

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS,

AMERICAN CIVIL LIBERTIES UNION
OF MISSOURI FOUNDATION

and

CHRISTOPHER S. MCDANIEL,

Plaintiffs,

v.

MISSOURI DEPARTMENT OF
CORRECTIONS,

Defendant.

Case No. _____

PETITION

Introduction

1. This is an action challenging Defendant's withholding of certain public records under § 610.010, RSMo, *et seq.* (the "Sunshine Law").
2. Public records laws promote the functioning of democracy by ensuring citizen access to government documents and facilitating voter oversight of government choices. That oversight function is particularly important on matters of great public interest and concern, including the practice of lethal injection. The State of Missouri committed itself to this goal of transparency by enacting the Sunshine Law in 1973. Nevertheless, Defendant is concealing information and keeping the public from fully understanding the workings of its government.

Jurisdiction and Venue

3. This Court has jurisdiction over this matter pursuant to § 610.010, RSMo, *et seq.*

4. This Court has jurisdiction to issue injunctions to enforce provisions of the Sunshine Law pursuant to § 610.030, RSMo, *et seq.*

5. Venue for this action is proper in this Court because the principal place of business of Missouri Department of Corrections is in Cole County.

Parties

6. Plaintiff Reporters Committee for Freedom of the Press (“Reporters Committee”) is a voluntary association located in and operating under the laws of the Commonwealth of Virginia. The Reporters Committee is a nationally focused non-profit organization in Arlington, Virginia, that works to protect the right to gather and distribute news; to keep government accountable by ensuring access to public records, meetings and courtrooms; and to preserve the principles of free speech and unfettered press.

7. Plaintiff American Civil Liberties Union of Missouri Foundation (“ACLU”) is a not-for-profit organization created and operating under the laws of the State of Missouri. The ACLU defends civil liberties and the principles of equality and justice in Missouri through its litigation, advocacy, and public education programs to protect and further civil liberties within Missouri.

8. Plaintiff Christopher S. McDaniel (“McDaniel”) is a citizen of the State of Missouri. McDaniel is a reporter for St. Louis Public Radio, and reports on a variety of issues including lethal injection procedures in Missouri.

9. Defendant Missouri Department of Corrections (“DOC”) is a governmental entity created by statutes of the State of Missouri and is a political subdivision of the State of Missouri.

Factual Basis for Claims

10. Defendant is a “[p]ublic governmental body” within the definition of § 610.010(4), RSMo, *et seq.*

11. Defendant has the responsibility for securing drugs to be used by the state in lethal injections.

12. Section 546.720(2), RSMo, grants the director of the DOC authority to choose an execution team, “consist[ing] 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.”

13. The DOC announced on October 22, 2013, that it had added a compounding pharmacy to its execution team.

14. The DOC has repeatedly refused to release information regarding the name of the pharmacy (or pharmacies) producing the drugs to be used in executing prisoners in Missouri and the name of the laboratory (or laboratories) testing those drugs.

15. On December 2, 2013, McDaniel submitted a public records request under § 610.010, RSMo, *et seq.* for a copy of “the license of the pharmacy that compounded the

pentobarbital for the Missouri Department of Corrections for use in its November 2013 execution.”

16. Defendant denied McDaniel’s request for public records on February 14, 2014, citing §§ 217.075 and 546.720.2, RSMo (addressing offender records and records relating to members of the execution team, respectively).

17. On January 27, 2014, McDaniel submitted three public records request under § 610.010, RSMo, *et seq.*, for copies of:

- A. Any and all records in the possession of the Department of Corrections (DOC), regardless of who produced them, regarding correspondence with the Apothecary Shoppe for the past 8 months ending today;
- B. Any and all records in the possession of the [DOC], regardless of who produced them, regarding payment for members of the execution team or testing laboratory over the last three months ending today; and
- C. Any and all records in the possession of the [DOC], regardless of who produced them, regarding midazolam and hydromorphone;

18. Defendant denied much of McDaniel’s requests on February 18 and 28, 2014, and March 17, 2014, citing §§ 610.021(14), 217.075 and 546.720.2, RSMo.

19. On February 7, 2014, the Reporters Committee submitted a public records request under § 610.010, RSMo, *et seq.* for copies of “records identifying the pharmacy (or pharmacies) producing drugs to be used in lethal injections in Missouri, and records identifying the laboratory (or laboratories) testing drugs to be used in lethal injections in Missouri.”

20. Defendant denied the Reporters Committee’s request for public records on February 14, 2014, citing §§ 217.075 and 546.720.2, RSMo.

21. On February 20, 2014, the ACLU submitted a public records request under § 610.010, RSMo, for copies of:

- A. All records indicating DOC's current inventory of pentobarbital;
- B. All records indicating the source of all pentobarbital in the DOC's current inventory;
- C. All records indicating the person or persons that authorized the purchase(s) of all pentobarbital in the DOC's current inventory;
- D. All records indicating DOC's current inventory of compounded pharmaceuticals;
- E. All records indicating the source of all compounded pharmaceuticals in the DOC's current inventory;
- F. All records indicating the person or persons that authorized the purchase(s) of all compounded pharmaceuticals in the DOC's current inventory;
- G. All phone records indicating calls between the DOC and any compounding pharmacy;
- H. All phone records indicating calls between the DOC and any pharmacist regarding the compounding of pharmaceuticals;
- I. All email messages between the DOC and any compounding pharmacy;
- J. All email message between the DOC and any pharmacist regarding the compounding of pharmaceuticals;
- K. All phone records indicating any calls within the DOC regarding the compounding of pharmaceuticals;
- L. All email messages within the DOC regarding the compounding of pharmaceuticals;
- M. All documents regarding the use of pentobarbital in executions; and
- N. All documents regarding the use of compounded pharmaceuticals in executions.

22. Defendant responded to the ACLU's request for public records on March 14, 2014, releasing some records and denying access to others, citing §§ 217.075, 546.720, and 610.021(1), RSMo (addressing offender records, records relating to members of the execution team, and records related to litigation respectively).

23. Also on February 20, 2014, McDaniel submitted a public records request under § 610.010, RSMo, for copies of “any and all records regarding the compounding pharmaceuticals for Michael Taylor’s execution, scheduled currently for Feb. 26, 2014.” The list of specific information sought was identical to that in the ACLU’s February 20 request.

24. On February 21, 2014, McDaniel requested three additional pieces of information related to Michael Taylor’s execution:

- A. All records indicating any federal licensure of the pharmacy;
- B. All records indicating any state licensure of the pharmacy; and
- C. All records indicating any licensure by any non-federal or non-state entity.

25. Defendant responded to McDaniel’s February requests for public records on March 14, 2014, releasing some records and denying access to others, citing §§ 217.075, 546.720, and 610.021(1), RSMo.

Violations of the Missouri Sunshine Law, § 610.023, RSMo.

26. The Sunshine Law, § 610.010, RSMo, *et seq.*, was intended to ensure broad public access to government records.

27. The legislature made clear its intent in enacting § 610.011(1), RSMo: “It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy.”

28. Section 546.720(2), RSMo, privileges from public release “any portion of a record that could identify a person as being a current or former member of an execution team.”

29. Section 546.720, RSMo, and similar laws in other states were designed to protect the personal privacy and security of individuals participating directly in executing prisoners.

30. In recent years there has been increased public scrutiny of execution procedures and capital punishment following several troubling executions and moves by pharmaceutical companies to restrict access to lethal drugs. The DOC, as administrator of the death penalty in Missouri, has been the target of much of this attention, particularly after information was released under Sunshine Laws that revealed an unlicensed pharmacy was providing the state drugs for use in lethal injections.

31. In the wake of this increased public scrutiny, DOC made public a new execution protocol in October 2013.

32. In its October 22, 2013, press release announcing a change in the execution protocol, DOC claimed that the compounding pharmacy used to produce the lethal injection drugs is a member of the execution team for the purposes of § 546.720, RSMo.

33. DOC’s October press release also claimed that the laboratory where execution drugs are tested is a member of the execution team.

34. Corporations are not “persons” for the purposes of personal privacy protections under freedom of information laws.

35. Neither the company producing drugs for lethal injection, nor the laboratory testing those drugs, “administer[s] lethal gas or lethal chemicals” or

“provide[s] direct support for the administration of lethal gas or lethal chemicals” as is required in order for someone to be a member of the execution team under Section 546.720(2), RSMo.

36. DOC is circumventing the legislature’s clear language and purpose in passing §§ 610.010 and 546.720, RSMo, by treating what should be a narrow personal privacy exemption to the Sunshine Law as a broad mechanism for withholding valuable information from the public.

37. Defendant’s failure to produce the requested records is a purposeful, or, in the alternate, knowing violation of the Sunshine Law.

Prayer for Relief

38. Plaintiffs request that this Court:
- A. Declare that the records sought by Plaintiffs are public records under the Sunshine Law and are not subject to any exception that would require, or permit, Defendant to choose to withhold the records or any portion thereof;
 - B. Enter an injunction requiring Defendant to provide Plaintiffs with copies of the records they requested;
 - C. Find that Defendant purposefully, or in the alternate, knowingly, violated the Sunshine Law;
 - D. Impose a civil penalty against Defendant pursuant to the Sunshine Law;
 - E. Award Plaintiffs attorneys’ fees and costs of litigation as authorized under the Sunshine Law; and

F. Grant to Plaintiffs such further relief as is just and proper.

WHEREFORE, the Plaintiffs pray this Court for its order and judgment as aforesaid.

Respectfully submitted,

/s/ Anthony E. Rothert

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