log Addendum & Obj., Sept. 11, 2015; Tr. 131:6-24.)

DOC's Withholding of Documents in the Public Domain

28. Many documents responsive to Plaintiffs' requests and included in DOC's Privilege Log are already in the public domain. (Pl.'s Notice of Deficiencies Exs. A, B, C, D & E.)

29. DOC itself introduced one set of documents into the public domain during litigation in *Zink v. Lombardi* in January 2014. These documents, numbered DOC 016-034, are the redacted quality control test results for the drugs used in the Franklin, Nicklasson, and Smulls executions. (Pl.'s Notice of Deficiencies Exs. A, B, C & D; Tr. 94:14-95:11.)

30. DOC also withheld from Plaintiffs and listed on the Privilege Log several responsive documents that it had already made public in redacted form, including the accreditation form for the lab used to test the drugs, pharmacy license, bid records, and pentobarbital labels. (Pl.'s Notice of Deficiencies Ex. E at 6, 8, 10, 18, 23-24, 51, 53-54.)

31. Also in the public domain are documents responsive to Plaintiffs' request but not included in DOC's Privilege Log, including prescriptions for the lethal injection drugs. (Pl.'s Notice of Deficiencies Ex. E at 25-26, 29, 52.)

32. DOC was aware that these records were available in the public domain and responsive to Plaintiffs' requests, yet did not identify or disclose them to Plaintiffs. (Tr. 95:21-102:4).

CONCLUSIONS OF LAW

33. As this Court previously held, 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. (July 15 Order ¶¶ 43-52, 55-57.)

34. DOC also 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. (July 15 Order ¶¶ 39-42.)

35. Further, subsequent fact-finding has shown that DOC purposely refused to disclose responsive documents that were publicly available.

36. DOC omitted from its Privilege Log categories of documents that were responsive to Plaintiffs' requests.

37. By refusing to disclose these documents already in the public domain, the Missouri Department of Corrections purposely violated the Sunshine Law.

38. The Sunshine Law requires that all DOC's records be presumptively open to the public, "unless otherwise provided by law." Mo. Rev. Stat. § 610.011.1.

39. Missouri Revised Statutes section 546.720 creates a Sunshine Law exemption only for records that identify those persons who are members of the 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.

40. This exemption protects the identities of the doctor and nurse who are present in the room during the execution (M2 and M3) and the non-medical personnel who assist with the execution and are also present (NM1, NM2, and NM3). DOC therefore does not need to produce DOC 035-DOC 039.

41. Missouri Revised Statutes section 546.720 does not create a Sunshine Law exemption for records that identify or that might identify the entities that supply the execution drugs. DOC 002-DOC 004 and DOC 009-DOC 034 are therefore public records and must be produced to Plaintiffs without redactions other than the identity of M5. Plaintiffs are likewise entitled to any other responsive documents not included in the Privilege Log.

42. Missouri Revised Statutes section 610.027, authorizes an award of costs and attorneys' fees and civil penalties against a governmental body that "purposely" or "knowingly" violates its disclosure obligations under the Sunshine Law.

43. When a public governmental body knowingly violates the Sunshine Law, the Court has discretion to award costs and reasonable attorney fees to a party successfully establishing a violation. Mo. Rev. Stat. § 610.027.3.

44. When a public governmental body purposely violates the Sunshine Law, "the court shall order the payment by such body or member of all costs and reasonable attorney fees to any party successfully establishing such a violation." Mo. Rev. Stat. § 610.027.4.

45. Because DOC purposely violated the Sunshine Law, Plaintiffs are entitled to all costs and reasonable attorneys' fees, which they have established to be $73,335.41, which

comprises $32,065.00 in fees together with $627.41 in expenses to Bernard J. Rhodes, and $39,245.25 in fees together with $1,397.75 in expenses to the Media Freedom & Information Access Clinic.

JUDGMENT

It is hereby ORDERED, ADJUDGED, AND DECREED that Defendant must make available for copying and inspection copies of 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, and policy statements, regulations, or memoranda reflecting the assessment or approval of drugs for use in executions. DOC 001-DOC 004 and DOC 009-DOC 034 listed in DOC's Privilege Log must be made available without redactions other than as to the identity of M5.

It is further ORDERED that, given Defendant's violations of the Sunshine Law, Defendant pay to Plaintiff all costs and reasonable attorneys' fees in the amount of $73,335.41.

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.

The Defendant's obligation to comply with this judgment shall be stayed until the same is determined to be final, either by operation of law or by exhaustion of all appeals. This stay does not apply to the production of records which are responsive to the Plaintiffs' requests and are not listed on Defendant's privilege logs.

SO ORDERED this 21 day of MAY, 2016.

Jon E. Beetem
Circuit Court Judge, Division I