

BEFORE THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

ACLU OF MISSOURI, et al.,)
 Plaintiffs,)
 vs.) Case No. 14AC-CC00458
MISSOURI DEPARTMENT OF)
CORRECTIONS,)
 Defendant.)

ORDER

The Court takes up the pending cause for ruling, having considered the evidence adduced and the arguments of counsel. Being duly advised in the premises, the Court enters its ruling.

At issue is whether or not the applications of persons to be witnesses for executions are open records. Plaintiffs requested disclosure of these records. Originally the Defendant produced some redacted records. Over the course of time, the Defendant produced more records with less redactions, but many were still redacted as of trial.

Several points are undisputed. First, the Missouri Department of Corrections (“Corrections”) is a public governmental body. Second, the records of Corrections at issue are therefore public records. Third, public records are presumed open to public inspection under the Sunshine Law unless otherwise provided by law.

The issue before the Court is whether or not otherwise provided by law applies. Two types of records are at issue. The first is a memorandum written and retained by Corrections which was admitted as being responsive to the request, but not provided on the basis of attorney client privilege. Other than reference to this memo, no further information was provided other than a description testified to by the General Counsel of Corrections. The Court finds that this evidence is sufficient to establish the existence of attorney-client privilege, justifying non-

disclosure. As opposed to *Laut*, this was a trial, not a motion for summary judgment.

The second type of records are the applications and related correspondence for the various persons who requested to witness an execution. There is no dispute that social security numbers are records that are not open to inspection by law and therefore may be properly redacted. As to the balance of the information in these records, Corrections asserts two basis for redaction. The “right to privacy” and “institutional security.”

There is no statute which establishes a “right to privacy” with respect to these records. Compare tax records and social security numbers which do have specific statutory protections. The case law relied upon by Corrections simply does not apply to the instant cause but it never reached the question. The type of information sought is released by the Department of Revenue Driver’s License Bureau on a daily basis and is available on line from Casenet to the general public. There is no privacy interest in records of personal information given to a government agency and Corrections may not rely on such a right of privacy to deny access to these records. While the Court is sympathetic to those individuals who testified, the legislature did not provide protections for this type of information.

Institutional security is a different question. Deputy Warden Kempker quite eloquently and clearly set forth how seemingly innocuous personal information of Corrections staff could be mis-used to undermine institutional security. The Court agrees. These documents which relate to institutional security because of the potential impact on the same. Other than name and employer, applications and other documents concerning current members of Corrections’ staff may be redacted. Former employees are more problematic, but the Court finds that institutional security could be compromised if employees knew that their personal information was not

protected after the termination of their employment. The personal information of former members of Corrections's staff may also be redacted as above. No evidence was adduced that institutional security would be impacted by the release of non-employee personal information. The Court notes that in their post-trial brief, Corrections asserts that these are "identifiable personnel records" and are closed pursuant to § 610.021(13) RSMo. This claim of justification, not included in the response to the Plaintiffs, is considered waived.

The Court finds, by a preponderance of the evidence, that the failure of Corrections to produce the records of non-employees, redacted for Social Security numbers, to be a knowing violation of the Sunshine Law. The reliance upon § 610.021 (14) RSMo, records protected from disclosure by law, for these records was mis-placed. The "right of privacy" appears to be an afterthought and is not present in the law as a statutory exception. The case law is clear that reliance on this subsection requires a statute which protects the information, not some "penumbral" right. Section 610.027.3 RSMo provides for consequences for such action.

The Court has considered this size of the jurisdiction (large), the seriousness of the offense (small) and the fact that Corrections has been found to have violated the Sunshine Law in the past. The Court has also considered the fact that the "institutional security" exception from § 217.075 RSMo has not been fully explored in the case law. A civil monetary penalty of \$500 is considered appropriate.

Again, the Court is sympathetic to those individuals who objected to the disclosure of their personal information. However, the Court finds that they have no protectable interest in that information and therefore have no standing.

Plaintiffs are also entitled to their costs and reasonable attorneys fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Defendants committed a knowing violation of the Sunshine Law as set forth above and are ordered to pay a civil monetary penalty of \$500 as well as the reasonable attorney fees and costs Plaintiffs incurred in prosecuting their prevailing claims.
2. Plaintiffs to submit their claim for attorney fees and costs within thirty (30) days and indicate whether or not they have been adjusted to reflect the fact that they did not prevail on all claims. Defendant to file any desired reply within fifteen (15) days thereafter.
3. Defendant provide to Plaintiffs, un-redacted except for social security numbers, each of the records in Plaintiff's Exhibit 5, excluding those of current and/or former employees of Corrections within thirty (30) days.
4. All other claims not expressly granted herein are deemed denied.
5. Compliance with this order is stayed pending final resolution of this case and it is the intent of this Court to enter its judgment consistent with the above, including attorneys fees, upon receipt of that information.
6. Case placed on 2-26-2016 law day for submission.

SO ORDERED this 31st day of December, 2015.


