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Attorney for Petitioner

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

ALIZA COVER,

Petitioner,

v.

IDAHO BOARD OF
CORRECTION, IDAHO
DEPARTMENT OF
CORRECTION, and JEFFREY
R. RAY, Public Information
Officer,

Respondents.

Case No. CV01-18-03877

**VERIFIED PETITION
FOR A WRIT OF
MANDATE TO COMPEL
THE DISCLOSURE OF
PUBLIC RECORDS**

1. The people of Idaho have a right to know whether their government conducts safe and legal executions. There are no properly regulated sources for lethal injection drugs within the United States. Officials in several states have

been caught buying illegal execution drugs from questionable foreign sources. Idaho officials themselves have emailed suppliers in India, seeking lethal injection drugs for import here.

2. The petitioner, Aliza Cover, is an associate professor of law at the University of Idaho College of Law whose scholarship focuses on the death penalty. She teaches a course on the death penalty and has testified in the Idaho courts on the death penalty. Professor Cover asked the respondents, in a simple and straightforward public records request, for records about the drugs Idaho used in its two most recent executions and about the drugs it will use in future executions.

3. The respondents refused to disclose those records. They told Professor Cover that they would not disclose any information about the specific execution drugs it will use or has used—including purchase orders, receipts, source paperwork, and communications with suppliers.

4. Their refusal was not justified. It was arbitrary, because the respondents have disclosed to others some of the records that they withheld from Professor Cover. The respondents have even publicly filed some of the records in court proceedings. As for the rest of the withheld records, the respondents cannot meet their heavy burden to show that they fall within the Public Records Act exemption they have cited.

Petition for a Writ of Mandate

5. The Idaho Supreme Court has prescribed (in *Dalton v. Idaho Dairy Products Commission*, 107 Idaho 6, 9 (1984)) that mandamus under Idaho Code § 7-302 is an appropriate means to enforce the right to inspect public records. Idaho Code §§ 7-301 through 7-314 establish proceedings for Courts to issue writs of mandate. Rule 74 of the Idaho Rules of Civil Procedure specifies the procedures. A writ of mandate is a court order that compels the performance of an act which a party has the duty to perform. IRCP 74(a)(1). An alternative writ, in particular, is a writ that orders the party either to perform the act immediately (in this case, disclose the requested records) or else show cause before the court why the party has not performed it. IRCP 74(a)(3). When a petition for a writ of mandate asks that an alternative writ be issued first, the Court may issue the alternative writ based on an affidavit showing grounds. IRCP 74(b)(1).

6. Idaho's Public Records Act is found at Idaho Code §§ 74-101 through 74-126. The Act sets out the "sole remedy" for a person whose public records request is denied: proceedings in the district court to compel the public agency to disclose them. I.C. § 74-115(1). Consistent with the writ of mandate rules, Idaho Code § 74-116(1) instructs that whenever it appears that an agency has improperly withheld public records, the Court must order the official

withholding the records either to disclose the records or show cause why he should not. I.C. § 74-116(1).

7. On September 21, 2017, Professor Cover sent her public records request to the respondents. She asked for records and information about:

- The most current IDOC protocol for executions.
- The drugs that have been or will be purchased/used in future executions (including identifying information about the drugs; drug labels; expiration dates; purchase orders/receipts; paperwork about how the drugs are to be stored; etc.).
- 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).

8. The respondents only produced to Professor Cover the most current IDOC protocol for executions, along with execution scripts and logs from Idaho's two most recent executions, of Richard Leavitt on June 12, 2012, and Paul Ezra Rhoades on November 18, 2011. The respondents did not produce information about the drugs used in the past executions or available for use in the future executions: no drug labels, no expiration dates, no purchase orders, no receipts, no information about the storage of the drugs, no information about

where IDOC got its drugs from, and no communications with drug suppliers or others about acquiring the drugs.

12. Rather, the respondent Jeff Ray told Professor Cover that “[t]he attorney general’s office has advised me . . . that there are some records, like purchase orders and receipts for execution drugs as well as source paperwork and communications that I am prohibited from disclosing.” The respondents denied Professor Cover’s public records request in part, citing “Board Rule 135.06.”

13. “Board Rule 135.06” refers to Idaho Board of Correction Rule 135.06, which is found in the Idaho Administrative Code at IDAPA 06.01.01.135.06.

That rule states:

Non-Disclosure. 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.

14. Subsequent research in preparing this petition has revealed that, at the very least, the respondents use this rule to arbitrarily and capriciously release or withhold records about lethal injection drugs. Here are just a few examples:

- Email exchanges—just months before the Rhoades execution—between IDOC Warden Randy Blades and a company, Harris Pharma LLP, listing addresses in Kolkata and Mumbai, India, seeking

pentobarbital and sodium thiopental. On information and belief, IDOC disclosed copies of these emails in May 2017 in response to a public records request and is aware that the emails were publicly filed in federal court in *Creech v. Reinke*, D. Idaho case no. 1:12-cv-173.

- An affidavit of former IDOC Director Kevin Kempf testifying about which drug (pentobarbital) was used in the execution of Richard Leavitt in June 2012, when that drug was purchased, where the supplier of that drug was located, and whether IDOC had an exclusive contract with that supplier. On information and belief, the respondents disclosed that affidavit in 2016 to plaintiffs' counsel in a federal case, *First Amendment Coalition of Arizona v. Ryan*, D. Ariz. case no. 2:14-cv-1447, and in February 2017 to counsel in another federal case.
- An IDOC Execution Chemical Inventory form for the Richard Leavitt execution, noting the chemical name (pentobarbital), quantity, description, chain of custody, and disposition of the execution drug that respondents used to kill Mr. Leavitt. On information and belief, the respondents disclosed this document in March 2017 in response to a subpoena.

15. Not only do the respondents use Rule 135.06 to make arbitrary and capricious decisions about what and to whom they produce execution drug

information, but the Rule itself is also unreasonable, invalid, and contradicts the legislature's clear expressions.

16. Even if Rule 135.06 were reasonable and valid, it could not justify the respondents' partial denial of Professor Cover's request. Disclosing records about execution drugs that respondents have already disclosed to the public, including other public records requesters, obviously could not jeopardize the ability to carry out an execution. And disclosing any other records about execution drugs would not jeopardize the ability to carry out any lawful execution.

17. Accordingly, Professor Cover asks the Court to issue a peremptory writ of mandate ordering respondents to disclose the withheld records. She asks that the Court first issue an alternative writ, ordering respondents to disclose all of the records she requested or else show cause why they should not do so.

Petition, in the alternative, for Judicial Review

18. In the alternative, Professor Cover also seeks judicial review of the respondents' partial denial of her public records request, under Rule 84 of the Idaho Rules of Civil Procedure. Petitions for judicial review may be filed with or in the alternative to mandamus petitions. IRCP 84(a)(1).

19. Rule 84 specifies required content for judicial review petitions. IRCP 84(c). Here is the required information for this case:

- (1) The name of the agencies for which judicial review is sought are the Idaho Board of Correction and the Department of Correction.
- (2) The title of the district court to which the petition is taken is the District Court of the Fourth Judicial District, in and for the County of Ada.
- (3) The date of the action for which judicial review is sought is September 25, 2017. There does not seem to be a heading, case caption, or other designation of the agencies for this action. A copy of the “Notice of Action on Public Records Request” that the petitioner received is attached to this petition.
- (4) There was no hearing or oral presentation before the agencies.
- (5) The issues for judicial review that the petition intends to assert include:
 - Whether the respondents improperly denied Professor Cover’s public records request in part.
 - Whether Idaho Board of Correction Rule 135.06 is unreasonable or otherwise invalid.

- Whether Idaho Board of Correction Rule 135.06 justified respondents' partial denial of Professor Cover's public records request.

(6) No agency transcript is requested, unless respondents contend that there are any relevant proceedings that could be transcribed.

(7) Certification:

- a. Upon filing, service of the petition will be made upon the respondents through counsel.
- b. On information and belief, there is no agency transcript or record requiring preparation or any fee for preparation.

Prayer for relief

The petitioner respectfully asks the Court for the following relief:

1. An alternative writ of mandate or order that the respondents either disclose the withheld records to Professor Cover or else show cause why they should not do so.
2. A peremptory writ of mandate or order that the respondents disclose the withheld records to Professor Cover.
3. An order under Idaho Code § 74-116(1) that respondents disclose all of the public records that Professor Cover requested or show cause why they should not do so.

4. An order under Idaho Code § 74-116(2) that the respondents disclose the records that Professor Cover requested.

5. Attorneys fees and costs under the Idaho Public Records Act and all other applicable law, decision, or custom.

6. All other relief that the Court determines appropriate or that the interests of justice may require.

Respectfully submitted,

/s/ Richard Eppink
Richard Eppink

American Civil Liberties Union
of Idaho Foundation

Attorney for Petitioner

Dated: February 27, 2018

VERIFICATION

I, Aliza Cover, verify that I have read the allegations contained in this Petition and that, other than allegations made upon information and belief, the allegations are true to the best of my knowledge, and I believe that the allegations made upon information and belief are true.

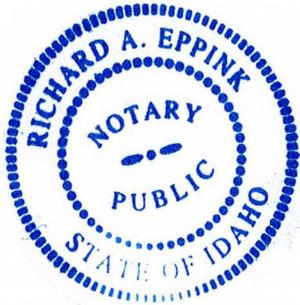
Dated: February 26, 2018



Aliza Cover

State of Idaho
County of Ada

Signed and sworn to before me on 2/26/2018.





Notary Public for Idaho
My commission expires: 2/24/2021

NOTICE OF ACTION ON PUBLIC RECORDS REQUEST

IDAHO DEPARTMENT OF CORRECTION
1299 N. Orchard, Suite 110
Boise, Idaho 83706

Name of Requestor: Aliza Plener Cover Date: Sept. 25, 2017
Address of Requestor: alizac@uidaho.edu

Dear Professor Cover:

The Idaho Department of Correction received your public records request on Sept. 21, 2017
(Date)

I. Request Granted

- The requested record is enclosed.
- You may inspect and photocopy the requested records during regular office hours by contacting

Name	Title	Telephone Number

II. Request Granted in Part and Denied in Part or Denied in its Entirety

Your request has been processed. However, your request has been

- Granted in part and denied in part
- Denied in its entirety

Pursuant to:

- | | | |
|--|--|--|
| <input type="checkbox"/> Idaho Code 74-104(1) | <input type="checkbox"/> Idaho Code 74-105(4)(a) | <input type="checkbox"/> Idaho Code 74-106(13) |
| <input type="checkbox"/> Idaho Code 74-104(2) | <input type="checkbox"/> Idaho Code 74-105(4)(b) | <input type="checkbox"/> Idaho Code 74-106(17) |
| <input type="checkbox"/> Idaho Code 74-105(1) | <input type="checkbox"/> Idaho Code 74-105(4)(c) | <input type="checkbox"/> Idaho Code 74-106(1) |
| <input type="checkbox"/> Idaho Code 74-108(5) | <input type="checkbox"/> Idaho Code 74-113(3)(e) | <input type="checkbox"/> IDAPA 06.01.01.108 |
| <input type="checkbox"/> Idaho Criminal Rule 32 | | <input type="checkbox"/> No record found |
| <input checked="" type="checkbox"/> <u>Board Rule 135.06</u> | | |

The statutory exemptions provided herein shall not constitute a waiver of any and all other legal bases or privileges which may also be applicable.

- If your request was denied in part or entirely, the Department had the opportunity to consult with, or the request was reviewed by, the deputy attorneys general who represent the Idaho Department of Correction.
- If your request was denied in part or entirely, you have the right to appeal the denial of your request by filing a petition in conformance with the provisions of the Idaho Public Records Law, Title 74, Chapter 1, Idaho Code. Your petition must be filed in the Fourth Judicial District Court of the State of Idaho within One Hundred Eighty (180) calendar days of the of the date of mailing of this notice.

III. Additional Comments:

Sincerely,
/signed/
Custodian/Designated Custodian Jeffrey F. Ray, Public Information Officer
Date: Sept. 25, 2017

cc: Central Records (offender records denied in its entirety or in part)