IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

MUSTAFA A. ABDULLAH, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 13AC-CC00586
MISSOURI DEPARTMENT OF CORRECTIONS,	)	
Defendant.	)	

ORDER AND JUDGMENT

A trial was held on November 18, 2016. Plaintiffs appeared and were represented by counsel. Defendant appeared and was represented by counsel. Having considered the evidence, including exhibits offered by both parties and the testimony of Grant Doty and Mustafa Abdullah for Plaintiffs and Matt Briesacher for Defendant, as well as the arguments of counsel, the Court enters its ruling.

Findings of Fact

1. Defendant, the Missouri Department of Corrections, is a public governmental body subject to the requirements of the Sunshine Law.
2. On August 26, 2013, Plaintiffs requested records from Defendant related to the execution drug propofol. Plaintiffs' Exhibit 3.
3. Specifically, Plaintiffs requested:

    A. All records indicating the DOC's current inventory of propofol;
    B. All records indicating the expiration date of all propofol in the DOC's current inventory;
    C. All records indicating the source of all propofol in the DOC's current inventory;
    D. All records indicating the shipment dates of all propofol in the DOC's current inventory;

E. All records indicating the person that authorized the purchase(s) of propofol in the DOC's current inventory;
F. All records indicating how much the state paid for the propofol in the DOC's current inventory, how payment was made, and from which account;
G. All records regarding efforts by the DOC, either successful or unsuccessful, to obtain propofol over the past five years ending today (August 26, 2013);
H. All records relating to the disposition of all expired propofol over the past five years ending today;
I. All phone records indicating calls between the DOC and Fresenius Kabi, Teva, or Hospira;
J. All email messages between the DOC and Fresenius Kabi (domain name, including but not limited to: @fresenius-kabi.com), Teva (domain name, including but not limited to: @tevapharm.com), and Hospira (domain name, including but not limited to: @hospira.com);
K. All packaging, labels, instructions, or documents that accompanied the propofol in the DOC's current inventory, including all writing on the packages containing the propofol in the DOC's current inventory; [and]
L. All package inserts for the propofol in the DOC's current inventory and all writing on the packages containing the propofol in the DOC's current inventory."

4. The requested records were retained by and in the possession of Defendant. Transcript pp. 15, 24-25, 40-41, 43.

5. At the time the request was made, Grant Doty was a staff attorney working at the ACLU of Missouri. Transcript pp. 6-7.

6. Mustafa Abdullah is currently lead organizer at the ACLU of Missouri, and he was employed by ACLU at the time the request was made to Defendant. Transcript p. 30.

7. Matt Briesacher is the Director of Human Resources for Defendant. At the time the request was made in this case, Mr. Briesacher was General Counsel for Defendant. Mr. Briesacher testified that, as General Counsel, he was responsible for responding to Sunshine Law requests related to executions. Transcript pp. 36-39.

8. The August 26, 2013 Sunshine Law request was received by Defendant. Transcript pp. 10-11, 39-40.

9. On or about August 28, 2013, Defendant informed Plaintiffs that, "[i]t will take approximately three weeks to respond to your request." Mr. Briesacher testified that responding to a requester and telling them that it would take three weeks was a standard response Defendant was giving at that time. This was the only response received by Plaintiffs within three days of Defendant receiving the request and no further detail regarding what would be produced or withheld was provided by Defendant at this time. Transcript pp. 12-14, 40.
10. Mr. Briesacher testified that he was responsible for responding to Plaintiffs' August 26, 2013 Sunshine Law request and that he received and reviewed it on or about August 28, 2013. Transcript p. 40.
11. Mr. Briesacher testified that, within a couple of days of receiving the request, he would have reviewed the request and contacted any employees within the Department of Corrections who likely keep the records needed and asked them to send him copies of any responsive documents. Transcript pp. 41-42.
12. During the week of September 30, 2013, after not receiving any responsive documents from Defendant or further explanation as to why those documents had not been provided, Plaintiffs' attorney placed two telephone calls on September 30 and October 2, 2013, to Defendant and left two detailed voicemail messages with the legal department regarding the request. Transcript pp. 12-13, 28.
13. Defendant called Mr. Briesacher as its only witness to testify in this case. Mr. Briesacher was not the party with whom Plaintiff's attorney left the two voicemail messages related to this Sunshine Law request. However, Mr. Briesacher acknowledged that, while the voicemails were not left with him directly, he received notice that someone from the

ACLU had called. Plaintiffs' testimony that two detailed messages were left with the legal department related to this specific Sunshine Law request during the week of September 30, 2013, is credible and unrefuted. Transcript p. 48.

14. After not receiving any response to the phone calls and no responsive records, Plaintiffs filed this lawsuit on October 4, 2013. Transcript p. 14.

15. The filing of the lawsuit received extensive publicity. Plaintiffs' Exhibits 5, 6, & 7.

16. Subsequent to the filing of this lawsuit, responsive records were produced by Defendant and received by Plaintiffs on October 8 and 18, 2013.[1] Stipulated Facts, Exhibit B.[2]

17. The records produced on October 8, 2013, revealed that Defendant had been contacted in August and November 2012 by a propofol (a/k/a diprivan) supplier (Morris & Dickson, LLC) and manufacturer (Fresenius Kai USA, LLC) who made urgent requests to Defendant that the propofol that had been delivered to Defendant be returned as they did not want the drug used in executions. Plaintiffs' Exhibits 8, 9, & 10.

18. On October 9, 2013, five days after this lawsuit was filed and one day after the first batch of records was produced, Defendant issued a press release indicating that it would be returning the propofol to Morris & Dickson, LLC, and acknowledging that the supplier had requested the return in 2012. Plaintiff's Exhibit 11.

19. On October 11, 2013, seven days after this lawsuit was filed and two days after the announcement from Defendant that it was returning propofol to a supplier, Governor Nixon issued a statement alerting the public that, "in light of the issues that have been

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[1] While a second batch of records was produced on October 18, 2013, the Department had informed Plaintiffs when it delivered the first batch of responsive records on October 8, 2013, that any additional records would be produced by October 11, 2013. Plaintiff's Exhibit 13.

[2] The 501 pages of responsive records were filed with this Court on January 20, 2015, as Exhibit B to Defendant's Motion to Dismiss.

raised surrounding the use of propofol in executions, I have directed the Department of Corrections that the execution of Allen Nicklasson, as set for October 23, will not proceed." The Governor also directed Defendant to modify the state's execution protocol to include a method of legal injection that does not require the use of propofol. Plaintiff's Exhibit 12.

20. Mr. Briesacher testified that one reason it took so long to respond to Plaintiffs' request was that, between the time he received the request and the date he finally responded, on October 8, 2013, the protocol had been changed. Transcript pp. 47-48. From the record, however, it appears that the Governor did not order Defendant to modify the execution protocol until after the records in this case were produced. Plaintiff's Exhibit 12. Moreover, Mr. Briesacher also testified that the reason he failed to respond to the request at issue was because he simply was not thinking about it between August and October and that the request had been lost. Transcript pp. 47-48, 51.

21. On October 7, 2013, Mr. Briesacher received a phone call from an attorney in the Governor's office. This attorney was aware of the pending request from the Plaintiffs and directed Mr. Briesacher to respond to it as soon as possible. Mr. Briesacher testified that he began reviewing the responsive records that same day. And, as the evidence reflects, he provided his first response to Plaintiffs the following day. Transcript pp. 50-51.

22. In light of the evidence presented and Mr. Briesacher's own testimony that on or about August 28, 2013, he had contacted at least six different individuals in search of the records and asked them to provide him with responsive documents, this Court does not find Mr. Briesacher's testimony regarding his reasons for failing to respond before October 8, 2013 credible. Moreover, because Mr. Briesacher was able to review and

produce hundreds of responsive records within one day after this lawsuit was filed and he received a call from the Governor's office, it is not credible that he could not have responded earlier.

23. Mr. Briesacher testified that when he took over the position of General Counsel in March 2013, he was made aware of the records showing that Defendant was ignoring the pleas of Morris & Dickson that the propofol mistakenly delivered to Defendant be returned, and, in fact, the existence of these records was so important that Mr. Briesacher was briefed on the issue by his predecessor when he became general counsel and informed that this was an issue he needed to be "ready for if something came up" as General Counsel. Transcript pp. 36, 57.

24. The ACLU made nearly identical requests to Defendant for information related to the execution drugs before the request that is the subject of this case (in November 2010 and August 2011) and after (October 2013). Defendant responded to the November 2010, August 2011, and October 2013 requests in a timely manner; no follow-up calls were needed, and no lawsuit had to be filed. Transcript pp. 7-10, 25-26.

25. Given how quickly Defendant was able to produce responsive records after this lawsuit was filed and the Governor's office contacted Mr. Briesacher, it is apparent that the bulk of the responsive records had already been gathered and the records were withheld because Defendant did not want to disclose the information in the records and made the choice not to do so until after a lawsuit was filed.

26. In addition to the other requests of the ACLU that were responded to fully and timely, the ACLU and others have also made requests to Defendant that have resulted in lawsuits in

which Defendant has been found to have knowingly violated the Sunshine Law. Plaintiffs' Exhibits 14-18.[3]

27. Mr. Briesacher testified that Defendant receives approximately one hundred Sunshine Law requests each week, some of which go directly to the office of the General Counsel. Transcript p. 38. Thus, Defendant is well aware of the Sunshine Law, its responsibility to respond to requests in a timely manner, the state policy of open and transparent government, and its obligation to provide any requesting party with all open records or provide a detailed explanation as to what exemptions apply to any records deemed closed.

28. In recent litigation, Mr. Briesacher testified that, as of July 2015, "he had been working on Sunshine Law requests in his role with the Department for five years, and responding to such requests was 'a substantial part of [his] duties' during the past two years." *Am. Civil Liberties Union of Mo. Found. v. Mo. Dep't of Corrections*, -- S.W.3d --, 2016 WL 6871552, at *1 (Mo. App. W.D. Nov. 22, 2016). Therefore, this Court finds that Mr. Briesacher had experience responding to Sunshine Law requests and considered those responses a substantial part of his job duties at the time the request was made in this case in August 2013.

29. Mr. Briesacher acknowledged that the propofol was not returned to the supplier until after the records were produced in this case. Transcript p. 59.

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[3] Exhibit 14 is the order and judgment in Case No. 12AC-CC00692; this decision was not appealed. Exhibit 15 is the order and judgment in Case No. 14AC-CC00458; the trial court's findings here were affirmed on appeal. *See Am. Civil Liberties Union of Mo. Found. v. Mo. Dept. of Corrections*, -- S.W.3d --, 2016 WL 6871552 (Mo. App. W.D., Nov. 22, 2016). The other judgments are under review by the Court of Appeals and, thus, are not accorded weight in this decision.

30. Defendant was aware of its obligation to produce open records under the Sunshine Law to Plaintiffs and failed to do so before the filing of this lawsuit.
31. Plaintiffs placed two phone calls to Defendant and left detailed messages related to the request before the lawsuit was filed.
32. Defendant failed to produce open records and knew the consequences of its actions. Defendant has been sued on several previous occasions and has been found to have knowingly violated the Sunshine Law for its failure to produce records.
33. Defendant responded within three days but only to tell Plaintiffs it would provide the records within three weeks and did not provide a detailed explanation as to the cause for delay or nondisclosure.
34. Then, Defendant still failed to provide the records within three weeks or provide any further response during that time. By failing to provide any further response within the time period it set for itself, it failed to "give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection[,]" as required by Mo. Rev. Stat. § 610.023.3.
35. Defendant delayed the disclosure of the records until after this lawsuit was filed because it did not want to make public the communications from Morris & Dickson and face the foreseeable consequences of having to return the drugs, re-write its execution protocol, and cancel an execution, as well as receive negative publicity.
36. Defendant knew its responsibilities under the Sunshine Law and that it was violating the Sunshine Law by failing to either produce the records or give a detailed explanation of the cause for further delay within three weeks.

37. Defendant knew it was violating the Sunshine Law when it failed to produce the requested records before the filing of this lawsuit.

38. Defendant failed to produce the requested records with a conscious plan or design to avoid its responsibility to produce responsive records on a timely basis.

39. Defendant intentionally forestalled production of public records until Plaintiffs sued.

Conclusions of Law

The Sunshine Law requires that requests be "acted upon as soon as possible, but in no event later than the end of the third business day" following receipt of the request by the custodian of records. § 610.023. "If access to the public record is not granted immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection." *Id.* "The period for document production may exceed three days for reasonable cause." *Id.*

"Section 610.027 allows any aggrieved person to seek judicial enforcement of the Sunshine Law and provides the remedies of civil monetary penalties, costs and attorney's fees for knowing or purposeful violations of that law." *Laut v. City of Arnold*, 491 S.W.3d 191, 197 (Mo. banc 2016). Knowing and purposeful violations of the Sunshine Law must be supported by a preponderance of the evidence. § 610.027.3-.4. The Sunshine Law shall be liberally construed and its exceptions strictly construed in order to promote openness and government transparency. *See Laut*, 491 S.W.3d at 196. "[T]he 'portions of the Sunshine Law that allow for imposition of a civil penalty and an award of attorney fees and costs are penal in nature and must be strictly construed.'" *Id.* (quoting *Strake v. Robinwood West Cmty. Improvement Dist.*, 473 S.W.3d 642, 645 n.5 (Mo. banc 2015)). "What constitutes a knowing or purposeful violation of the Sunshine Law is a question of law." *Laut*, 491 S.W.3d at 193.

"[A] purposeful violation occurs when the party acts with 'a conscious design, intent, or plan to violate the law and d[oes] so with awareness of the probable consequences.'" *Laut*, 491 S.W.3d at 198 (quoting *Strake*, 473 S.W.3d at 645). "Plaintiff must show that the conscious plan or scheme, the purpose of the conduct, was to violate the law." *Id.* at 199. "Purposeful conduct means more than actual knowledge." *Id.* "A purposeful violation involves proof of intent to defy the law or achieve further some purpose by violating the law." *Id.* at 200 (citing *Strake*, 473 S.W.3d at 646, and noting that the violation there was knowing and purposeful because the governmental body had actual knowledge of its obligations under the Sunshine Law yet chose not to disclose open records in an effort—i.e., "plan"—to avoid liability for breach of contract). "A public official's intentionally forestalling production of public records until the requester sues would be a purposeful violation of Chapter 610 and would be subject to a fine and reasonable attorney fees." *Buckner v. Burnett*, 908 S.W.2d 908, 911 (Mo. banc 1995).

"A knowing violation requires proof that the public governmental body had 'actual knowledge that [its] conduct violated a statutory provision.'" *Strake*, 473 S.W.3d at 645 (quoting *White v. City of Ladue*, 422 S.W.3d 439, 452 (Mo. App. E.D. 2013)); *see also Laut*, 491 S.W.3d at 198. "The court, therefore, must find that the defendant knew it was violating . . . the Sunshine Law for the statute to authorize a fine or penalty." *Laut*, 491 S.W.3d at 199. Thus, "a knowing violation requires knowledge of the violation and . . . a purposeful violation requires proof of a conscious plan or design to violate the statute." *Id.*

"Whether the conduct of [a governmental body] brings it within the scope of the statutory definitions of knowing or purposeful conduct is a question of fact." *Id.* at 196. However, there is no requirement that a governmental entity knew it was violating the law for this Court to find that a violation occurred; proof of knowledge and/or intent is necessary only for imposition of a

penalty, costs, and fees. *See Laut*, 491 S.W.3d at 200. If a knowing violation is found, a penalty (in an amount up to $1,000) is mandatory and an award of costs and reasonable attorneys' fees is discretionary with this Court. § 610.027.3. Upon finding that the violation was purposeful, however, penalty (in an amount up to $5,000), costs, and reasonable attorneys' fees are mandatory. § 610.027.4. "The court shall determine the amount of the penalty by taking into account the size of the jurisdiction, the seriousness of the offense, and whether the public governmental body or member of a public governmental body has violated sections 610.010 to 610.026 previously." § 610.027.3-.4.

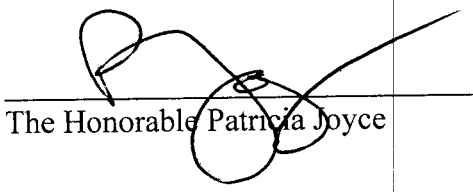
A trial court is in the best "'position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record.'" *White v. Dir. of Revenue*, 321 S.W.3d 298, 308–09 (Mo. banc 2010) (quoting *Essex Contracting, Inc. v. Jefferson Cty.*, 277 S.W.3d 647, 652 (Mo. banc 2009)). Additionally, this Court is "'free to believe any, all, or none of the evidence presented at trial.'" *Laut*, 491 S.W.3d at 197 (quoting *Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. banc 2014)). Furthermore, this Court can "draw all reasonable and legitimate inferences from the evidence presented before it, and base ultimate findings upon such reasonable inferences." *State ex rel. Eagleton v. Patrick*, 370 S.W.2d 254, 257 (Mo. 1963).

Based upon the evidence adduced at trial, and supported by the findings of fact, Court finds and concludes that Defendant knowingly and purposely violated the Sunshine Law.

IT IS THEREFORE ORDERED AND DECREED:

1. Defendant knowingly and purposely violated the Sunshine Law.
2. Defendant is ordered to pay a $2,500 civil penalty to Plaintiffs.
3. Defendant is further ordered to pay Plaintiffs' costs and reasonable attorneys' fees.

4. Within 14 days from the date of this judgment, the parties shall submit all materials related to their position regarding the amount of such award for the Court's consideration. This judgment shall be amended accordingly and, upon amendment, shall become final.



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The Honorable Patricia Joyce Date