

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ALIZA COVER,

Petitioner,

vs.

IDAHO BOARD OF CORRECTION,
IDAHO DEPARTMENT OF
CORRECTION, JEFFREY RAY,

Respondents.

Case No. CV01-18-03877

ORDER GRANTING PEREMPTORY
WRIT OF MANDATE REQUIRING
DISCLOSURE OF SOME RECORDS

This matter came before the Court for a hearing on April 5, 2018 for the Idaho Board of Correction and the Idaho Department of Correction to show cause why the Court should not issue a Peremptory Writ of Mandate ordering the Board and/or the Department to disclose all records responsive to the Petitioner's Public Records Request attached to the Verified Petition for a Writ of Mandate filed February 27, 2018.

Apparances: Richie Eppink for Petitioner
 Jessica Kuehn for Respondents

The Petitioner filed her Verified Petition for a Writ of Mandate on February 27, 2018, which included a copy of the partial denial of her Public Records Request to the Idaho Department of Correction on September 25, 2017. The Petitioner requests a Writ of Mandamus by the District Court under Idaho Code § 7-302 to enforce the rights of inspection of public records afforded in the Idaho Public Records Act, Idaho Code §§ 74-101, et seq. The District Court can compel the production of such records under Idaho Code § 74-115(1). The parties stipulated to the show cause hearing and the Court entered an Alternative Writ of Mandate on March 7, 2018.

A. Records released prior to the show cause hearing

After the Court entered the Alternative Writ of Mandate and Order for Show Cause Hearing on March 7, 2018, the Respondents provided additional responsive records to the Petitioner. An actual copy of the additional responsive records or any

records that continued to be withheld were not produced for the Court. The Petitioner requests reasonable attorney fees and costs in the Petition. Although the Respondent argues the subsequent disclosure was because of an inadvertent mistake and not because of bad faith, the Court finds that the Petitioner is the prevailing party regarding this subsequent disclosure and that the Respondents' partial denial of any documents disclosed between March 7, 2018 and the hearing on April 5, 2018 was frivolously pursued. The standard for award of fees and costs is not whether the agency withholding the record acted in good faith or bad faith. The standard is whether there was a basis in law for denying public access to the documents. Although the Respondents claim the Public Records Request was ambiguous, the request was sufficient to put the Respondents on notice of the types of records she was seeking (except the addition of "etc." at the end of the request). The agency cannot put the burden on the requester to know exactly what documents exist or have already been publicly released; the agency retains the burden to show there is a statutory exemption for the release of such records and the Respondents failed to make this showing for the records released before the hearing. It is the agency's burden to perform a diligent search for any records which could be responsive to a Public Records Request. Therefore, the Petitioner must file a memorandum of fees and costs within fourteen days of receipt of this order for fees and costs incurred for the filing of the Petition and up to April 5, 2018. However, that memorandum should not include fees and costs for preparing any reply to the Respondent's response for the hearing or costs related to the hearing because the Respondents' claims of exemption from disclosure are addressed below. Respondent may then file any objection under the deadline in Idaho Rule of Civil Procedure 54(d) and (e).

B. The Hearing

Idaho Code § 74-116(1) permits an *in camera* review of any record in the Court's discretion. No records were submitted by the Respondent prior to or at the hearing for the Court to conduct an *in camera* review. Idaho Code § 74-116(2) states,

If the court finds that the public official's decision to refuse disclosure is not justified, it shall order the public official to make the requested disclosure. If the court determines that the public official was justified in refusing to make the requested record available, [the court] shall return

the item to the public official without disclosing its content and shall enter an order supporting the decision refusing disclosure. In any such action, the court shall award reasonable costs and attorney fees to the prevailing party or parties, if it finds that the request or refusal to provide records was frivolously pursued.

The Respondents filed the Affidavit of Jessica Kuehn on March 14, 2018 which specifically denies that any responsive records exist as to Cover's request for "drugs that have been or will be purchased/used for future executions (including identifying information about the drugs, drug labels, expiration dates, purchase orders/receipts; paperwork about how the drugs are stored)." Therefore, the Court cannot compel the production of items that do not exist.

However, the Kuehn Affidavit acknowledges that the Respondents continue to withhold documents and items related to Cover's request for records of, "The use of lethal injection in the Rhoades and Leavitt executions (including paperwork about where IDOC got its drugs from, and communications with drug suppliers or others regarding acquisition of drugs)." The Respondents assert this denial is justified because of rule (IDAPA 06.01.01.135.06 which is an administrative rule of the Idaho Board of Correction on Executions (hereinafter "Board Rule 135.06)) and statutes (Idaho Code §§ 74-104 and 74-105(4)(a)).

Board Rule 135.06 states,

The Department will not disclose (under any circumstance) the identity of the onsite physician; or staff, contractors, consultants, or volunteers serving on escort or medical teams; nor will the Department disclose any other information wherein the disclosure of such information could jeopardize the Department's ability to carry out an execution.

Idaho Code § 74-104 exempts from disclosure, "(1) Any public record exempt from disclosure by federal or state law or federal regulations to the extent specifically provided for by such law or regulation" and also exempts records in court files of judicial proceedings, if disclosure is prohibited by rules adopted by the Idaho Supreme Court, but only to the extent that confidentiality is provided under such rules.

Idaho Code 74-105(4)(a) exempts specific records of the Department of Correction from disclosure including: ¹

- (i) Records of which the public interest in confidentiality, public safety, security and habilitation clearly outweighs the public interest in disclosure as identified pursuant to the authority of the Idaho board of correction under section [20-212](#), Idaho Code;
- (ii) Records that contain any identifying information, or any information that would lead to the identification of any victims or witnesses;

The Court reads the Board Rule and statutes cited as protecting three different types of information: 1) the identities of specific persons involved in executions, 2) court records exempt from disclosure; and 3) other information protected by federal or state law.

First, the Board Rule protects from disclosure the identity of the onsite physician, staff, contractors, consultants, escort volunteers, or medical teams; and Idaho Code 74-105(4)(a)(ii) protects identifying information of victims or witnesses. “Identity” is not further defined in the Board Rule and “identifying information” is not further defined in the statute. “Identity” is defined in Webster’s Dictionary as “the distinguishing character ... of an individual.”² The Court takes this to mean the person’s name.³ To the extent any individual person’s name appears in denied documents, the Court finds disclosing the actual name of a person who was the onsite physician, a staff member, contractor, consultant, escort volunteer, medical team member, or victim or witness to the crime, for the Leavitt or Rhoades executions is exempt from disclosure pursuant to Idaho Code § 74-104(1) and Board Rule 135.06. Based upon the Corrected Affidavit of Jeff Zmuda, the Court finds the Respondents have shown good cause in its significant concern for

¹ The Petitioner’s identity is irrelevant to a public records request except to the extent I.C. § 74-105(4)(a)(v) exempts disclosure of certain records to another prisoner or probationer. There is nothing in the record to indicate the Petitioner is in prison or on probation so the Court will not further discuss this statutory exemption. Also, since the request relates to executions, the Court will not further address I.C. § 74-105(4)(a)(iv) which pertains to presentence investigations records. Also, there is nothing in the record that indicates the records request related to the Leavitt and Rhoades executions asks for future transportation records of a prisoner so I.C. § 74-105(4)(a)(iii) is also not further addressed.

² Merriam-Webster online dictionary, accessed at <https://www.merriam-webster.com/dictionary/identity> on May 12, 2018.

³ The current standard operating procedure for executions is available to the public on the IDOC website and includes detailed descriptions of roles in executions by job titles. Since this information is publicly available, any interest in a person of having their job title remain confidential is already outweighed by the public interest since the information by job title is already in the public domain.

the personal safety and security, at work and in the community, for those persons and finds a denial of release of individuals' names justified. The public's interest in knowing their names is not outweighed by the concerns for these individuals' safety and security. Therefore, the Court will not require disclosure of the names of any onsite physician, staff, contractor, consultant, escort volunteer, medical team member, victim, or witness appearing in any denied records. To the extent the Court enters any order releasing any records, these names must be redacted.

The second category of information specifically denied in the record is an IDOC Execution Chemical Inventory Form that notes the name, quantity, description, chain of custody, and disposition of drugs used in the Leavitt execution. While Respondents argued that certain documents denied were only previously disclosed in another court case pursuant to a subpoena, neither party addressed whether those documents ultimately became part of the public court file, were sealed in the court file, or were subject to a protection order if provided in discovery. Apparently, these documents were released by IDOC in March 2017 in response to a subpoena issued in some unidentified case. Neither party identified whether there was a protection order in that case that would exempt the information from disclosure or redisclosure, or whether the information was sealed in the court file, making it "confidential" information under Idaho Supreme Court rules and Idaho Code § 74-104. If the information was subject to a protection order or sealed in a court file, the Respondent must submit the documents to the Court for an *in camera* review along with the protection order or order sealing such information in the Court file to support its claim of exemption.

Absent Respondents' *in camera* showing of an order sealing such records or a court's protection order, the Court further considers the release of such records under the third category of information in Board Rule 135.06 is "any" information which "could" jeopardize the Department's ability to carry out an execution and in Idaho Code 74-105(4)(a)(i) which exempts specific records of the Department of Correction from disclosure including records where the public interest in confidentiality, public safety, security and habilitation clearly outweighs the public interest in disclosure as identified through the Board of Correction's rulemaking authority bestowed in Idaho

Code § 20-212. This case does not involve records of habilitation since it involves executions.

In the Zmuda Affidavit, Mr. Zmuda testifies that he is currently the Deputy Director of IDOC and has been involved in preparing for and completing death penalty executions during his 30-year career with IDOC. Paragraph 5 states, “In my experience, disclosing the identity of the source of a lethal injection chemical and the nature of that chemical would jeopardize the Department’s ability to carry out an execution. Disclosing this information is likely to subject lethal injection chemical sources to significant harassment and pressure, leading to lethal injection chemicals becoming unavailable from those sources.” If such chemicals became unavailable, is it a threat to public safety or security? No. The Idaho Department of Corrections website lists nine people on death row in Idaho received at the Idaho Maximum Security Institution between 1983 and 2017. If all lethal injection chemicals are unavailable when an execution is scheduled, then such unavailability would not cause an inmate’s release from prison. Most states wait for different chemicals to become available while some have adopted alternative forms of execution such as firing squad or electric chair. The Court is not aware of any who just release death row inmates into the community. Therefore, the public interest in public safety and security are not endangered if chemicals become unavailable in the future.

So, in reading Mr. Zmuda’s affidavit in conjunction with the statutes and board rule cited and the Kuehn affidavit, the Respondents have withheld the identity of sources of lethal injection chemical(s) and the nature of that (those) chemical(s) used in the Leavitt and Rhoades executions on the basis of confidentiality. The Respondents cannot justify withholding this information because it would jeopardize the Leavitt or Rhoades executions since both have already occurred. Therefore, the Court interprets Mr. Zmuda’s affidavit as saying that not keeping the identity of the source and nature of the lethal injection chemical(s) used in the Rhoades execution in 2011 and the Leavitt execution in 2012 confidential would jeopardize the Department’s ability to carry out future execution(s) of death row inmates. Paragraph 9 of the Zmuda affidavit states, “In my experience and knowledge, sources in various states have refused to supply lethal injection chemicals to correctional facilities due to external pressures and public

knowledge that those individuals or entities were involved in supplying the lethal injection chemicals.”

The Petitioner’s reply cites news sources stating that U.S. companies stopped making sodium thiopental in very early 2011 in response to its use in lethal injection executions, other foreign producers stopped legally exporting lethal injection chemicals to the United States around the same timeframe, and cites a 2016 article stating that all U.S. Food and Drug Administration-approved manufacturers of potential execution drugs (including pentobarbital) have blocked drug sales for the purpose of lethal injections by prisons. The reply states the Drug Enforcement Agency was seizing sodium thiopental supplies from states and cites a source noting “DEA seizures in Alabama, Arkansas, Georgia, Kentucky, South Carolina, and Tennessee” in 2011.⁴ This document doesn’t actually say anything about “DEA seizures” and only says these states “received letters in April 2012 from the FDA requesting that they turn over their foreign-sourced lethal injection drugs, in accordance with the U.S. District Court ruling in *Beatty v. FDA* (Lincoln Journal Star, 4/18/12).” In that March 29, 2012 decision in the U.S. District of Columbia District Court brought by a group of death row inmates, the District Court permanently enjoined the FDA from permitting entry of foreign-manufactured thiopental into interstate commerce in the United States. The second cited news source states the Food and Drug Administration seized illegal shipments of sodium thiopental ordered by Arizona and Texas in 2015. Still, from the sources cited by the Petitioner, the question is whether the Respondents have shown good cause for withholding the type of chemical(s) and source of those chemical(s) used in the Leavitt and Rhoades executions because of public interest in confidentiality of the information and release of that information jeopardizes the Respondents’ ability to conduct future lethal injection executions.

The Idaho Public Records Act ensures that government records are accessible to the public, has a “very broad scope,” and must be interpreted to favor access. *Dalton v. Idaho Dairy Products Commission*, 107 Idaho 6, 11, 684 P.2d 983, 988 (1984). There is a presumption that public records are open for public inspection under Idaho Code §

⁴ This appears in footnote 6 of the Reply which references pages 145 to 156 of that document.

74-102(1), and the Court must narrowly construe every exemption. *Federated Publications, Inc. v. Boise City*, 128 Idaho 459, 463, 914 P.2d 21, 25 (1996).

Based upon the evidence before the Court from the show cause hearing, the Respondents have failed to show good cause for denying the Petitioner's Public Records Request for any records of "The use of lethal injection in the Rhoades and Leavitt executions (including paperwork about where IDOC got its drugs from, and communications with drug suppliers or others regarding acquisition of drugs)" since the restriction of supply of drugs used in 2011 and 2012 was caused by the Food and Drug Administration, manufacturers of those drugs, and court decisions, and not because of this Public Records Request. The Petitioner cites the public's needs to know whether Idaho's drug suppliers have been sanctioned by regulators, whether the Respondents complied with state and federal laws and regulations, and the public interest in knowing the use of public funds as sufficient bases to require disclosure. The public's interest in disclosure of public information outweighs the Respondent's interest in the confidentiality of the sources and drugs used in 2011 and 2012 because of the stated reason that they may receive "significant harassment and pressure, leading to lethal injection chemicals becoming unavailable from those sources" in the future.

Therefore, the Court will issue a Peremptory Writ of Mandate requiring disclosure of any records (as defined in the Public Records Act) responsive to Petitioner's request for "The use of lethal injection in the Rhoades and Leavitt executions (including paperwork about where IDOC got its drugs from, and communications with drug suppliers or others regarding acquisition of drugs)," unless the records are submitted for an in camera review because they have been sealed by court order or a protection order; but the Respondents can redact individual name(s) of any onsite physician, staff, contractor, consultant, escort volunteer, medical team member, victim, or witness because this information is exempted by statute or rule.

ORDERED Signed: 5/14/2018 03:44 PM



Lynn Norton
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2018, I e-mailed (served) a true and correct copy of the above document to the following:

Richard Eppink

reppink@acluidaho.org

Jessica Kuehn

Jessica.kuehn@ag.idaho.gov

CHRISTOPHER D. RICH

Clerk of the Court



Deputy Clerk Signed: 5/14/2018 04:00 PM

