

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. CV01-18-3877

FINDINGS OF FACT,
CONCLUSIONS OF LAW

A Verified Petition for a Writ of Mandate to Compel the Disclosure of Public Records was filed by Aliza Cover on February 27, 2018.

A Court trial was held on January 28th through 30th, February 1st and 4th, 2019. On January 25, 2019, the parties filed Stipulated Facts and Exhibits.¹ The Court had previously entered an Amended Alternative Writ of Mandate requiring disclosure of records responsive to Petitioner's request that were in existence as of September 21, 2017.

Cover clarified her public records request during the course of these proceedings that she was not seeking disclosure of individual name(s) of any onsite physician, staff, contractor, consultant, escort volunteer, medical team member, victim, or witness; or telephone numbers redacted from IDOC records except the telephone numbers on Exhibit 40, pages 654 and 655.

The Petitioner moved under Rule 41(b) before she began her case-in-chief. The Court granted in part since the Court only had the opportunity to review in detail Exhibit 40, pages 1 through 1297. The Court then reconsidered its decision as to Exhibit 40, page 654 only, and the trial proceeded. To the extent the Court reserved ruling on Exhibit 40, pages 1298 through 2497, the Court denies the Rule 41(b) motion and will rather reach findings and conclusion on all of Exhibit 40 based upon the admissible

¹ Stipulated Facts and Exhibits, filed Jan. 25, 2019, hereinafter "Stipulated Fact."

evidence and the law, but still being mindful that the Respondents carry the burden of proof in this proceeding.

Based upon the evidence presented at trial and the arguments of counsel, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT²

1. Throughout this decision, the Idaho Board of Correction will be referenced as “IBOC” and the Idaho Department of Correction will be referenced as “IDOC.” Additionally, the Court will use acronyms defined in IDOC SOP 135.02.01.001 as Idaho Maximum Security Institution (IMSI), Idaho State Correctional Institution (ISCI), South Idaho Correctional Institution (SICI), South Boise Women’s Correctional Center (SBWCC), Correctional Alternative Placement Program (CAPP), and Idaho Correctional Center (ICC). All are IDOC prison facilities just south of Boise, Idaho.
2. Jeff Zmuda testified he has been employed by IDOC for 30 years. He has been the Deputy Director for the Idaho Department of Correction for the past two years and was in that role in September 2017 when Cover’s public records request was submitted. He has also held roles as the Chief of Prisons, Deputy Chief of Prisons, Deputy Administrator of Operations, Deputy Warden for Security at IMSI, Deputy Warden for Security at ISCI, and Associate Warden for ISCI.

I. The Rhoades and Leavitt Executions

3. Paul Ezra Rhoades was sentenced to death for the murders of two women. He was executed at the Idaho Maximum Security Institution on November 18, 2011.³
4. The parties stipulated that IDOC purchased the chemicals used to execute Rhoades with cash in an amount of \$10,000 or more.⁴
5. The unredacted record at Exhibit 40, page 655,⁵ identifies the source and other information about the lethal injection drugs used in the Rhoades execution.
6. The parties stipulated that IDOC made no promises to the source at page 655 that the source’s identity or other information would be kept confidential.⁶

² Any Finding of Fact that should be designated as a Conclusion of Law is hereby denominated as such.

³ Stipulated Fact, ¶ 34.

⁴ Stipulated Fact, ¶ 34.

⁵ This was described at trial as a DEA form or chain of custody for chemicals that has identifying information, addresses, dates related to supplier, specific information on the controlled substance, with a DEA registration number, signature, and a phone number.

7. Zmuda was employed with IDOC during 2011 and 2012 and was an incident commander for both executions. He was not involved in procuring lethal injection chemicals or vetting chemical sources for the 2011 or 2012 executions. He testified at the trial as a lay witness since he was not properly disclosed as an expert witness.
8. Zmuda testified he did not know if the source at page 655 was a pharmacy or a compounding pharmacy and did not know for certain whether that supplier was subject to any state regulation or oversight, or whether that source could provide drugs or chemicals for future executions.
9. Richard Leavitt was sentenced to death for first degree murder. He was executed at the Idaho Maximum Security Institution on June 12, 2012.⁷
10. The parties stipulated that IDOC purchased the chemicals used to execute Leavitt with cash in an amount of \$10,000 or more.⁸
11. The unredacted version of the record at Exhibit 40, page 654, is a source from which IDOC obtained a commitment to obtain lethal injection chemicals in the future after the Leavitt execution.⁹ Zmuda testified that the chemicals from that receipt were not actually obtained because no execution has taken place in Idaho since the Leavitt execution in 2012.
12. Zmuda's testimony at trial was that the source in page 654 can no longer provide lethal injection chemicals to IDOC because that source cannot comply with current regulations.
13. Although page 654 is not a record of drugs used in the Leavitt execution, Zmuda's testimony at trial was that page 654 identifies a compounding pharmacy that was the source of the lethal injection drugs used to execute Leavitt and was redacted under Board Rule 135. The parties stipulated that IDOC made no promises to the source in page 654 that the source's identity or other information would be kept confidential.¹⁰

⁶ Stipulated Fact, ¶ 34.

⁷ Stipulated Fact, ¶ 34.

⁸ Stipulated Fact, ¶ 34.

⁹ Zmuda's testimony at trial was that page 654 includes a company logo, name, address, e-mail, telephone number, fax number, and date; and also states receipt of a stated amount of money with a printed name and signature. In the lower right is a note written with the name of a family member of the company owner, relationship to owner, and a phone number.

¹⁰ Stipulated Fact, ¶ 34.

14. The evidence presented at trial was that at the time of the Rhoades and Leavitt executions, Brent Reinke was the Director of the Idaho Department of Correction; Randy Blades was the Warden at Idaho Maximum Security Institution responsible for overseeing both executions; Reinke, Blades, Kevin Kempf and Josh Tewalt were IDOC employees involved in obtaining lethal injection chemicals for these executions; and other members of IDOC's administrative team had roles in the execution.

15. There were media articles related to the Leavitt execution admitted in Exhibit 40 at a tab titled, "Media Articles."¹¹ One article¹² reported in May 2012 that:

The state execution team will administer a single, lethal dose of the surgical sedative pentobarbital during the scheduled June 12 execution of convicted murderer Richard Leavitt, said Brent Reinke, director of the Department of Corrections.

His decision marks a departure from Idaho's most recent execution in November, when a mixture of three chemicals, including pentobarbital, were used to kill Paul Ezra Rhoades in the state's first execution in 17 years.

Reinke said the single-dose injection complies with the newest version of the state's execution policy, which also allows the state the options of returning to the three-drug mixture later.

...

The switch was also driven in part by the difficulty of obtaining the other two drugs that were used on Rhoades.... Decisions by [Arizona, Ohio, Texas and several other states that had switched to the single drug in the prior year] were fueled by complications in getting other drugs, a preference for one-drug lethal injections and after the only U.S. manufacturer of execution drug sodium thiopental signaled it would stop production.

"I made the decision on availability of the drug and what we're seeing in other capital punishment states," Reinke said. "It's just easier to obtain one chemical over three."

He declined to say how much pentobarbital the agency has on hand for next month's execution or those likely to occur in the next several years.

¹¹ The BATES numbers are cut off at the bottom so the court cannot cite to specific page numbers related to these articles.

¹² Idaho Statesman, "Idaho opts for 1 drug only in execution policy," May 19, 2012, Ex 40, Media Articles, p. 27; same Associated Press news story also printed The Republic, "Idaho opts for 1 drug only in lethal injection process; joins other states using pentobarbital" at pp. 29-30.

(Ex 40, Media Articles, pp. 27, 29-30). Another article¹³ reported that the 9th Circuit of Appeals ordered Idaho prison officials to open the curtain immediately after Leavitt entered the execution chamber, enabling witnesses to see as executioners inserted IV catheters into Leavitt's body during Leavitt's execution. (Ex 40, Media Articles, p. 24). According to that article, "Witnesses said the execution was uneventful." (Id.) According to the article, "Reinke said the agency and its execution team made adjustments to comply with the federal court order. Execution team members donned masks and goggles to ensure their anonymity." (Id.)

16. The parties stipulated that Respondents have no records that chemicals used in the Rhoades or Leavitt executions were tested and none of those chemicals remain available for testing.¹⁴
17. Cover testified at trial that there is no evidence that the Rhoades or Leavitt executions were "botched"¹⁵ executions.
18. The IDOC standard operating procedure (protocol) is at a different website link than was provided to Cover in Exhibit 2. That document was not admitted as a trial exhibit. The Court takes judicial notice of Idaho Department of Correction Standard Operation Procedure 135.02.01.001, Execution Procedures (hereinafter "IDOC SOP 135.02.01.001").¹⁶
19. IDOC SOP 135.02.01.001 was in effect at the time of the Rhoades and Leavitt executions and states the IDOC has four options for lethal injection methods and the option used depends upon the availability of chemicals. It then states the director of IDOC has approved certain lethal injection chemicals and methods as described in the attached chemical charts. (IDOC SOP 135.02.01.001, App. A, p. 1). The attached charts show the chemicals as follows: Chart 1 includes Sodium Pentothal, Heparin/Saline, Pancuronium Bromide, and Potassium Chloride; Chart 2 shows

¹³ Idaho Statesman, "Idaho executes inmate for woman's killing in 1984," June 12, 2012, Ex 40, Media Articles, p. 24.

¹⁴ Stipulated Fact, ¶ 32.

¹⁵ The Court applied the dictionary meaning to "botched" which means "unsuccessful because of being poorly done: spoiled by mistakes." Merriam-Webster online dictionary, accessed at <https://www.merriam-webster.com/dictionary/botched> on March 1, 2019.

¹⁶ Only a confidential draft was admitted as an exhibit. Ex 40, beginning at p. 2343. Idaho Department of Correction Standard Operation Procedure 135.02.01.001, Execution Procedures, was adopted May 18, 1998 and last reviewed Jan. 6, 2012. IDOC SOP 135.02.01.001 was in effect at the time of the Rhoades and Leavitt executions.

Pentobarbital, Heparin/Saline, Pancuronium Bromide, and Potassium Chloride; Chart 3 shows Sodium Pentothal and Heparin/Saline; and Chart 4 shows Pentobarbital and Heparin/Saline. (Id. at App. A, pp. 2-5) The charts also show dosage amounts to be given during an execution. (Id.)

II. Other Requests Related to Executions, Lethal Injection

20. The parties stipulated that in the past years, the United States Food and Drug Administration (FDA) seized lethal injection execution drugs from Arizona and Texas state officials, and the United States Drug Enforcement Agency (DEA) seized execution drugs from Georgia and Alabama state officials.¹⁷
21. As lethal injection drugs have become increasingly scarce, another state was reported in the media as having obtained illegally imported drugs from Harris Pharma, a drug distributor in India. The parties stipulated in this trial that IDOC officials have emailed suppliers in India seeking lethal injection drugs for import to Idaho.¹⁸
22. In response to an October 2011 public records request asking for IDOC communications between May 1st and October 7th, 2011 regarding the procurement of lethal injection chemicals (Ex 40, p. 265), Zmuda was involved in providing responsive records. Krista L. Howard, Deputy Attorney General, Idaho Department of Correction, wrote the 2011 response letter and included an attachment described as an email between Warden Blades and Chris Harris of Harris Pharma LLC. (Id.)
23. A July 2015 public records request from Chris McDaniel requested communications between IDOC and Harris Pharma. (Ex 27, 2615–2618) That request was received by Ray and forwarded to Zmuda and other IDOC employees. Ultimately, IDOC responded by a Notice of Action on Public Records Request that “No Record Found” signed by “Custodian/Designated Custodian Jeffrey F. Ray, Public Information Officer Date: July 20, 2015.” (Ex 27, p. 2618) However, Zmuda admitted at trial that the 2011 email correspondence between Warden Blades and Harris Pharma (Ex 15, pp. 1-8, hereinafter “Harris Pharma email”) was in his office file drawer in 2015 but was not disclosed to Ray or to McDaniel in 2015.

¹⁷ Stipulated Fact, ¶ 33.

¹⁸ Stipulated Fact, ¶ 33.

24. Zmuda's testimony at trial was that Chris Harris or Harris Pharma did not provide any lethal injection drugs to IDOC.
25. There was no evidence at trial that any public records requests, other than Cover's, were being litigated before any District Court or on appeal.
26. Pursuant to IDOC SOP 135.02.01.001, the IMSI Warden is responsible for creating a permanent record of execution activities. (IDOC SOP 135.02.01.001, p. 3) Warden Blades was the IMSI Warden at the time of the Rhoades and Leavitt executions and is still an IDOC employee.
27. Between January 1, 2011, and September 21, 2017, Respondents responded to at least ten other public records requests seeking records regarding lethal injection drugs including five from the Berkeley Law Death Penalty Clinic around October 7, 2011, July 26, 2013, September 21, 2016 (Ex 25, 2548–2551), April 21, 2017 (Ex 23, 2547, 2552–2559), and September 8, 2017; two from Rebecca Boone of the Associated Press; one from Chris McDaniel of Buzzfeed News around July 15, 2015 (Ex 27, 2615–2618); one from Federal Defender Services of Idaho; and one from April Rohman. (Stipulated Fact, ¶ 25)
28. Because of the frequency of requests and after an extensive and detailed records request from the Berkeley Law Death Penalty Clinic in April 2017, Zmuda and Mabe created a packet of documents to be used to respond to public records requests regarding the Rhoades and Leavitt executions.
29. Zmuda testified that his duties in 2017 did not directly include responding to public records requests but he was "indirectly" involved. He testified that it was his belief that Mabe was primarily responsible for responding to requests related to executions and that Ray was a back up for her.
30. Zmuda testified he interacted frequently with Ray and Mabe but he did not supervise either.
31. Zmuda testified "we" had gathered records created in 2011 and 2012 related to the Rhoades and Leavitt executions in a filed cabinet located in Zmuda's current office. Zmuda testified that he had collected the records in 2011 and 2012 from members of the Administrative Team overseeing the executions, the IMSI Warden, and other deputy chiefs at that time including Tewalt. Zmuda was unsure if Kempf had been

asked for documents at that time but he believed Kempf was involved. Zmuda was also unsure if Reinke was involved in the 2011 or 2012 collection but Zmuda testified he did not ask Reinke for any documents then. Theo Lowe was the Executive Financial Officer for IDOC at the time of Rhoades's execution and a Project Manager for IDOC during the Leavitt execution. Lowe testified she provided financial documents in 2011.

32. Further, Zmuda testified that as additional records came in related to executions, "most of them" would make their way into Zmuda's file cabinet although other records were with members of the Administrative Team. This included documents Theo Lowe had previously provided.
33. Zmuda testified that he did not conduct any search to respond to the 2017 Berkeley public records request, only retrieved documents from his file cabinet. He testified that an additional search was not conducted because it did not occur to him that there would be other documents that were not in his files.
34. To create the packet, Zmuda testified that he took some, but not all, of the records from his filing cabinet that had been saved in 2011 and 2012 related to executions. Zmuda testified that he gave some of these records to Mabe in 2017.
35. Zmuda testified that he did not give her all of the records he had related to the executions. He testified he withheld expenditure logs (or confidential cash log) and warden's logs, to the best of his recollection. He testified these identify dates tied to activities "that could expose some operational problems and/or identities of team members...some...specifically identify team members' by name."
36. Mabe testified that she then contacted Kristina Schindele along with Warden Blades, Jeff Zmuda, Brett Phillips, and Randy Valley (all still IDOC employees in May 2017) to obtain additional responsive documents. Mabe testified that she believed she contacted all individuals who would likely possess materials related to the 2011 and 2012 executions.
37. Neither Mabe, Zmuda or Ray asked former Directors Brent Reinke or Kevin Kempf, or current Director Josh Tewalt for responsive records since they were not employed at IDOC in May 2017 when this compilation of records occurred. No one in IDOC had ever sent out an "all-IDOC staff" email requesting all employees search for

records related to executions. No other employees were asked in May 2017 if they had records related to the Rhoades or Leavitt executions.

38. In May 2017, over 600 pages of records related to the Rhoades and Leavitt executions were collected by Zmuda and Mabe. Zmuda and Mabe with the assistance of Deputy Attorney General Kristina Schindele, redacted some of these records.
39. Mabe testified that she relied on the IDOC Public Records Act manual, the Public Records Act, and the IDAPA Rules in making redactions to the general packet but she did not specify which statute or rule was the basis for any particular redaction.
40. Zmuda testified he referred to Board Rules and had a sheet with some information on it that he used to make redactions. His testimony at trial was that information was redacted if it was “possible” the information could jeopardize security or safety, or reveal identities of protected persons, or sources of drugs.
41. Zmuda first testified he was not involved in redacting pages 50 to 652 of Exhibit 40 and did not know who helped with those redactions. Later, on redirect examination, he testified that “a few of us and I would have participated in helping assist in the redaction of those, identifying items that needed to be redacted.”
42. These redacted records were referred to as the “general packet” at trial and the records were stored on Mabe’s computer at the time of Cover’s public records request.
43. The general packet was admitted as Exhibit 15 at trial and consists of 1,058 pages¹⁹ which includes as pages 1 through 9 the Harris Pharma email mentioned above. The parties stipulated that Exhibit 15, pages 1 through 857 were in the general packet on or before May 18, 2017.²⁰
44. Zmuda testified that he thought the general packet contained all relevant records and intended the general packet at Exhibit 15 would be provided to anyone who made a public records request for documents related to the 2011 and 2012 executions.

¹⁹ Respondents added materials to the general packet at different times and the parties stipulated that the dates on the tabs in admitted Exhibit 15 reflect the approximate date that materials were added to the general packet. Stipulated Fact, ¶ 23.

²⁰ Stipulated Fact, ¶ 23.

45. Zmuda testified he thought he had a conversation with Mabe about how to use the general packet. He testified, “Our intention was that that packet in its entirety could go out to a public records request related to the death penalty.”
46. Mabe testified that she thought the purpose of the general packet was for her to go through for future records request to see if records within it were responsive.
47. Ray was not involved in compiling the general packet. Ray relied upon Mabe’s and Zmuda’s review of the general packet to determine which records should be released to Cover.
48. After Cover’s September 21, 2017 public records request and before trial, Respondents received six additional public records requests seeking records regarding lethal injection drugs.²¹ Since Exhibits 16 through 21 were not admitted at trial, the Court did not consider these exhibits.

III. Petitioner’s Public Records Request

49. On September 21, 2017, Aliza Cover sent an email to Jeffrey Ray at the Idaho Department of Correction, seeking three categories of records: (1) “The most current IDOC protocol for executions,” (2) “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.),” and (3) “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).” (Ex 1²²) The parties stipulated this was a legitimate public records request.²³
50. Ray provided Cover with a web link to the most current IDOC protocol for executions on September 22, 2017. (Ex 2²⁴) There remained no dispute at trial that the protocol had been released in its entirety in a timely response to Cover.
51. The court finds Cover did not request any information about purchases of other items used in the Rhoades or Leavitt executions such as medical supplies...only

²¹ IDOC received and responded to the requests of Adanya Lustig, MuckRock staff reporter, around September 28, 2017, and to requests by Daniel Schlein around December 5, 2017, January 10, 2018, March 30, 2018, May 9, 2018, and September 28, 2018. Stipulated Fact, ¶ 25.

²² Stipulated Fact, ¶¶ 2 and 32.

²³ Stipulated Fact, ¶ 32.

²⁴ Stipulated Fact, ¶ 4.

drugs and drug suppliers. Therefore, Cover did not request information Zmuda testified was redacted at Exhibit 40, pages 1593, 1594, 1597-1598, and 1616-1617 identifying the supplier of IV lines, catheters, syringes, and other medical supplies because these were not records about drugs or drug suppliers.

52. *Disclosure of Idaho Department of Correction Records Under The Idaho Public Records Act* was IDOC's manual governing the disclosure of records under the Idaho Public Records Act in effect at all times relevant to Cover's public records request (Ex 32²⁵). It was adopted in January 2016. IDOC also had a policy regarding Public Access to Records in effect at all relevant times (Ex 33²⁶). It was adopted in 1991. Both the policy and manual list the Public Information Officer, among others, as official records custodians for IDOC. (Ex 32, p. 2585; Ex 33). The parties stipulated that Ray was the Public Information Officer and a designated records custodian for IDOC.²⁷ Other IDOC designated official custodians pursuant to Idaho Code § 74-101(3), the policy and the manual at the time of the Cover request were the Director, the Central Records Sentencing Supervisor, the Division Chiefs, and the Facility Heads. (Ex 32, p. 2585, Ex 33). "Division Chiefs" is not further defined. The manual also states, "Employees designated as official custodians of IDOC records may delegate duties and responsibilities of the custodians in order to more efficiently process public requests. IDAPA 06.01.01, Rules of the Board of Correction, Section 108, Idaho Public Records Act, subsection 03, Custodian of Records." (Ex 32, p. 2585).

53. Ammie Mabe, IDOC's Constituent Services Manager, testified she was delegated responsibility as an IDOC designated custodian of records although she could not remember exactly when she was designated or the designation was by former Director Kempf or former Director Atencio.

54. Mabe testified that she had never received any formal training on responding to public records requests or the Public Records Act, although she had read the Idaho's Office of the Attorney General's "Idaho Public Records Law Manual." She

²⁵ Stipulated Fact, ¶ 26.

²⁶ Stipulated Fact, ¶ 26.

²⁷ Stipulated Fact, ¶ 26.

testified that she also consults with Idaho Code chapter 74, the Public Records Act, when responding to requests.

55. Mabe responded to a Public Records Request from Jennifer Moreno and signed the Notice of Action on Public Records Request as “Custodian/Designated Custodian” on May 17, 2017. (Ex 23)
56. Ray has been IDOC’s Public Information Officer for thirteen years. He is one of IDOC’s designated official custodians of records²⁸ and is responsible for ensuring IDOC produces all responsive records to public records requests. In 2008 and 2010, Ray attended training by the Idaho Office of the Attorney General’s Office on how to properly respond to public records requests. He responds to fifteen to twenty public records requests each year.
57. Although Ray testified that it was not until his deposition in January 2019 that he became aware that he was actually official designated custodian for IDOC at the time of Cover’s request, the designation of IDOC’s Public Information Officer as a designated official custodian of records has been in IDOC’s policy since at least 1991.
58. On September 21, 2017, Ray informed IDOC’s Deputy Director of Prisons, Jeff Zmuda, of Cover’s public records request and asked Zmuda where to find responsive records. Zmuda directed Ray to ask Mabe for assistance in finding responsive records. He also confirmed to Cover his receipt of the request.²⁹
59. On September 22, 2017 (the first business day after receipt), Ray responded to Cover informing her that he anticipated having more records in a week when his colleagues returned from vacation (Ex 2³⁰) but that the Attorney General’s Office had advised him some of the records would not be disclosed (Ex 2). On September 25, 2017 (the second business day after receipt), Ray informed Cover that he expected to email all “disclosable” documents in response to her request by 5:00 p.m. on Thursday, September 28, 2017.
60. On September 22, 2017, Ray also forwarded Cover’s public request to Ammie Mabe, asking for records (Ex 201). Ray’s email states, “Remember that big request

²⁸ Stipulated Fact, ¶ 26.

²⁹ Stipulated Fact, ¶ 3.

³⁰ Stipulated Fact, ¶ 3.

we got awhile back? Did you give me copies of the response? If so, I'll find it and send it to this requester. If not, can you give me the records and I'll handle this response?"

61. On September 25, 2017, Mabe read Cover's public records request that had been sent by Ray. Mabe searched through the records on her computer for records she believed were responsive to Cover's request and determined that 49 of the 857 pages of the general packet were responsive. Mabe testified that she looked at each page of the general packet to determine whether each page was responsive to Ms. Cover's request.
62. Mabe testified that she did not consider the 2011 Harris Pharma email where Warden Blades inquired seeking lethal injection chemicals from Chris Harris to be responsive to Cover's request. The 2011 Harris Pharma e-mail begins with Warden Blades contacting Chris Harris on March 15, 2011 stating, "I am contacting you inquiring about the availability of Pentobarbital." (Ex 15, p. 8) The response included that Harris Pharma could only supply a large quantity of pentobarbital, but they could supply Sodium Thiopental in a minimum quantity of 500 vials, and they had recently supplied this to Nebraska and South Dakota. (Ex 15, p. 7) In follow up e-mails, Harris clarified that Harris Pharma was selling to Caligor Rx Inc, a U.S. company, that Harris represented could import the products legally to supply to IDOC. (Ex 15, pp. 2-3) The follow up e-mails continue until May 24, 2011. (Ex 15, p. 1)
63. Again, Rhoades was executed on November 18, 2011, and in a May 28, 2012 newspaper article, Director Reinke stated a mixture of three chemicals, including pentobarbital, were used to execute Rhoades. (Ex 40, Media Articles, pp. 27, 29-30) When combined with the publicly available IDOC SOP 135.02.01.001, Appendix A, in effect at the time of the Rhoades execution, information was available publicly that Rhoades was executed using a Chart 2 combination of Pentobarbital, Heparin/Saline, Pancuronium Bromide, and Potassium Chloride. When combined with the publicly available IDOC SOP 135.02.01.001, Appendix A, in effect at the time of the Leavitt execution, information was available publicly that Leavitt was executed using Chart 4 with Pentobarbital with Heparin/Saline.

64. Mabe also determined Command and General Staff meeting agendas mentioning procurement of lethal injection chemicals for the 2011 and 2012 executions (Ex 15, pp. 52 and 426) were not responsive.
65. Mabe did not send the entire general packet to Ray. Mabe emailed to Ray five digital files on September 25, 2017 (Ex 201) which contained the forty-nine pages that Mabe considered responsive (Ex 40, pp. 1-49). Mabe's e-mail to Ray stated, "Here are the documents we previously provided to Berkeley...." However, Mabe attached only five digital files when twenty-nine digital files had actually been released in response to the earlier Berkeley response. (Ex 201; Ex 23, p. 2555).³¹
66. On September 26, 2017, Ray emailed those five files from Mabe with a proposed Notice of Action in a digital file to Zmuda and Kristina Schindele, an Idaho Deputy Attorney General assigned to IDOC, for their review. (Ex 3³²)
67. Ray testified that he believed he had obtained the entire general packet to disclose to Cover but his testimony was that he did only a very cursory review of the records forwarded by Mabe, which included only looking at the file names. When asked why he did not open the files to review them, he testified, "that is not my thing...I have a lot going on and I didn't have occasion to, I know her to be a reliable person."
68. Ray also testified that he did not compile the records and was not involved in the redactions to those records. He also testified that he was never involved in finding or redacting any other responsive records after September 22, 2017.
69. It was Ray's perception from the email in Exhibit 3 that Zmuda and Schindele had approved sending those six files to Cover in response to her request. Schindele's response is redacted as attorney-client privileged information. At a minimum, there is not a record that they did not approve his response.
70. Zmuda testified that he did not compare the records being sent to Cover with the records in the general packet or to execution records he kept in his office.
71. On September 27, 2017, Ray then emailed Cover six digital files which included an IDOC Notice of Action on Public Records Request (Ex 5, hereinafter "partial denial")

³¹ Mabe's May 2017 response to the Berkeley request indicated, "Because our server cannot handle a large amount of data to be attached, I will have to send several emails to get all of the documents to you." (Ex 23, p. 2555) Exhibit 23 shows 29 digital files sent attached to four separate e-mails.

³² Stipulated Fact, ¶ 5.

explaining that her public records request was granted in part and denied in part pursuant to “Board Rule 135.06.”³³ A copy of the records that Ray provided to Cover on September 27, 2017 were admitted as Exhibit 4, page numbers 1 to 49.³⁴

72. The Notice of Action on Public Records Request had a box checked stating Cover’s request was, “Granted in part and denied in part” then said “Pursuant to:” and typed on one line was “Board Rule 135.06.” There were several other code section preprinted on the form which included different sections of Idaho Code 74-104, -105, 106, -108, -113, IDAPA 06.01.01.108, and Idaho Criminal Rule 32. None of those boxes were checked. The form then stated, “The statutory exemptions provided herein shall not constitute a waiver of any and all other legal bases or privileges which may also be applicable.” Then the box was checked before, “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 Correct.” The document is “/signed/” by “Custodian/Designated Custodian Jeffrey F. Ray, Public Information Officer.” (Ex 5)
73. The parties stipulated that Exhibit 4 contains all records produced before the trial to Cover and the dates on the tabs in that exhibit indicate the approximate date that IDOC produced the materials under each tab to Cover.³⁵
74. All of the e-mails exchanged between Ray and Cover between September 21st to 27th, 2017 are in Exhibit 2.³⁶
75. Respondents stipulated at trial that they did not conduct any additional search for records responsive to Cover’s request between receiving Cover’s request on September 21, 2017 and responding to her request on September 27, 2017.³⁷
76. Zmuda, Mabe, and Ray testified that no additional search was conducted because they believed a thorough search was conducted before the Berkeley response in May.
77. Respondents stipulated at trial that the September 27, 2017 response to Cover was incomplete.³⁸

³³ Stipulated Fact, ¶¶ 5 and 7.

³⁴ Stipulated Fact, ¶ 6.

³⁵ Stipulated Fact, ¶ 6.

³⁶ Stipulated Fact, ¶ 5.

³⁷ Stipulated Fact, ¶ 8.

78. Ray testified that IDOC has “hundreds, if not thousands, of file cabinets” and many records on computers. He also said IDOC maintains nine facilities, seven district offices, several other satellite offices, and has thousands of employees. He testified he did not know where to search. He goes to the custodian that he defined as “the person who has custody of the records” for that person to retrieve records.
79. In comparing the Berkeley April 2017 request to Cover’s September 2017 request, they both sought records related to the executions of Rhoades and Leavitt including information about drugs used and drug suppliers, and also about execution drugs obtained since to be used in future executions. (Ex 2, Ex 25) Zmuda testified that the requests were “similar, maybe not exactly,” and then later testified they were “very different” from each other, in the Court’s review of both requests, they overlap even though the Berkeley request is much more detailed and requests much more information.
80. The meeting minutes of the Idaho Board of Correction (IBOC) from 2011 and 2012 were admitted as Exhibit 38.³⁹ These minutes do not demonstrate that IBOC ever voted to adopt IBOC Board Rule 135.06 (the proper legal citation is Idaho Administrative Code (IDAPA) 06.01.01.135.06). The parties stipulated that IBOC never made an explicit determination that the public interest in confidentiality, public safety, security and habilitation clearly outweighs the public interest in disclosure prior to the promulgation of Board Rule 135.06.⁴⁰ The Notice of Proclamation of Rulemaking regarding Idaho Administrative Code (IDAPA) 06.01.01.135.06 is admitted as Exhibit 39.
81. After the September 27, 2017 response to Cover, the parties stipulated that Respondents added to the general packet pages 858 through 897 on about September 29, 2017; page 898 on about October 2, 2017; pages 899 through 996 on about October 19, 2017; and pages 997 through 1030 on about December 5, 2017.⁴¹

³⁸ Stipulated Fact, ¶ 8.
³⁹ Stipulated Fact, ¶ 31.
⁴⁰ Stipulated Fact, ¶ 31.
⁴¹ Stipulated Fact, ¶ 23.

82. On March 14, 2018 (the same day that Respondents filed their Response), the parties stipulated that Respondents produced to Cover's counsel 603 pages of new, previously undisclosed records. (Ex 4, pp. 50–653⁴²) These records were accompanied by a letter from Ray to Cover. (Ex 6⁴³) That letter was signed by Ray as "Public Information Officer" and identified I.C. §§ 74-104 and 74-105(4)(a) and IDAPA Rule 06.01.01.135 as the basis for its partial denial and redaction of those records. (Ex 6) These records were part of the Exhibit 15 general packet that existed in September 2017 but had been withheld from Cover by the Respondents.
83. Ray testified that he provided these additional documents but that he "just passed along what someone else sent." He testified he did not review them or ensure they were a complete response.
84. Mabe testified that after September 2017, she had no other involvement in redactions or responding to Cover's request.
85. The Court notes that although the Respondents released pages 50 to 653 of Exhibit 4 on March 14, 2018 to Cover, the general packet had actually grown to 1,030 pages by that time (Ex 15).
86. The parties stipulated that Respondents added to the Exhibit 15 general packet pages 1031 through 1036 on about March 30, 2018.⁴⁴
87. Cover submitted a public records request to the Idaho Department of Administration, Division of Purchasing and received a response on March 22, 2018 which included a letter from Valerie Bollinger and additional records admitted at trial as Exhibits 36 and 37.⁴⁵ Related to Exhibits 36 and 37 received from Division of Purchasing, these records show a payment from the Department of Correction to "Theo M Lowe," for "Execution Purchases" in the amount of \$10,372.25; and a payment of \$16,383 to "Kevin H Kempf," then the Deputy Director of IDOC, with a handwritten note, "execution." Theo Lowe testified that cash was withdrawn and used by IDOC employees to procure materials needed for executions. Lowe testified the financial records for the cash still flowed through the general ledger and were contained on a

⁴² Stipulated Fact, ¶¶ 10, 11 and 12.

⁴³ Stipulated Fact, ¶ 11.

⁴⁴ Stipulated Fact, ¶ 23.f.

⁴⁵ Stipulated Fact, ¶ 28.

standard financial report processed through the State Controller's Office. She testified there were no records created or maintained that left off any execution expenditures.

88. Lowe testified that although cash expenditures are unusual, they are not disallowed by state laws or regulations. Many cash expenditures have been discontinued with P-cards (purchase cards) are now used. Lowe's testimony about these accounts was more credible than the testimony of Joanne Sooter.⁴⁶ While the Court understands why the public would be concerned about Sooter's representation that there were "three sets of books" and large amounts of public monies expended in

⁴⁶ Lowe testified that cash was withdrawn and used by IDOC employees to procure materials needed for executions. Lowe testified that cash was used because expenses came up on nights or weekends when no one had a purchase card or because there was not a lot of time for purchases, but she could not say why purchases for executions needed to be made so fast.

Joanne Sooter, a former IDOC Purchasing Agent during the Rhoades and Leavitt executions, testified that she was concerned that Lowe had described to Sooter that IDOC "kept three sets of books regarding executions." Sooter's impression of Lowe's explanation was that the first set contained information produced in response to public records requests. A second set was released only if IDOC was pressured or ordered to reveal more information about the executions. Then, the third set of books contained the actual financial records for executions. Lowe did not recall giving Sooter this explanation. Sooter testified she never actually saw the three books.

Lowe testified that IDOC had three types of financial records regarding executions. Lowe testified there were 1) financial records related to the remodel of the F Block execution chamber which was a fixed asset file with a mandatory requirement by the State Controller for permanent retention; 2) financial records including receipts from the cash to which Warden Blades had access in a binder in Lowe's office for which an audit was conducted of those underlying financial records; and 3) then there were the audited records that just shows a summary of lump sums as paid to Lowe or Kempf in cash. IDOC maintains handwritten loose leaf paper where medical team members' names are listed to reflect they were paid in cash. That confidential cash log is still retained by IDOC and has not been provided to Cover in any form other than the summary referenced immediately above. The Court reviewed those records in camera.

Lowe testified the financial records for the cash still flowed through the general ledger and were contained on a standard financial report processed through the State Controller's Office. She testified there were no records created or maintained that left off any execution expenditures.

The Petitioner testified she was not familiar with IDOC financial practices and did not know IDOC's financial practices related to executions.

In weighing the credibility of Lowe and Sooter at trial, the Court finds Sooter's explanation of her concern about record keeping at IDOC related to executions was genuine. The evidence at trial was that cash-based payments for a state agency was very rare. However, Sooter was just in the office where such records were maintained and was not responsible for maintaining those records. Her testimony about the "three sets of books" where additional information was released if there was pressure or orders is not as credible an explanation as the detail of the three binders provided by Lowe.

Lowe's testimony differentiating between fixed assets and expense accounting records being maintained separately is credible. Her description of how the cash account for execution spending was maintained was also credible. The evidence at trial was that the accounts and expenditures were audited and the receipts for cash expenditures were available for Division of Purchasing audits. Therefore, even though cash accounting is rare, there was no credible evidence presented at trial that IDOC's record keeping or execution expenditures were illegal or violated any regulation.

cash, the Court has included its findings as a footnote because this is an action to compel disclosure of records only.

89. The Court held a Show Cause hearing on April 5, 2018 for Respondents to show cause why the Court should not order Respondents to disclose the records the petitioner requested.⁴⁷ The Court heard oral arguments and considered affidavits filed before the hearing. At that hearing, counsel for Respondents initially stated the Respondents had released all responsive records except the “Leavitt document” but later clarified they were still withholding additional records under Board Rule 135.06. Respondents also conceded that day that negligence or inadvertence was not a basis for withholding documents.
90. The parties stipulated that in 2017, IDOC received a federal subpoena regarding an F.R.C.P. 30(b)(6) deposition of the Idaho Department of Correction and seeking documents relating to executions. Counsel for IDOC sent a letter on March 3, 2017 in response (Ex 34) and produced records in response to that subpoena (Ex 35).⁴⁸
91. Following the show cause hearing, this Court had ordered the release of the document at Exhibit 35 unless the Respondents could show that it was subject to a protective order of the Court in that proceeding. The Respondents have not shown that Exhibit 35 was released subject to any protective order in that litigation.
92. Exhibit 35 is the “Leavitt document” referenced by counsel at the show cause hearing. It consists of two “Execution Chemical Inventory/Chain of Custody/Disposition Form” and an “Idaho Department of Correction Sequence of Chemical Form—Method 4” for Leavitt.
93. Zmuda testified that Exhibit 40, p. 2171, was Leavitt’s form and Zmuda testified that document was redacted because the redacted information “could identify a medical team leader.”
94. In the Court’s in camera review of Exhibit 40, p. 2171, the date of the document reveals it is the information of a volunteer during a training session and not anyone executed. Leavitt’s Sequence of Chemical Form is at Exhibit 35, page 2806.

⁴⁷ Stipulated Fact, ¶ 13.

⁴⁸ Stipulated Fact, ¶ 27.

95. On May 14, 2018, this Court entered an Order Granting Peremptory Writ of Mandate Requiring Disclosure of Some Records, with an accompanying Peremptory Writ of Mandate.⁴⁹ On September 17, 2018, the Court reconsidered and vacated the peremptory writ, substituted an Amended Alternative Writ of Mandate, and set the remaining issues for trial.⁵⁰
96. The parties stipulated that Respondents added to the Exhibit 15 general packet pages 1037 through 1045 on about May 16, 2018.⁵¹
97. After the May 14, 2018 Writ of Mandate, the Respondents continued to find records responsive to Cover's public records request.⁵²
98. According to Zmuda's testimony at trial, an IDOC employee⁵³ was reorganizing his cubicle at the IDOC Headquarters (Central Office) building in May 2018. Both Chad Page and Randy Valley had previously occupied this cubicle. Randy Valley served as the Emergency Preparedness Coordinator at the time of the Rhoades and Leavitt executions and is still employed with IDOC in another position. Kimmel found a box with records related to executions in it. Once found, these records were provided to Cover.
99. Zmuda testified he believed he had all execution-related documents before this box was found in May 2018.
100. Later, Mabe overheard Kimmel talking with Lowe about finding these execution-related records.
101. Mabe relayed the conversation to Zmuda and Zmuda requested Lowe provide any responsive documents. Lowe provided records different from those she provided in 2011 to Zmuda, and they were produced to Cover.
102. Another IDOC employee⁵⁴ was cleaning a vacant office next to Zmuda's in May 2018 and discovered the unredacted version of Exhibit 40, p. 655, in Tewalt's former desk drawer that lists the lethal injection chemical supplier for the Rhoades

⁴⁹ Stipulated Fact, ¶ 13.

⁵⁰ Memorandum Decision and Order Reconsidering Peremptory Writ of Mandate, filed Sep. 17, 2018; Amended Alternative Writ of Mandate, filed Sep. 17, 2018.

⁵¹ Stipulated Fact, ¶ 23.g.

⁵² Stipulated Fact, ¶ 13.

⁵³ Bret Kimmel

⁵⁴ Cheryl Iseri.

execution. (Ex 40, p. 655) A heavily redacted version of this record was provided to Cover around May 25, 2018.⁵⁵

103. Zmuda testified page 655 is a DEA form, a “chain of custody” type form for chemicals⁵⁶ that identifies the source and other information about the lethal injection drugs used in the Rhoades execution in 2011. Zmuda testified he did not know if this source was a pharmacy or a compounding pharmacy, whether it was subject to any state regulation or oversight, or whether that source could provide drugs or chemicals for future executions. Zmuda testified it was redacted under Board Rule 135.
104. A binder with execution medical team training documents was subsequently found in another vacant office.⁵⁷ These records had not previously been disclosed to Cover so they were then provided to Cover.
105. An IDOC employee⁵⁸ then searched through the director’s archive in a basement storage room in the Central Office described at trial as a “catchall for storage.” Zmuda testified some documents were found and were provided to Cover including the 2011 Reinke letter.
106. It appears that Director Reinke’s archives had been stored in that basement storage room since Reinke’s departure from IDOC employment and these archives were not searched for execution-related records until after the Court entered its May 2018 Writ of Mandate in this case.
107. Zmuda testified that the August 2011 Reinke letter (Ex 40, p. 2342) was found in the Director’s archives in the basement of the IDOC Central Office in summer of 2018.
108. That letter was disclosed to Cover around October 28, 2018⁵⁹ in its completely unredacted form. The letter written in August 2011 by Director Reinke to the

⁵⁵ Stipulated Fact, ¶¶ 14 and 15.

⁵⁶ Zmuda testified the form includes an address, dates related to the supplier, specific information to the chemicals, schedule of the chemicals, DEA registration number, signature, phone number, and handwritten phone number.

⁵⁷ Described as Shannon Cluney’s old desk.

⁵⁸ Also Iseri.

⁵⁹ Stipulated Fact, ¶¶ 14, 21. This was previously redacted as Ex 4, pp. 2342-2352 according to Stipulated Fact ¶ 29. Only one page is the letter. The rest is the confidential draft of the execution standard operating procedure for Idaho that Reinke references for the amount of the chemicals he is seeking to acquire.

California Department of Corrections and Rehabilitation (CDCR) seeking lethal injection chemicals for “a possible execution in late November of this year, with the possibility of three additional executions on the horizon for 2012 and 2013. Because of the difficulties we are facing, it is our hope that CDCR will consider allowing IDOC to purchase the amount of legal substances required in order to perform four executions.” (Ex 40, pp. 2342-2352) There is also a one-page outline used to draft that letter that was redacted (Ex 4, p. 2353⁶⁰) then completely unredacted in October 2018 (Ex 40, p. 2353).

109. It is clear that the August 2011 Reinke Letter existed in IDOC’s custody in October 2011, was responsive to a request for IDOC communications between May 1, 2011 and October 7, 2011 regarding the procurement of lethal injection chemicals, but was not produced in the October 2011 Public Records Act response written and signed by the Deputy Attorney General for the Idaho Department of Correction (Ex 40, p. 265) or in response to Cover’s request in 2017.
110. Zmuda testified Ashley Dowell, then IDOC Chief of Prisons, assisted with the review of documents and redactions prior to trial and noticed a reference to meeting minutes mentioning a shared drive that stored records related to executions.
111. Zmuda testified that he used the shared drive in 2011 and 2012, but he had subsequently forgotten about the drive. Zmuda testified he did not believe that shared drive was in active use in 2017. Zmuda testified that shared drive had never been searched for execution-related records before the Court entered the May 2018 Writ of Mandate. IT personnel then recovered records from the shared drive that were responsive to Cover’s request.
112. Zmuda then asked the Division of Purchasing to search for records related to prior executions. Division of Purchasing produced records that Zmuda did not previously have.
113. Zmuda testified he also found some records after the May 2018 Writ of Mandate in a file drawer in his own office that were not disclosed to Cover but were responsive to her request. The records were subsequently disclosed.

⁶⁰ Stipulated Fact, ¶ 30.

114. After the May 2018 Writ of Mandate entered, Respondents produced records responsive to Cover’s public records request, including:

May 25, 2018 (Ex 4, 654–950; Ex 7) records not provided to Cover in September 2017 or before the May Writ of Mandate.⁶¹

May 29, 2018 (Ex 4, 951–1196; Ex 8) including some records never previously produced to Cover and some duplicates.⁶²

June 1, 2018 (Ex 4, 1197–1542; Ex 9) including some records never previously produced to Cover and some duplicates.⁶³

June 12, 2018 records (Ex 4, 1543–1887; Ex 10) including some records never previously produced to Cover and some duplicates.⁶⁴

July 10, 2018 records (Ex 4, 1888–1951; Ex 11) records never previously produced to Cover.⁶⁵

115. Zmuda was not aware of any other searches for digital records to determine if IDOC held any other records responsive to Cover’s request.

116. On July 19, 2018, the Affidavit of Jeff Zmuda Regarding Documents was signed, sworn and filed in this case. The Court takes judicial notice of that affidavit. That affidavit detailed records found within IDOC in various locations and testified:

Our experience in this case and our difficulty in finding responsive documents, as well as finding documents in various offices in the possession of various employees, has indicated to us that we have previously failed to organize documents properly. We have found multiple copies of the same documents in various places. We have found many draft copies of a document that was later finalized. Following this experience, we have collected and safely stored all known documents related to the executions of inmates Rhoades and Leavitt.

117. Zmuda testified on cross-examination that he would emphasize the word “known” in the last sentence, because the affidavit testified IDOC had collected and safely stored *all known documents* related to the Rhoades and Leavitt executions.

118. On July 20, 2018 (the day after that affidavit was filed), Zmuda had Mabe send an e-mail on Zmuda’s behalf to all IDOC personnel requesting each IDOC employee check his or her files and archives for records regarding the Rhoades and Leavitt

⁶¹ Stipulated Fact, ¶¶ 14 and 15.

⁶² Stipulated Fact, ¶¶ 14 and 16.

⁶³ Stipulated Fact, ¶¶ 14 and 17.

⁶⁴ Stipulated Fact, ¶¶ 14 and 18.

⁶⁵ Stipulated Fact, ¶¶ 14 and 19.

executions in order to identify records responsive to Cover's September 2017 public records request. (Ex 12, p. 2056⁶⁶).

119. Zmuda received additional records in response to that email admitted at trial as pages 2069, and 3632 through 3658 of Exhibit 13.⁶⁷ These included records from the Warden of Idaho Correctional Institution Orofino (Ex 13, p. 2069); Sandy Jones, Executive Director of the Idaho Commission of Pardons and Parole (Ex 13, p. 3623-3635); Brett Phillips (Ex 13, pp. 3641-3644, 3650-3653); a box taken to "legal" by Bret [Kimmel] (Ex 13, pp. 3638-3639, 3645-3646); records given to Zmuda by Theo Lowe (Ex 13, pp. 3647-3648); records from Bob Morlan given to "Ashley" (Ex 13, p. 3649, 3654).
120. The parties stipulated that Respondents added to the Exhibit 15 general packet pages 1046 through 1058 on about September 28, 2018.⁶⁸
121. Respondents stipulate that they produced additional records to Cover on October 29, 2018 which included Exhibit 4, pages 2044, 2045, and 2340 through 2353 which had never previously been produced to Cover.⁶⁹ This included the August 2011 letter written by Director Reinke to the California Department of Corrections and Rehabilitation (CDCR) seeking lethal injection chemicals to perform up to four executions in 2011 and 2012. (Ex 40, pp. 2342-2352; Ex 4, p. 2353⁷⁰; Ex 40, p. 2353). The October 2018 response also included duplicates of previously disclosed records (Ex 4, 1952-2496; Ex 14⁷¹).
122. IDOC could not find its possession an unredacted version of Bates 656. It was unclear at trial when that document was redacted and when the unredacted version was destroyed.
123. In preparation for trial, Petitioner's counsel deposed Zmuda on December 20, 2018.⁷² During the deposition, Zmuda referred to a general packet of public records

⁶⁶ Stipulated Fact, ¶ 20.

⁶⁷ Stipulated Fact, ¶ 20.

⁶⁸ Stipulated Fact, ¶ 23.

⁶⁹ Stipulated Fact, ¶¶ 14, 21. This was previously redacted as Ex 4, pp. 2342-2352 according to Stipulated Fact ¶ 29. Only one page is the letter. The rest is the confidential draft of the execution standard operating procedure for Idaho that Reinke references for the amount of the chemicals he is seeking to acquire.

⁷⁰ Stipulated Fact, ¶ 30.

⁷¹ Stipulated Fact, ¶¶ 14 and 21.

⁷² Stipulated Fact, ¶ 22.

that IDOC had prepared to responding to public records requests about the death penalty. At Petitioner’s counsel’s request, Zmuda produced the general packet at the deposition. At the time of the deposition, the general packet had grown to be 1,058 pages in length.⁷³ The parties stipulated that as of December 20, 2018, the general packet included Bates numbers GP 344–389, 406–425, 831–838, and 863–898 in Exhibit 15 which existed at the time of Cover’s September 2017 request and response but had never been produced to Cover before the December 20, 2018 deposition.⁷⁴

124. On January 18, 2019, the Court entered an order compelling discovery finding that IDOC respondents had failed to completely search their records and failed to timely supplement by the deadline of December 10, 2018.⁷⁵ The Court compelled Respondents to respond to Request for Production 1 of Petitioner’s October 11, 2018 First Set of Written Discovery Requests which requested production of “all communications regarding the petitioner’s September 17, 2017, public records request, including communications regarding efforts to locate, retrieve, search for, compile, produce, or redact records in response to the petitioner’s September 21, 2017, public records request, the petition in this case, or any of the court orders or writs regarding that request.”

125. Then, on January 24, 2019—just before the trial began, Respondents provided a new version of previously-provided documents but with substantially fewer redactions.⁷⁶

126. Zmuda’s testimony was that this additional information was released after a line-by-line determination of whether it was “probable” the information could jeopardize security or safety, or reveal identities of protected persons, or sources of drugs.

127. The less redacted documents provided on January 24, 2019 were admitted at trial as Exhibit 40. To the extent this Court’s decision references a page number without an Exhibit number, such reference is to Exhibit 40. This decision skips the zeros at the beginning of the page numbers.

⁷³ Stipulated Fact, ¶ 23.

⁷⁴ Stipulated Fact, ¶ 24.

⁷⁵ Stipulated Fact, ¶ 35.

⁷⁶ Stipulated Fact, ¶ 36.

128. Altogether, Respondents produced a total of 3,554 pages of records in response to Cover's request, many partially redacted and many duplicates of one another.⁷⁷

129. In addition to the exempt information redacted in Exhibit 40, IDOC also did not disclose EKG strips taken of volunteers during execution training sessions and a confidential cash log which includes papers with execution team members' names and reflecting their cash payments for roles while execution team members but IDOC still retains those records.⁷⁸ Respondents mentioned on the first day of trial that they existed and the Court could inspect them in camera.

130. IDOC SOP 135.02.01.001 describes the roles and responsibilities of a variety of personnel involved in planning and performing an execution.

IV. Basis for Redacted and Withheld Records

a. Presentence Investigation Information

131. At trial, Zmuda testified that pages 2272 to 2275 has information redacted that was extracted from a presentence investigation (PSI), including medical information. Presentence information is exempt from disclosure pursuant to Idaho Court Administrative Rule 32, Idaho Criminal Rule 32(h), and I.C. § 74-105(4)(a)(iv). Additionally, page 720 is PSI information actually gathered during the course of a presentence investigation since it was received from a Technical Records Specialist who would have access to that information.

b. Security or safety plans under Board Rule 108

132. At trial, Zmuda testified that some information redacted from the records under Board Rule 108 included incident action plans (which address who is responsible for an assignment, resources, restriction and movement of prisoners, and the timeframes for those), demobilization plans (when staff were released from responsibilities), operational timelines (including execution planning and tracking timelines), radio and communication information, and site-specific operational and security plans used during executions and to respond to emergencies that would compromise security or safety of operations. Zmuda described execution plans at

⁷⁷ Stipulated Fact, ¶ 14.

⁷⁸ The standard operating procedure for executions states that all logs, the applicable sequence of chemical forms, the list of identifiers, and the EKG machine tape shall be submitted to the deputy attorney general who represents the IDOC for storage. IDOC SOP 135.02.01.001 at App. A, p. 10.

pages 778-834, and 1296 as site-specific operational plans that are a type of incident action plan that were redacted for safety or security reasons. He testified times to open and close the demonstrator lot were redacted from page 2046 pursuant to Board Rule 108.

133. Zmuda testified that pages 1332, 1334-1335, 2354 had information redacted for operational issues like who was assigned to perform specific tasks, dates, time frames, and phone numbers, and specific areas for staging (described as designated areas where staff report or gather to check in and then be assigned specific duties or responsibilities) or staffing (number of employees and assigned posts required to carry out a mission), and tactics used. He also testified that assignment lists, specifically the one at page 1459, from which the redacted information would disclose a very specific responsibility, area, or the number of staff assigned. He testified that generally other assignment lists were redacted consistently.

134. Zmuda testified that pages 2378-2384, and 2396-2397 were evacuation or lockdown plans with redacted information on exactly where staff would go and conduct themselves if an emergency required an evacuation, or staff could not evacuate a building. He testified generally that any document titled lockdown plan was redacted for the same reasons.

135. Pages 2378-2384, 2391-2397, 2400-2406 are duplicates of the same records.

136. Zmuda testified that radios are used by staff in managing prison facilities, for movement of staff and prisoners, to call for emergencies, and coordinate communications. Radio capabilities, frequencies, and numbers were redacted from page 701 and from other documents. Radio information is also redacted on pages 1093, 1114, 1242, 1391, 1444, 1633, 1754, and 1756-1758.

c. Assignment and deployment lists under Board Rule 108

137. Zmuda testified that deployment checklists at pages 1223 to 1234 are checklists of activities that occur prior to and during an execution used to identify when an activity would occur, who was assigned for that activity, and when it was completed. Zmuda testified that specific dates, the number of people assigned, and specific

locations were redacted from these documents. He testified generally that he believed other deployment checklists were redacted the same way.

138. Zmuda testified that a “department clocking report,” pages 1708-1714, was redacted to remove staff identifying information include their IDOC associate or ID number, dates and times for operational safety and security reasons.

d. After action plans under Board Rule 108

139. Zmuda testified that an after action corrected action plan, beginning at page 1532, was used to capture lessons learned and what could be performed better at future executions and had information redacted related to operations, staging and staffing. He testified generally multiple after action reports were redacted consistently.

140. Zmuda testified that information was redacted from a debrief documents at pages 1080-1086 because it was related to safety and security, operations, and included staffing, staging, security plans, and emergency response. He testified the redacted information would be consistent across all debrief documents.

141. Zmuda testified that “Control center notes after execution” at pages 1704-1707 were redacted to remove “very, very specific information about augmentation of staffing...and an operational aspect for ensuring security and safety.”

e. Permanent log book or activity logs under Board Rule 108

142. Zmuda described pages 835 to 950 and beyond as an IMSI permanent log for F Block where executions are performed that tracks activities and time frames, including people associated with a specific activity.

143. Zmuda described pages 835 to 950, and 1888-1951, to be activity logs. Zmuda testified activity logs have information related to safety and security including movements and the time they occurred, staging and staffing of the prison facility, along with medical or escort team members, that was redacted.⁷⁹

⁷⁹ IDOC SOP 135.02.01.001, p. 7, states, “The IDOC shall make every effort in the planning and preparation of an execution to ensure that the execution process: . . . Reasonably addresses the right of the offender to not suffer cruelly during the execution; Accommodates the public’s right to obtain certain information concerning the execution”

144. Exhibit 40, pages 740-743 are also the Operations Chief's Log with specific information related to times, staging, staffing, staffing augmentation, and emergency response of the prison facility redacted pursuant to Board Rule 108.

f. Meeting minutes and agendas

145. Zmuda testified that information was redacted from command and general staff meeting agendas, like the one at pages 1087-1088, then opined how that information "could be" detrimental, which evidence was stricken because it was an expert opinion and Zmuda was not properly disclosed as an expert. Zmuda testified generally that information that "could" impact operations, "could" compromise security or safety, such as staging, staffing, or emergency response, was redacted throughout all command and general staff meeting agendas.

146. Zmuda testified that agency rep meeting minutes (held at 9 a.m. on 10/10/11, a couple days before the Rhoades execution) (Ex 40, p. 1095-1096) had many redactions although the same document was previously released completely unredacted at pages 117-118 of Exhibit 40. Although page 234 of Exhibit 40 are minutes of a subsequent meeting on the same day (Command and General Staff meeting, 10/10/11 at 11 a.m.), it has the exact same first paragraph which was completely unredacted at page 117 but then has a redaction when the exact same first paragraph appears at page 234.

147. Zmuda testified that "we" knew that staff meeting minutes had been previously publicly released unredacted or mostly unredacted although the later versions were released to Cover in a more redacted form.

148. Zmuda later testified he did not intend to add redactions between the first and second review.

g. Staff informational records under Board Rule 108

149. Page 2046 has information on the time the "demonstration lots" open and how long they remain open which Zmuda testified was redacted under Rule 108.⁸⁰

⁸⁰ IDOC SOP 135.02.01.001, p. 7, states, "The IDOC shall make every effort in the planning and preparation of an execution to ensure that the execution process: . . . Provides opportunity for citizens to exercise their First Amendment rights to demonstrate for or against capital punishment in a lawful manner." That standard operating procedure also provides IDOC will take actions necessary to prevent the disruption of an execution or the safe and orderly operation of correctional facilities including for those

150. Zmuda testified that emails labeled as “situational briefing” at pages 2253-2259 were redacted to remove timeframes, where people would be staged, or the location of an activity. These pages include specific information of where team leaders for the executions will be at specific times immediately before the execution.

h. Maps and aerial views under Board Rule 108

151. Zmuda testified that maps which were aerial overviews of the south Boise complex were redacted in their entirety at pages 1731-1733 because the maps show shows “very specific locations” where staff was deployed to perform duties associated with the executions. He testified generally that multiple maps of the facility were redacted for the same reason.

152. IDOC SOP 135.02.01.001 is a publicly available document describing general timelines for an execution.⁸¹ This includes temporary flight restrictions surrounding the south Boise complex for a three nautical mile radius to 500 feet in altitude.⁸²

i. Support by other agencies

153. Zmuda described information redacted from page 776 under “agency support” as staging, staffing and operational information that discusses who is providing external security, which entity is doing what, and the number of communication devices required.

154. IDOC SOP 135.02.01.001, a publicly available document, states, “The IDOC will ensure that adequate law enforcement officers to include but not limited to the Boise Police Department, Ada County Sheriff’s Department, and/or Idaho State Police are present....”⁸³ Further, that document defines IDOC’s south Boise complex to include IMSI, ISCI, SICI, and SBWCC; that the SICI warden will control the south Boise complex during an execution to include establishing access and checkpoints; and also states SBWCC will provide staff to help the SICI warden provide security for the controlled perimeter zone.⁸⁴ The standard operating procedure requires the south

participating in unlawful demonstrations, or unlawfully attempting to disrupt, prevent or otherwise interfere with an execution. Id. at 8.

⁸¹ IDOC SOP 135.02.01.001, p. 12.

⁸² IDOC SOP 135.02.01.001, pp. 14 and 23.

⁸³ IDOC SOP 135.02.01.001, p. 8.

⁸⁴ IDOC SOP 135.02.01.001, p. 15.

Boise complex and the CAPP and ICC facilities to go on a secured status ordered not less than nine hours prior to an execution.⁸⁵

j. Medical, escort team identifying and training information under Rules 108 and 135

155. Zmuda testified that the arrival and departure times of the medical team members was redacted pursuant to Board Rules 108 and 135 to protect the identities of medical team members involved in the execution and protect them from harm. Zmuda testified this include redactions on pages 434 (first and second box), 662, and 693.

156. IDOC SOP 135.02.01.001 at pages 9 through 11 states the criteria for selection of a Medical Team for executions, that there is a Medical Team leader, and specifies team training requirements and intervals. The Administrative Team⁸⁶ oversees that training. The Medical Team Leader is responsible for ensuring serviceability of medical equipment including the EKG machines (to include instruments) and/or defibrillator, and the availability of graph paper; and ensure heart monitor lead lines are sufficient length.⁸⁷ Volunteers participate in this training.⁸⁸

157. Zmuda testified that there were training agendas or schedules for the medical or escort teams for executions which included the date, the timeframe of the training, the agenda for the training, that had safety and security information redacted or identities of those involved redacted. Zmuda testified dates were redacted 1) to protect the safety and security of those involved in the training, and 2) if it was

⁸⁵ IDOC SOP 135.02.01.001, p. 33, defined at p. 23.

⁸⁶ "Administrative Team" is defined as the deputy chiefs for the Prisons Bureau, the IMSI warden, and the backup to the IMSI warden. The Administrative Team selects the Escort Team and Medical Team members, identifies a licensed physician to be on site during the execution, and establishes dates for an annual training and periodic on-site rehearsals for Escort Team, Medical Team, and command staff involved in executions. IDOC SOP 135.02.01.001, pp. 2-3. The Administrative Team shall ensure that all Medical Team members understand the standard operating procedure for executions and are well trained in execution procedures. Id. at p. 10. The training and rehearsal requirements are at page 10 and require weekly training after receipt of a death warrant, require a minimum of four training sessions before participating in an execution with two of those being within forty-eight hours immediately prior to the execution. Id. at p. 10. This document states the names of the individuals serving on the escort and medical teams and the name of the on-site physician will be treated with the highest degree of confidentiality and provides for disciplinary action, including dismissal, of any staff member who discloses those identities. Id. at p. 8.

⁸⁷ IDOC SOP 135.02.01.001, p. 29.

⁸⁸ The standard operating procedure for executions states that Medical Team training must include placing IV catheters and an IV drip in at least two live volunteers within forty-eight hours of an execution, IDOC SOP 135.02.01.001 at p. 10.

known when and where they were training, there might be other means to reveal their identity. This included pages 703, 706, and 711.

158. Zmuda testified that information that “might” reveal the identities of execution team members to include escort or medical team members was redacted under Board Rule 135. This included:

Page 751 identifying a specific task to be performed by the medical team leader;
Pages 753-763, 2168, 2174, 2177, and in other places redacted because it had the medical team leader’s handwriting which Zmuda felt would protect the medical team leader’s identity. When asked, “And if anywhere throughout the documents handwriting appears on the medical team training documents, are those redactions done for the same reason?” and Zmuda responded, “Yes, I believe so.”

Page 1617 has a medical team member’s identity redacted;

Pages 1952-1965 and other pages like that have dates for medical team briefings redacted to protect the identity of medical team members and operational aspects of when they arrive on site and when they might leave.

Page 2171 is a “sequence of chemical form” from the execution standard operating procedure used for the administration of lethal chemicals during an execution. He testified it was redacted because it “could” identify a medical team leader. Exhibit 35 contains the unredacted sequence form. He testified generally that there are several sequence of chemical forms in Exhibit 40.

159. The Court finds that pages 1966-1967 were not retained in a non-redacted form by IDOC but there is no indication of when the redactions were made.

160. IDOC SOP 135.02.01.001 requires the Medical Team leader and the medical Team recorder each to sign the applicable sequence of chemical form which shall then be submitted to the deputy attorney general who represents the IDOC for storage. (App. A., p. 10)

k. Emergency response team information under Board Rule 108

161. Zmuda testified that CERT is the Correctional Emergency Response Team which is the tactical element in corrections, similar to a SWAT team. CRFT is the Correctional Fire Response Team on the south Boise complex that responds to fires.

162. IDOC SOP 135.02.01.001 at page 2 states the Deputy Chief of the Prisons Bureau is responsible for the activities of the CERT team during an execution⁸⁹ and that the CERT team is activated twenty-four to twelve hours prior to the execution.⁹⁰
163. Zmuda testified certain documents were redacted because they contained the number of CERT team members on site at a given time and the time associated with their arrival and departure; and the location of the CERT team, including the locations specified on pages 91, 94, 96, 153, 157, 230, 231, 244, 299, 570, 575, 578, 630, 635, 1285 were redacted as a plan that defines a site-specific security operation that disclosure would jeopardize facility security and public safety pursuant to Board Rule 108(4)(a)(iii) and as an emergency plan under Board Rule 108(4)(a)(ii) that disclosure would interfere with the secure and orderly conduct of IDOC operations.

I. HIPAA-related information

164. Zmuda also testified that anything that “might” be HIPAA-related information was redacted. Zmuda did not testify as to his understanding of HIPAA or how he determined if information was HIPAA-related.
165. The Court understands “HIPAA” to mean the Health Insurance Portability and Accountability Act of 1996 which is federal legislation that provides data privacy and security provisions for safeguarding medical information. However, no explanation was provided as to what information this law would apply to or how it related to any redacted information.
166. Zmuda testified that page 680 had “some information from a clinician kind of detailing a visit to the condemned and maybe at least part of it is a conversation that they had with him” that was mental health information of the condemned.
167. Zmuda said information in the lower left of page 735 “goes to a medical issue” of Leavitt.
168. Zmuda testified that page 737 on lines 9, 10, and 11 included a medical condition and aids of Leavitt but did not further testify of a basis for redaction of the information.

⁸⁹ IDOC SOP 135.02.01.001, p. 2.

⁹⁰ IDOC SOP 135.02.01.001, p. 31.

m. Personal identifying information or family information of the condemned

169. Zmuda testified he also redacted some personal identifying information including two birthdates on page 700, names and offender numbers of Leavitt's relatives in page 734, 737, how Leavitt communicated with his son from page 735;
170. He testified pages 2412, 2414-2416 includes information related to the family members of an executed inmate, activities that occurred with the family and that inmate, and a medical condition of the inmate's family member.
171. Zmuda testified page 776 included a contingency plan related to a medical condition of an inmate at SBWCC unrelated to the execution but that may need additional personnel for support.

n. Execution drugs, lot numbers, expiration dates

172. Related to the expiration date and lot numbers listed for three drugs in pages 46 and 48, Zmuda generally testified that the information was withheld pursuant to Board Rule 135.

Related to page 46, Zmuda testified:

Q. And turning to page 46, there's one redaction on this page. What is the nature of that redaction, the information?

A. It is an entry indicating the receipt of supplies and some identification numbers for supplies to be used in the execution.

Q. You indicated identification numbers. Is that identification numbers of the supplies or something else?

A. It appears to be identification numbers directly to those supplies.

Q. And what types of supplies are those?

A. Those are chemicals.

Q. And on what statute or rule did you base this particular redaction?

A. Rule 135.

Related to page 48, Zmuda testified:

Q. Mr. Zmuda, so turning your attention to Exhibit 40 again, looking at page 48?

A. 48?

Q. There are two redactions on this page, the first closest to the top, what is the nature of the information redacted in that redaction?

A. It is an entry noting receipt of supplies directly related to an execution and a location where they were received.

Q. Is the location information also in that first redaction?

A. Yes, it is.

Q. And then in the second block redaction, what is the nature of that information redacted?

A. Information related to the receipt of supplies directly related to an execution and some identifying information specific to those materials.

Q. And on what statute or rule did you rely for these redactions?

A. Board rule 135.

o. Harm

173. Zmuda testified that there has been no harm to any individuals participating in any executions Zmuda had been involved with and that he was not aware of any credible threat of harm to any individual who had participated in the Rhoades or Leavitt executions.

174. Between the time after Leavitt's execution in 2012 and Cover's public records request in 2017, Zmuda was involved in trying to obtain lethal injection chemicals or drugs on behalf of IDOC for an execution. No death penalty executions have actually occurred in Idaho since Leavitt's execution. Zmuda testified that he did not speak with any lethal injection chemical source between May 2012 and September 2017 that said it will not supply lethal injection chemicals if its identity was revealed to the public. It was during this timeframe the commitment for drugs in page 654 was acquired.

175. Zmuda testified that he was not involved in any search for lethal injection chemicals between May and September 2017.

176. Zmuda testified he has been involved in 2018 with procuring or attempting to procure lethal injection chemicals and has had one or two conversations with potential drug suppliers since May 2018.

177. Zmuda testified that no source had ever told him they were unwilling to provide lethal injection chemicals if it was public knowledge that they were the source.

178. Zmuda testified that there were no executions that IDOC was unable to conduct because IDOC lacked the required chemicals.

179. Zmuda testified that he had experienced some difficulty in obtaining sources for lethal injection chemicals in his personal experience trying to obtain them for IDOC.

p. Additional Information

180. Zmuda testified that he did not rely upon Board Rule 108.04.a, subsections (v), (vi), or (viii) as a basis for any redactions.

181. Exhibit 40, pages 10-23, has no information actually in the darkened boxes so do not contain withheld information.

182. Zmuda testified that duplicates in the record are because multiple people or multiple worksites retained a separate copy of the same record.

V. Petitioner's Evidence

183. Jeanne Woodford, Executive Director of Death Penalty Focus, testified as an expert for Petitioner. She worked for the California Department of Corrections for twenty-seven years, eventually becoming the Warden at San Quentin State Prison who carried out four executions.

184. She was appointed in 2004 as the Director of the California Department of Corrections.

185. She retired from government service in 2006 and now works for an organization with a mission of abolishing the death penalty.

186. Woodford testified about her experience in California when lethal injection executions were required by the courts to be conducted with witnesses from the time the lethal injection IV was inserted until the execution was complete.

187. She testified that some members of the execution team were concerned when their identities were revealed by leaving the curtain open from the time the IV was inserted throughout the execution because these members had family in the area that might find out about their involvement.

188. She testified that in her experience in California that security plans for executions, including staging, staffing, checkpoints, and posts were not disclosed to the public.

189. Dr. Stephen Silberman, an industrial organization economist, testified he had experience in evaluating monopolies, antitrust cases, price fixing, taxes, false advertising, and trade, although he had not audited or evaluated prisons, prison security or operations, executions, or lethal injection chemical suppliers.

190. He testified generally that there is a strong presumption that access to more information improves market performance or improves social welfare.

191. Silberman testified that obtaining the identity of a lethal injection drug supplier could be to boycott that source with a goal to have the business stop providing the drugs for that purpose.
192. He testified that a boycott of one source could have a chilling effect on all other sources that might provide lethal injection chemicals to departments of correction.
193. Still, Silberman felt disclosure of a drug supplier could also encourage a safer and more effective product or lead to information of more sources available for drugs. He testified withholding information may increase the likelihood the department would choose a less safe or effective supplier or reduce social welfare by having public see a botched execution.
194. Woodford testified that if the identity of a lethal injection chemical source were revealed to the public, it is her opinion that it would be possible departments of correction would not be able to obtain lethal injection chemicals, which could delay an execution or jeopardize the ability to carry out an execution.
195. Woodford testified that a lethal injection supplier for Texas had been made public and the only impact was personal protests or protests in writing.
196. Dr. Lynn Paulsen is a doctor of pharmacy, has taught managing diseases with drugs at Washington State University (WSU), and was an institutional pharmacist at hospitals including Kaiser Permanente and University of California hospitals. While at WSU, she also worked with the veterinary school to develop better practices for using pentobarbital from euthanizing large animals because pentobarbital becomes less effective over time when mixed with water, changing stability in animals.
197. With hospitals, she worked to meet or exceed pharmacy safety guidelines between 2011 and 2016. In this role, she inspected sixty-one pharmacies to evaluate reliable processes according to standards she had developed; finding twenty-three of those were unacceptable. She testified more reliable processes lead to more reliable outcomes for drugs produced by these pharmacies.
198. Paulsen testified that the FDA clarified regulations about compounding pharmacies in 2014 because of contamination incidents in 2012 and 2013.
199. She testified that a 503A pharmacy makes one product for a patient that is compounded for a specific patient that is regulated by state board of pharmacy rules

and is less frequently inspected. Any pharmacy can be a 503A pharmacy and there are more than 50,000 503A compounding pharmacies nationwide.

200. She testified that 503B pharmacies compound larger batches of a drug and these pharmacies are totally regulated by the FDA with more stringent regulations and more frequent inspections. Because of this regulatory scheme, there are less than 100 503B pharmacies.

201. Compounding pharmacies that mix solutions for injection, including lethal injection of drugs such as pentobarbital, must be sterile compounding pharmacies, and the Idaho Board of Pharmacy regulations default to USP 797 sterile standards for compounding pharmacies mixing solutions for injection.

202. Paulson testified that for lethal injection drugs, the EU prohibits sale of drugs manufactured in the EU to be used for lethal injection; commercial manufacturers also prohibit resale to prisons for use in lethal injection; so most prisons resort to using compounding pharmacies for lethal injection drugs.

203. Paulsen testified that lethal injection drugs typically come from 503A pharmacies.

204. Related to medications, most of the “really bad recalls” are of drugs from China and India.

205. Products from a compounding pharmacy typically have a “use by” date rather than an expiration date.

206. Once a compounding pharmacy mixes a drug, how the drug is stored by the pharmacy and then the purchaser could greatly impact potency. A product by use date will typically be twenty-four hours at room temperature or seventy-two hours if refrigerated.

207. Paulson testified that compounding pharmacies typically use analytical grade chemicals like those used in research and diagnostic labs. These chemicals are also used in anesthesia to induce 1) sedation, 2) excitation, then 3) anesthesia. If overused, the chemicals induce the fourth stage, death.

208. Paulson testified there can be a concern with potency of drugs from a compounding pharmacy if the potency is not labelled or if it is used after the “use by” date. The stability of a drug is how long it remains at the same potency as when mixed.

209. She stated the only way to test to see if a drug is stable is to test the drug (usually about a \$30,000 test performed once), and then test potency for each use.
210. She testified that 503A pharmacies are not required to test every product.
211. She testified that pentobarbital and thiopental are not very stable in water and degradation can depend on time, temperature, and light.
212. She testified a compounding pharmacist's ability to properly mix lethal injection drugs depends upon their skill set and some compounding pharmacies are good while others are not. She testified that there is a higher risk when mixing drugs if it is done infrequently since things can go wrong even if written down.
213. Paulson testified the options available if there is a drug shortage are 1) see if someone has a stockpile somewhere through contacts, 2) use alternative drugs, 3) outsource making the drug to a compounding pharmacy, or 4) make the drug internally.
214. She testified that the right personnel and equipment at a prison would permit a prison to mix their own lethal injection chemicals, although she had not heard of that happening.
215. Paulson testified that knowing a pharmacy's identity would permit someone to look for regulatory violations on a board of pharmacy or FDA website, or permit a person to request the master formula for ingredients and the beyond use date from the supplier.
216. However, she testified that "lot numbers" are not standardized across all pharmacies but most use a date, month and year, which would permit someone to figure out when a pharmacist mixed the chemical to help figure out the beyond use date.
217. Dr. Paulsen testified that knowing the identity of a lethal injection chemical source from 2011 or 2012 would provide "a clue" about potency but would not tell if the medication was stable or safe. It could lead to information about the master formula to allow one to learn more about the effectiveness of the chemicals used in the 2011 and 2012 executions.
218. The Petitioner is a tenured professor at the University of Idaho Law School and writes and researches constitutional criminal procedure including on lethal injection

and the death penalty, including the 8th Amendment's prohibition against cruel and unusual punishment and the evolving standard of decency related to capital punishment. She has also advocated for condemned individuals.

219. She testified that the lack of public information makes it hard to determine safety and efficacy, ensure executions are constitutional and humane, that government is acting ethically and legally, or speak publicly to legislators or in protest.

220. She testified that as lethal injection drugs became more difficult to obtain, states have turned to compounding pharmacies or India, changed protocols which could have unexpected results, or sought and received drugs from illegal or high risk sources. She cited Missouri and Texas as examples. A drug company sued Nevada last year and stayed that execution.

CONCLUSIONS OF LAW

This is not a case about whether the death penalty should be legal in Idaho.

The death penalty is legal in Idaho for First Degree Murder or First Degree Kidnapping, when a death penalty notice is filed, and certain requisite statutory aggravators are found.⁹¹

Upon issuance of a death warrant,⁹² IDOC is charged with the responsibility to carry out an execution pursuant to Idaho Code §§ 19-2716 and 19-2716A.⁹³

In Idaho, lethal injection has been the only method for infliction of the death penalty statutorily permitted since 2009.⁹⁴

Therefore, the death penalty in Idaho currently cannot be carried out without lethal injection drugs or chemicals, or a statutory change by the Idaho legislature.⁹⁵

⁹¹ Idaho Code §§ 18-4001, -4003, -4004, -4004A (murder), 18-4504, -4504A, -4505 (kidnapping); 19-2515, -2515A (sentences in capital cases).

⁹² Idaho Code §§ 19-2719 and 19-2719a.

⁹³ Idaho Code § 19-2716A was added to the Idaho Code July 1, 2012, which was after the Rhoades and Leavitt executions. This statute permits any pharmacy, prescriber, manufacturer, wholesale distributor or other entity authorized by law to possess controlled substance to distribute controlled substances to the director of the Department of Correction or his designees who this statute states, "shall not be subject to criminal or civil liability for the death of the condemned person." Additionally, that statute permits the director and his designees to obtain, possess, store and administer controlled substances and specifies he and his designees are exempt from most laws and regulations related to pharmacies. Idaho Code § 19-2716A; Idaho Session Laws, 2012 ch. 85, § 1, p. 242.

⁹⁴ Death by firing squad was removed from Idaho Code § 19-2716 in 2009. Idaho Session Laws, 2009 ch. 81, § 1, p. 228.

Glossip v. Gross details obstacles in the United States and internationally experienced in obtaining lethal injection drugs which the Supreme Court attributed to anti-death-penalty advocates pressuring pharmaceutical companies to refuse to supply the drugs used to carry out death sentences.⁹⁶ That Supreme Court opinion states pentobarbital was used in all of the forty-three executions carried out in the United States in 2012.⁹⁷ The opinion then describes the unavailability of pentobarbital attributed to lobbying by anti-death-penalty advocates which resulted in states acquiring and substituting other drugs to be used in their lethal injection protocols.⁹⁸

There was testimony at trial about whether the information from public records requested can or will be used to boycott, protest, lobby, research, or advocate related to the death penalty and lethal injections.

The law is clear that a requester's motive in obtaining public records is completely irrelevant in a Public Records Act proceeding. "Once a request for public records is made, the custodian of the records is to make no inquiry of the person making the request, except as explicitly provided in Idaho Code § 9-338(5)⁹⁹." *Wade v. Taylor*, 156 Idaho 91, 96, 320 P.3d 1250, 1255 (2014). In *Wade v. Taylor*, the district court considered the purpose of the requester which was error resulting in vacating the court's decision. The Idaho Supreme Court has required the same objective analysis of the Court in restricting its determination of the motive for the request.

⁹⁵ The Supreme Court of the United States stated in 2015, "Our decisions [on death penalty by lethal injection] have been animated in part by the recognition that because it is settled that capital punishment is constitutional, "[i]t necessarily follows that there must be a [constitutional] means of carrying it out." *Glossip v. Gross*, 135 S.Ct. 2726, 2732-33 (2015), citing *Baze v. Rees*, 553 U.S. 35, 47, 128 S.Ct. 1520 (2008). The Supreme Court continued, "And because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain. After all, while most humans wish to die a painless death, many do not have that good fortune. Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether." (citation omitted), *Glossip v. Gross*, 135 S.Ct. at 2733.

⁹⁶ *Glossip v. Gross*, 135 S.Ct. 2726, 2733 (2015).

⁹⁷ *Id.*, citing The Death Penalty Institute, Execution List 2012, online at 222.deathpenaltyinfo.org/execution-list-2012 (visited June 26, 2015). "And courts across the country have held that the use of pentobarbital in executions does not violate the Eighth Amendment." *Glossip v. Gross*, 135 S.Ct. at 2733, additional citations omitted.

⁹⁸ *Id.* at 2733-34. *Glossip v. Gross* affirmed the dismissal of a complaint by death row inmates challenging Oklahoma's use of midazolam in a lethal injection protocol under Eighth Amendment grounds. See generally *Id.*

⁹⁹ I.C. § 9-338 is the former version of I.C. § 74-102(5). I.C. §§ 9-338, et seq., was repealed by Idaho Session Laws 2015, ch. 140, §1, effective July 1, 2015, and replaced by the Idaho Public Records Act in I.C. § 74-102, et seq., effective July 1, 2015. Therefore, even though there is now a different statute number, the holding of *Wade v. Taylor* still applies in this case.

I. Respondents' First Affirmative Defense

The Idaho's Public Records Act can be found in Chapter 1, Title 74, Idaho Code Sections 101 through 126.

The parties stipulated, and the Court agrees, that Cover's September 21, 2017 email to Ray was request under the Public Records Act to inspect and copy records as required by I.C. § 74-117.¹⁰⁰

The Respondents issued the "Notice of Action on Public Records Request" (hereinafter "partial denial") citing only to "Board Rule 135.06," on September 27, 2017.¹⁰¹ The Respondents provided only forty-nine pages of records, some with redactions. The Respondents stipulated at trial that the September 27, 2017 response to Cover was incomplete.¹⁰²

The Court concludes as a matter of law, that the September 27, 2017 response to Cover was incomplete and that IDOC improperly withheld responsive documents. Therefore, the Court dismisses the Respondents' First Affirmative Defense that Petitioner failed to state a claim.¹⁰³

II. Respondents' Third Affirmative Defense

This case is not a challenge to Idaho's lethal injection protocol or even the Idaho Board of Correction's rulemaking authority.

On February 27, 2018, Cover filed a Petition for a Writ of Mandate before the District Court in the Fourth Judicial District seeking to compel disclosure of the records requested by Petitioner on September 21, 2017 but withheld by Respondents.¹⁰⁴ The Petition clearly only states a claim under the Idaho Public Records Act, Idaho Code §§ 74-101, et seq.

¹⁰⁰ A public records request can be submitted by electronic mail, I.C. § 74-102(4), and a response may be in an electronic form as well, I.C. § 74-102(15).

¹⁰¹ Under I.C. § 74-103(1), the Respondents had three working days from receipt of Cover's request to produce or deny the records, unless Respondents determined up to 10 working days longer was necessary and notified petitioner in writing of that determination. The Respondents notified Cover in writing that they needed until September 28, 2017.

¹⁰² Stipulated Fact, ¶ 8.

¹⁰³ Amended Response/Answer to Petitioner's Verified Petition for Writ of Mandate, filed Oct. 15, 2018, p. 6.

¹⁰⁴ Stipulated Fact, ¶ 9; Verified Petition for a Writ of Mandate to Compel the Disclosure of Public Records, filed Feb. 27, 2018 ("Petition").

Therefore, the only question before this Court is whether IDOC properly withheld and redacted records provided to the Petitioner pursuant to her Public Records Act request made September 21, 2017.

Respondents' Third Affirmative Defense is that this is a Public Records Act proceeding under I.C. § 74-115 is not the proper forum to challenge the rulemaking authority of IBOC or Board Rules 108 and 135.¹⁰⁵

To the extent the rulemaking authority of the IBOC or the validity of Board Rules 108 and 135 is relevant to the Second Affirmative Defense, it is discussed below.

The Court finds the Respondents met their burden of proof that this is a proceeding under Idaho Code §§ 74-101, et seq., which limits the remedies available to this Court. The Court finds for the Respondents on the Third Affirmative Defense.

III. Respondents' Second Affirmative Defense

Petitioner clarified in this litigation that she was not pursuing the release of telephone numbers (except if on pages 654 or 655 of Exhibit 40), or records identifying on-site physician or staff, contractors, consultants, and volunteers serving on an escort or medical team. The Petitioner narrowed her request.

The Court finds these pages contain names which Cover stated she was not requesting: Exhibit 40, pages 25, 40, 43-44, and 49, 661, 661,669,677,679, 681, 684, 686, 689, 694, 696-697, 699, 702, 703, 706, 711, 713, 718, 745, 1599, 1614, 1627, 1653, 2407-2408, 2418, and 2477. Activity logs at Exhibit 40, pages 835-1079, and 1888-1951 also have names redacted.

The Court finds these pages contain telephone numbers which Cover stated she was not requesting: Exhibit 40, pages 75, 81, 116, 129, 130, 177, 183, 190, 193, 236-237, 239, 275, 277, 280, 281, 338-339, 354, 356, 359, 360, 417-418, 501, 509, 512, 514, 518, 521, 587, 602-604, 625, 629, 631, 632, 636-637, 676, 679, 684, 710, 714, 1089-1090, 1126, 1132, 1268, 1274, 1288-1290, 1339, 1403-1404, 1413-1414, 1446-1447, 1464-1478, 1483-1485, 1492, 1493, 1495-1498, 1512-1523, 1543, 1557-1560, 1562-1563, 1573-1576, 1579-1584, 1635, 1687, 1688, 1693, and 1718.

The Court also notes that Exhibit 40, pages 10 through 23 are just boxes with black fill that did not have any information redacted. Therefore, there was no information withheld on these pages.

¹⁰⁵ Amended Response/Answer to Petitioner's Verified Petition for Writ of Mandate, filed Oct. 15, 2018, p. 7.

The Respondents' Second Affirmative Defense states, "Respondents have properly withheld public records or redacted information in public records pursuant to Idaho Code § 74-105(4)(a) and Board Rule 135; Idaho Code § 74-105(4)(a)(i) and Board Rule 108; Idaho Code § 74-105(4)(a)(ii) and Board Rule 108(4)(b)(i); and Idaho Code § 74-104. The Court discusses its conclusions of law on this affirmative defense below.

A. Proper parties

Under I.C. § 74-101(3), the version in effect in 2017,

"Custodian" means the person having personal custody and control of the public records in question. If no such designation is made by the public agency or independent public body corporate and politic, then custodian means any public official having custody of, control of, or authorized access to public records and includes all delegates of such officials, employees or representatives.

The version in effect since July 1, 2018 states, "Custodian' means the person or persons having personal custody and control of the public records in question."

I.C. § 74-101(12) at all times relevant defines "Public official" to mean "any state, county, local district, independent public body corporate and politic or governmental official or employee, whether elected, appointed or hired."

I.C. § 74-102(16) as amended on July 1, 2018 states, "A public agency, elected official or independent public body corporate and politic shall designate a custodian or custodians for all public records, which includes any public official having custody of, control of, or authorized access to public records and also includes all delegates of such officials, employees or representatives."

At all times relevant to this proceeding Ray and Mabe were designated custodians of records. The preponderance of the evidence is that Zmuda was a "public official" within the definition of the statute and had personal custody and control as defined by the statute and its amendment of certain IDOC records both before June 30, 2018 and after July 1, 2018.

To the extent the March 14, 2018 Response asked for dismissal of Jeffrey Ray as a party, the Court finds Ray is a proper party in this proceeding and the Court will not dismiss him.

At all times relevant, I.C. § 74-112 required exempt and nonexempt information requested be separated to permit the nonexempt material in a public record to be examined by the public.¹⁰⁶ I.C. § 74-112(2) then requires the public agency shall keep all documents or records in question until the end of the appeal period, until a decision has been rendered on the petition, or as otherwise statutorily provided, whichever is longer.

No evidence was presented at trial that the unredacted version of Exhibit 40, page 656, was destroyed after I.C. § 74-112(2) was enacted in 2015 or that there was any other litigation or rule that would have required its retention in unredacted form.

I.C. § 74-119, effective July 1, 2015 required, “By January 1, 2016, every state agency or independent public body corporate and politic shall adopt guidelines that identify the general subject matter of all public records kept or maintained by the state agency or independent public body corporate and politic, the custodian, and the physical location of such documents.” That statute was in effect at all times relevant to this request and litigation.¹⁰⁷

Therefore, all named Respondents are proper parties and have had notice and an opportunity to be heard.

To the extent any other custodian of records or designated custodians of records for IDOC were not named as a party in this proceeding, they have not had notice of the requirement to defend this action or the opportunity. Appearing in an action as a witness does not invoke the responsibility to defend the litigation.

B. Whether the Court is required to give deference under Board Rules

First, this is not an Administrative Procedures Act proceeding under Idaho Code § 67-5201, et seq. This is a proceeding to enforce the right to examine a record or to receive a copy of the record filed before the District Court pursuant to Idaho Code § 74-115. Idaho Code § 74-115(1) states:

¹⁰⁶ This requirement to separate exempt from non-exempt material was not added to the Public Records Act until July 1, 2015. Idaho Code § 74-112, Idaho Session Laws, 2015, ch. 140, § 5, p. 344.

¹⁰⁷ Idaho Code § 74-119, Idaho Session Laws, 2015, ch. 140, § 5, p. 344. Idaho Code § 74-119 also required that by January 1, 2019 that “Public agencies shall designate at least one (1) person as custodian to receive public records requests and shall provide an alternate custodian or alternate custodians for contingencies.”

The sole remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings in the district court of the county where the records or some part thereof are located, to compel the public agency or independent public body corporate and politic to make the information available for public inspection in accordance with the provision of this chapter.

There is no reference to the Administrative Procedures Act, or Idaho Code § 67-5270 in the Public Records Act. Therefore, Idaho Code § 67-5279 requiring the Court to defer to the judgment of the agency as to the weight of the evidence on questions of fact does not apply.

Further, *Wade v. Taylor* holds that whether or not a record is exempt from disclosure is an objective inquiry for the court. *Wade v. Taylor*, 156 Idaho 91, 96, 320 P.3d 1250, 1255 (2014). Therefore, this Court is not required, or even allowed, to give deference to the subjective determination of the records custodian. “[W]hether a public record is subject to disclosure is an objective analysis, both for the custodian and for the district court.” *Wade v. Taylor*, 156 Idaho at 101.

Idaho Code § 74-105(4)(a)(i) records of the department of correction from disclosure under the Public Records Act to include:

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;

Idaho Code § 20-212 specifically provides that “no other provisions of chapter 52, title 67, Idaho Code, [the Administrative Procedures Act] shall apply to the board, except as otherwise specifically provided by statute.” I.C. § 20- 212(1). No additional statutory restrictions exist related to release or withholding of records under the Public Records Act.

The meeting minutes of IBOC from 2011 and 2012¹⁰⁸ do not demonstrate that IBOC ever voted to adopt IBOC Board Rule 135.06. So, even if the Notice of Proclamation of Rulemaking Board that added Rule 135.06¹⁰⁹ was entered, there is a question of whether the Court is required to give deference to decisions made under Board Rule 135.06. The parties stipulated that IBOC never made an explicit

¹⁰⁸ Stipulated Fact, ¶ 31, Exhibit 38.

¹⁰⁹ Exhibit 39.

determination that the public interest in confidentiality, public safety, security and habilitation clearly outweighs the public interest in disclosure prior to the promulgation of Board Rule 135.06.¹¹⁰

Idaho Code § 74-105(4)(a)(i) provides an exemption for department of correction records if the board identified the public interest in confidentiality, public safety, security, and habilitation clearly outweighs the public interest in disclosure. Board Rule 135.06 lacks that explicit determination. Although Respondents argue that weighing can be implied, the Court disagrees, especially given the Public Records Act's presumption in favor of disclosure and the Court's responsibility of making an objective determination. If the Court implies anything, it applies the statutory presumption from Idaho Code § 74-102(1) that the public records are open for inspection by the public.

The language of Board Rule 108 specifically recognized the balancing test required in I.C. § 74-105(4)(a)(i) and indicated that Rule was made according to that balancing test. Therefore, the Court recognizes IBOC conducted a balancing test when promulgating Board Rule 108 to qualify as an exemption under I.C. § 74-105(4)(a)(i).

Since Board Rule 135 lacks the explicit balancing test language and nothing else in the record shows IBOC or the records custodian considered the balancing test when promulgating Board Rule 135, then it is the Court that must objectively conduct the balancing test when evaluating any records a custodian testified was withheld pursuant to Board Rule 135. Further, the second part of Board Rule 135.06 states, "The Department will not disclose . . . any other information wherein the disclosure of such information could jeopardize the Department's ability to carry out an execution."¹¹¹ "Could jeopardize" is not the legal standard or burden of proof required for this trial. Respondents are still required to meet the heightened level of scrutiny for a public records act proceeding discussed below.

C. Claims before the Court

Pursuant to *Wade v. Taylor*, the Court's first inquiry is whether the writings requested are public records. *Wade v. Taylor*, 156 Idaho at 97.

¹¹⁰ Stipulated Fact, ¶ 31.

¹¹¹ Exhibit 39; Idaho Administrative Code, Idaho Department of Correction, Rules of the Board of Correction, IDAPA 06.01.01.108, is "Idaho Public Records Act," and subsection 04 is "Records Exempt from Disclosure".

All records contained in Exhibit 40 and the nonredacted materials are public records as defined in Idaho Code §§ 74-101(13) and (16).

"Public record" includes, but is not limited to, any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics.¹¹²

"Writing" includes, but is not limited to, handwriting, typewriting, printing, photostating, photographing and every means of recording, including letters, words, pictures, sounds or symbols or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums or other documents. The definition of a public record includes any writing "regardless of physical form or characteristics."¹¹³

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); *Federated Publications, Inc. v. Boise City*, 128 Idaho 459, 463, 914 P.2d 21, 25 (1996). There is a presumption that public records are open for public inspection under Idaho Code § 74-102(1).

If the Court finds in its first inquiry that the writings requested are public records, the Court applies the presumption that the records are open to the public, unless it is shown that an exemption applies. *Wade v. Taylor*, 156 Idaho at 97.

Respondents must demonstrate a reasonable probability that disclosure of each requested record could result in potential harm, and provide evidence demonstrating the harm that might result. *Hymas v. Meridian Police Dept.*, 156 Idaho 739, 747, 330 P.3d 1087, 1105 (Ct.App. 2014) (*Hymas I*). If Respondents fail to meet this burden, the Court shall order disclosure. "Although the district court is required to review the records and consider the exemptions, it does so only after the withholding agency provides sufficient evidence to meet the relevant standard While individual documents themselves may tend to evidence the reasonable probability of harm from disclosure, the agency must nonetheless satisfy its burden with evidence demonstrating the harm that might result from disclosure of each document." *Hymas v. Meridian Police Dept.*, 159 Idaho

¹¹² I.C. § 74-101(13).

¹¹³ I.C. § 74-101(16).

594, 602, 364 P.3d 295 303 (Ct. App. 2015) (*Hymas II*). Further, *Hymas II* emphasizes, “And, while the evidence showing the likelihood of harm from disclosure of a document may be the same or similar for all or a number of the subject documents, the evidence must not be generalized or categorical.” *Id.* at 603. The Court must order disclosure if the respondents do not meet their burden. See *Dalton*, 107 Idaho at 9, 684 P.2d at 986.

Then, Respondents bear the burden to prove that redacted or withheld records fit within a narrowly-construed exemption. *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002); *Federated Publications, Inc. v. Boise City*, 128 Idaho 459, 463, 914 P.2d 21, 25 (1996); *Dalton*, 107 Idaho at 11. If it is not obvious that a record falls within an exemption, a narrow construction of the exemption compels the conclusion that the record is not exempt. *Id.*

The Idaho Supreme Court noted in *Wade v. Taylor*, “Finally, we note that the inquiry should focus on whether the withholding agency has shown a reasonable probability of a harm identified in [the statutory exemption] at the time of the denial of the public records request rather than at the time of the hearing. . . . This language makes it clear that the relevant inquiry is the time of the denial.”¹¹⁴

September 27, 2017 and March 14, 2018 disclosures

On September 27, 2017, Ray emailed the partial denial with pages 1-49 of Exhibit 4 to Cover with the only explanation for withholding as “Board Rule 135.06.”¹¹⁵ While there were several other code section preprinted on the form which included different sections of Idaho Code 74-104, -105, 106, -108, -113, IDAPA 06.01.01.108, and Idaho Criminal Rule 32, Ray did not select any of those as his basis for withholding.

Ray did not review the records withheld or disclosed. Ray testified he did not review the records at all because it was “that is not my thing...I have a lot going on and I didn’t have occasion to.”

Mabe testified that she relied on the IDOC Public Records Act manual, the Public Records Act, and the IDAPA Rules in making redactions to the general packet but she

¹¹⁴ *Wade v. Taylor* is a case in which the Canyon County Prosecuting Attorney’s Office withheld investigatory records compiled for law enforcement claiming exemption under Idaho Code § 9-335 (which would now be an exemption under Idaho Code § 74-105. The department of correction has claimed other statutory exemptions in this case so the court uses the law in *Wade v. Taylor* to analyze the specific statutory exemptions claimed in this case.

¹¹⁵ Stipulated Fact, ¶¶ 5 and 7.

did not specify a statute or rule for any particular redaction or withholding, or explain why she thought probable harm would result from release. She was the only one who actually looked at the records released to Cover or withheld from Cover in September 2017.

Zmuda testified he referred to Board Rules and had a sheet with some information on it that he used to make redactions. His testimony at trial was that information was redacted if it was “possible” the information could jeopardize security or safety, or reveal identities of protected persons, or sources of drugs, then reviewed with some redactions changed in January 2019 if harm was “probable.”

Under I.C. § 74-103(3), respondents are required to give written notice of any partial denial and, under subsection (4), that written notice must “indicate the statutory authority for the denial.”

Respondents identified only “Board Rule 135.06” as the basis for the partial denial in September 2017.

Clearly, IDOC and the records custodians knew they had 635 pages of responsive records on September 27, 2017 but only released 49.

To the extent Zmuda alleged probable harm would result from the release of the redacted information, the dates and times are sequential in these pages so anyone with access to the public portions of these documents can figure out the timeline for events. Further, the Respondents presented no evidence of the probable harm that would result from the release of the redacted information in pages 1 through 49 and Zmuda’s testimony at trial failed to show there was a narrow statutory exemption for the information redacted in the records released on September 27, 2017 (Ex 40, pp. 1-49). Therefore, the Court orders any redactions (other than names on pages 25, 40, 43-44, and 49, and titles on pages 43-44 discussed below) must be released.

The Court notes that Exhibit 40, pages 1966-1972 is the same log as contained at pages 43-49 but with different redactions so those pages must also be released as well.

To the extent IDOC had released redacted pages 50-635 in May 2017, the Respondents have failed to show a reasonable probability of harm or provide any

evidence of the harm that may result from releasing to Cover these previously-released pages in their redacted form.

The Respondents filed their Response to the Petition on March 14, 2018 citing Board Rule 135 and Idaho Code§ 74-105(4)(a).¹¹⁶

Specifically, for pages 43-44, members of the medical team must have certain qualifications identified at page 9 of IDOC SOP 135.02.01.001. To the extent a job title is actually named within the SOP qualifications, the public interest is outweighed by reasonable probability of harm as to those job titles. However, if a medical team member's job title listed on pages 43-44 differs from one listed in the SOP, the work location is specific enough and Zmuda's testimony establishes a reasonable probability of harm if the identity were known, and Zmuda identified a specific narrow exemption under Board Rule 108.04.a.i. for withholding work information.

Specifically, for page 434, Zmuda's testimony established a reasonable probability of harm with specific evidence only as to the timeframe in the first box, and proved a narrow exemption for withholding for safety and security reasons under Board Rule 108.04.a.i. However, the remainder of the redacted information is already publicly disclosed at page 34 of IDOC SOP 135.02.01.001. So, the Respondents have failed to show a reasonable probability of harm to all of the information except the specific timeframe.

Related to the expiration date and lot numbers listed for three drugs in pages 46 and 48, the Respondents failed to present any evidence of the specific harm that would be caused by the release of the expiration date and lot numbers listed. The Respondents failed to present any evidence of a reasonable probability of harm resulting from disclosure of the lot numbers, expiration dates, or location of drugs on pages 46 and 48. The Respondents failed to show any evidence of harm outside of what the records says. While Dr. Paulson testified that expiration dates and lot numbers can provide some information about the potency of a drug, the evidence presented through cross examination was insufficient to establish a reasonable probability of harm to the ability to perform future executions if the expiration dates and lot numbers from a past execution are released. Further, Dr. Paulson's testimony did

¹¹⁶ Stipulated Fact, ¶ 9.

not establish that a lot number could be used to actually identify the drug's source. The Respondents offered no specific evidence of probable harm in its case-in-chief or in its rebuttal case. Therefore, the Respondents must disclose unredacted pages 46 and 48.

May 25, 2018 and later disclosures

This Court's Memorandum Decision and Order Reconsidering Peremptory Writ of Mandate on September 17, 2018, permitted Respondents to amend their response as to any records disclosed after March 14, 2018 and granted leave to file an amended responsive pleading.

As to records produced to Cover on about May 25, May 29, June 1, July 10, and July, 11, 2018, respondents sent Cover letters identifying I.C. §§ 74-104, 74-105(4)(a), (4)(a)(i), and (4)(a)(ii), Board Rule 135, Board Rule 108, and specifying Board Rule 108(4)(b)(i). as the basis for withholding records. (Ex 7–11)

The Amended Response, Second Affirmative Defense,¹¹⁷ asserts records were properly withheld or redacted as follows:

- a. Purchase orders, receipts, source paperwork, and communication with suppliers pursuant to I.C. § 74-105(4) and Board Rule 135;
- b. [addressed above];
- c. Records wherein the public's interest in confidentiality or public safety and security outweighs the public's interest in disclosure, including building design details and specific operational records that would jeopardize public safety and security of the facility pursuant to I.C. § 74-105(4)(a)(i) and Board Rule 108;
- d. Records that contain identifying information pursuant to I.C. § 74-105(4)(a)(ii) and Board Rule 108(4)(b)(i); and
- e. Records exempt from disclosure by federal or state law or federal regulations I.C. § 74-104.

No further statutory or rule authority was cited for any partial denials of records produced on October 29, 2018 (Ex 14) or later.

D. Whether withholding justified under specific exemptions cited

Under *Wade v. Taylor*, the Court's inquiry for Petition to access public records is whether the exemption from disclosure was justified at the time of the refusal to disclose rather than at the time of the hearing. *Wade v. Taylor*, 156 Idaho 91, 99–100, 320 P.3d 1250, 1258–59 (2014).

¹¹⁷ Amended Response/Answer to Petitioner's Verified Petition for Writ of Mandate, filed Oct. 15, 2018, p. 6.

Additionally, *Hymas v. Meridian Police Dept.* holds that even if the agency discloses the requested records before a hearing is held, the burden of proof remains with the withholding party to justify its denial. *Hymas v. Meridian Police Dept.*, 159 Idaho 594, 599, 364 P.3d 295, 300 (Ct. App. 2015)(*Hymas II*), citing *Hymas v. Meridian Police Dept.*, 156 Idaho 739, 747 330 P.3d 1087, 1105 (Ct.App. 2014) (*Hymas I*). *Hymas II* further explains, “Thus, where an agency denies a public records request in whole and then subsequently discloses the records after its denial is legally challenged, the moving party need only make a good-faith claim that the agency’s conduct in denying the request was frivolous and the withholding party must then articulate the statutory basis for withholding the documents.” *Hymas II*, 159 Idaho at 599.

Hymas I states, [the public] agency must still show a reasonable probability that disclosure of each requested document in [a public] record may result in one of the enumerated harms and they must disclose all documents in the [public] records for which this showing cannot be made. *Hymas II*, 159 Idaho at 601, citing *Hymas*, 156 Idaho 746. “And, while the evidence showing the likelihood of harm from disclosure of a document may be the same or similar for all or a number of the subject documents, the evidence must not be generalized or categorical.” *Hymas II*, 159 Idaho at 602. The Court is required to examine whether the Respondents have provided sufficient proof that connects a risk of harm to the production of each document.

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:¹¹⁸

¹¹⁸ 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

- (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 relevant portion of Board Rule 135.06¹¹⁹ 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.

The relevant portion of Board Rule 108.04 states,

In order to protect information consistent with the public's interest in confidentiality, public safety, security, and the habilitation of offenders, the Board has identified records of the Department to be exempt from disclosure in whole or in part. These records include, but are not limited to:

- a. Records to be exempt in their entirety:
 - i. Records of the Department that define specific building design details, such as facility blueprints, that if disclosed would jeopardize public safety and the security of the facility;
 - ii. Records of the Department that define specific operations used to respond to and control emergencies, such as emergency plans, that if disclosed would interfere with the secure and orderly conduct of Department operations;
 - iii. Records of the Department that define site-specific security operations, such as facility security procedures and site-specific post orders, that if disclosed would jeopardize public safety and the security of the facility;
 - iv. Records containing information specific to the habilitation of an offender, including information tracking the behavior, progress or digression of a particular offender under the legal care, custody, supervision or authority of the Board, including a person within or without the state pursuant to an agreement with another state or a contractor. Notwithstanding this exemption,

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.

¹¹⁹ Exhibit 39; Idaho Administrative Code, Idaho Department of Correction, Rules of the Board of Correction, IDAPA 06.01.01.108, is "Idaho Public Records Act," and subsection 04 is "Records Exempt from Disclosure".

records of this nature specific to inmates sentenced to death shall be available to counsel of record for inmates sentenced to death, subject to redaction;

- v. [Zmuda testified he did not rely upon this exemption]
- vi. [Zmuda testified he did not rely upon this exemption]
- vii. Pre-sentence investigation reports, addenda, and the information contained in or attached to the reports, shall not be disclosed to any person except as provided by Idaho Rules of Criminal Procedure;
- viii. [Zmuda testified he did not rely upon this exemption]
- ix. Medical, counseling and treatment records. Notwithstanding this exemption, an offender's medical, counseling and treatment records shall be disclosed to the offender's attorney of record in his criminal case, or the offender's private professional health care provider, provided that the attorney or the health care provider submit a release for these records, on his letterhead, signed by the offender. A release under Subsection 108.04.a.ix. must be current within six (6) months.

Idaho Code § 74-105(4)(a)(iv), Idaho Court Administrative Rule 32, Idaho Criminal Rule 32(h), and Board Rule 108.04.a.vii. exempt presentence investigation records from public disclosure. Respondents met their burden of showing that Exhibit 40, pages 720, 2272 to 2275, contained redacted presentence investigation information statutorily exempt from disclosure and withholding the information was justified under this narrow statutory exemption.

Idaho Code 74-105(4)(a)(ii) only protects identifying information of victims or witnesses. The Court finds that members of the escort or execution team are not "witnesses" to the execution. Family members of a condemned who attend an execution are witnesses to an execution.

Board Rule 135 protects from disclosure the identity of the onsite physician, staff, contractors, consultants, escort volunteers, or medical teams; but "Identity" is not further defined in the Board Rule. "Identity" is defined in Webster's Dictionary as "the distinguishing character ... of an individual."¹²⁰ Identity extends beyond a person's name.¹²¹ Identifying information beyond a name that would identify the onsite

¹²⁰ Merriam-Webster online dictionary, accessed at <https://www.merriam-webster.com/dictionary/identity> on May 12, 2018.

¹²¹ 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

physician, a staff member, contractor, consultant, escort volunteer, or medical team member for the Leavitt or Rhoades executions is exempt from disclosure pursuant to Board Rule 135.06 but only if the custodian shows or the Court finds the likelihood of harm from disclosure of a document and sufficient proof that connects a risk of harm to the production of each document.

While Board Rule 135.06 protects “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, there is no evidence that IBOC when making the rule, or the custodian of the record when applying the rule, actually engaged in the required balancing test.

The Sequence of Chemicals form with a medical team member’s handwriting, Exhibit 35, was released by IDOC in March 2017 in response to a subpoena issued in a litigated case. This Court invited proof of whether that information was released under a protective order or in a sealed court file which would make the information “confidential” under Idaho Supreme Court rules and Idaho Code § 74-104. The Respondent failed to show any protection under court rules or that statute. Therefore, the Respondents have failed to show the public interest in confidentiality in this document clearly outweighs the public interest in disclosure.

The Court finds that the identity of medical (or execution) team members could be discovered and there is a probability of harm if their names are discovered from piecing together certain information within the redacted records. This identity or distinguishing character includes handwriting and the training schedule dates and times. While Zmuda testified that no harm has been threatened to anyone involved with an execution, the actual identity of the executioners has not been revealed. A showing of actual harm is not required, just sufficient proof of a reasonable probability of harm. The Respondents, through Zmuda’s testimony, have shown a reasonable probability of harm

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.

could result if sufficient information from the records is released to discover the identities of the escort or medical teams for the past executions. Zmuda also established a sufficient basis for narrowly-construed exemptions under Board Rules 108 and 135. IBOC performed the weighing of the public interest against disclosure in Rule 108. The Court has considered the evidence and weighed the public's interest in disclosure against the safety and security of personnel actually involved in the executions and finds the safety and security of personnel outweighs the public's interest in learning the identities through the training schedules or workplaces, or in learning the exact times and locations of their arrival on the day of the executions.

Exhibit 40, pages 1, 5, first box on 434, 662, 693, and 749 specify arrival times and locations of execution team members on the execution days, the Respondents met their burden of showing the withholding was justified under Board Rules 108 and 135, and that remaining information should remain redacted.

However, the information on pages 4, 9, and 2122 is actually unredacted at 2138. Given that the information was publicly released, the Respondents are unable to show a probable risk of harm from releasing the information. The Court finds that the continued withholding of the information at pages 4, 9, and 2122 is not justified.

The Respondents have failed to show any harm from identifying a medical team member by position title only so page 672 must be unredacted.

The Respondents have shown sufficient basis for withholding the entire training schedules on pages 703, 706, and 711, and the dates listed on the training agendas on pages 1952-1965. Additionally, page 751 if tied with page 670 would identify medical team member's name so that information can continue to be withheld.

Also, pages 763 and 768 include work location information for medical team members. Respondents have shown sufficient basis for withholding because it could reveal the members' identities and there is a reasonable probability that harm could result.

Zmuda testified pages 753-762 were redacted because of the possibility of identifying handwriting of medical team members. However, the handwriting was already released in Exhibit 35. So, the release of these records do not make harm any more probable. The Respondents have failed to show a reasonable probability of harm

would result in the disclosure of pages 753-762 so those pages should be released unredacted except for the training dates.

Respondents withheld EKG strips that were represented by counsel to be the EKG strips of members of the execution teams taken during trainings and not of the condemned during the executions. No other testimony or evidence related to the EKG strips or any evidence about probable harm was presented at trial. The probable harm of disclosure of medical team training dates is discussed above and applies to any training dates included on the EKG strips. Since no evidence of probable harm from information beyond the training dates was presented at trial by the Respondents, the records are presumed to be public records subject to disclosure. Respondents have failed to overcome that presumption with any evidence. Therefore, the EKG strips must be disclosed except for the training dates for the reasons discussed above.

Next, the Court addresses the handwritten confidential cash log withheld from the Petitioner. Lowe's testimony established the purpose of the confidential cash log was to shield the identity of execution team members by providing their interface for payment through the Warden who knew their actual identities as well as convenience in making payments during non-business hours. Cover clarified she was not seeking names but there is other identifying information including dates of payments that correlate to training dates otherwise withheld. Therefore, the Court finds the agency established the confidential cash log is confidential and the agency's interest in the confidentiality of the information on payments outweighs any interest in public disclosure of this information since the information was available to auditors in the Controller's Office and was audited. This information is exempt pursuant to Board Rule 135 and I.C. § 74-105(4)(a)(i) and the Court will not require disclosure.

The existence of a CERT team is public information in IDOC SOP 135.02.01.001. Therefore, any reference to the CERT team redacted just because it exists is not justifiably withheld.

However, the Respondents have shown a reasonable probability of harm as a site-specific security procedure or operation pursuant to Board Rule 108(4)(a)(iii) and as an emergency plan under Board Rule 108(4)(a)(ii) for specific post locations and numbers and Respondents can continue to withhold the information specifically cited in

testimony on pages 91, 94, 96, 153, 157, 230, 231, 244, 299, 570, 575, 578, 630, 635, 1285, 2378-2384, 2391-2397, and 2400-2406.

The “Operational Period Timeline” at page 91 only has two redactions which are justified as discussed above. To the extent other Operational Period Timelines which are the same document as page 91 have more information redacted, the Respondents have failed to show withholding of information previously publicly released is justified. Therefore, pages 1139, 1143, 1145, 1160, 1286, 1305, 1341, 1352, 1370, 1373, 1376, 1448, 1461, 1500, 1502, and 1504 must be redacted consistent with page 91.

Also, the “Execution Event Log” at page 230 only has two specific CERT team redactions. These redactions are not contained in similar completely unredacted versions at pages 128, 217 and 225. The Court finds the Respondents met their burden that the two redactions on page 230 are justified. However, pages 1083, 1103, 1190, 1638, and 1658 are “Execution Event Logs” with no explanation for any additional redactions. Therefore, any additional redactions on these pages are not justified and must be unredacted.

There was no explanation why the medical plan at pages 1445 and 1755 were redacted or why there is any harm as to location of medical care during an execution. Therefore, the records must be provided in unredacted form except the phone numbers can remain redacted.

Information that the Idaho State Police, Ada County Sheriff’s Office, and Boise Police Department are law enforcement agencies with jurisdiction over the South Boise Complex prison facilities is included in the Standard Operating Procedure for Executions. Still, information about law enforcement or peace officer presence or patrols during executions is outside of the public records request asking for information about drugs or drug suppliers for the Rhoades, Leavitt, and future executions, so this information at pages 776, 1332, and 1334-1335 can remain redacted.

The Respondents have shown a reasonable probability of harm as a site-specific security procedure or operation pursuant to Board Rule 108(4)(a)(iii) and as an emergency plan under Board Rule 108(4)(a)(ii) for radio and communication plans during the executions since the number, frequency, and radio capabilities could remain the same for the facilities and personnel, now or for future executions to allow disruption

of emergency communications at the facilities or for the agencies that own the radios. Therefore, pages 701, 1093, 1114, 1242, 1391, 1444, 1633, 1754, and 1756-1758 can remain redacted. In the alternative, radio and communication plans are not drug or drug supplier information related to executions that are actually responsive to Cover's records request.

The Respondents have shown a reasonable probability of harm as a site-specific security procedure or operation pursuant to Board Rule 108(4)(a)(iii) and as an emergency plan under Board Rule 108(4)(a)(ii) for deployment checklists at pages 1223 (although 1609 should be unredacted consistently with 1223), arrivals and departures of staff in pages 1715-1717, demobilization checkout sheets 1762-1887, contingency checklists or plans at pages 1260, 1300, 1302, 2066-2067, 2378-2384, 2391-2397, 2400-2406, the "Confidential" IMSI Post Order for Escort Team with post locations at pages 1975-1980, Operations Chief Log at pages 730-743, assignment lists at pages 1332, 1334-1335, 1353-1363, 1365-1367, 1419, 1424-1443, 1452, 1456-1459, 1667-1674, 1709-1714, 1720-1725, 1734-1753, specific checkpoint check-in times at pages 1322, 1324-1325, 1327-1328, 1330-1331, the demobilization plan beginning at page 15 (although the same beginning at page 1091 should be redacted the same), command post locations and times at pages 1115 and 2229, staging locations at pages 1511, 2234, 1334, 1337 (although 1618 and 2354 need to be redacted consistently), after action plans at pages 1532, and 1704-1707, segregation plan at page 1561. In the alternative, these operational, personnel staging, post, and staffing plans are not drug or drug supplier information related to executions that are actually responsive to Cover's records request.

However, the Respondents failed to show probable harm from the release of the following or that the interest in safety and security is outweighed by public interest in the following general information without specificity in trial evidence: pages 1525 except phone number, badge numbers from pages 791-794, pages 1080-1086, 1390, 2047-2048, 2425, 1279, 1284, 1277, 2426, and pages 773, 1277, 1278, 1368, 2035-2036, 2229, 2241-2243, 2244, 2282, and 2388.

The Court does not find that the "google" maps would be exempt under Board Rule 108.04.a.i. as IDOC records that define specific building design details, such as

facility blueprints. However, these maps have site specific post locations added to them that, if disclosed, would jeopardize the security of the facility or posted personnel. The Respondents have shown a reasonable probability of harm as a site-specific security procedure or operation pursuant to Board Rule 108.04.a., Subsections ii and iii, for pages 1731-1733 only. There was no specific testimony or evidence offered as to how pages 1421-1423, 1453-1455, and 1664-1666 differed from “google” maps downloaded from the internet or what information was added to make those documents demonstrate probable harm if they were released.

The Petitioner’s request was for drugs and drugs suppliers for the Leavitt and Rhoades executions, or future executions. While the Rhoades and Leavitt execution plans are site-specific security plans under Board Rule 108.04.a.iii., they are not specifically related to the drugs or drug suppliers for the executions. Therefore, the redacted information in pages 778-834, and 1296 is not responsive to Petitioner’s request. The Court does note that these documents were released with inconsistent redactions.¹²²

Many minutes and agenda were also released in unredacted or near-unredacted form but then later released with more redactions without justification for the increased redactions. These agendas and meeting minutes must be released with the least restrictive redactions:

Command and General Staff minutes beginning¹²³ at pages:

- 11/18/11, page 1195 must be unredacted like page 250,
- 11/17/11, page 1191 must be unredacted like 248,
- 11/10/11, pages 1087-1088 must be unredacted like 234-235,
- 11/8/11, page 1097 must be unredacted like 218,
- 11/1/11, page 1184 must be unredacted like 204,
- 10/25/11, pages 1164 and 195 must be unredacted like page 91,
- 10/27/11, page 1170 must be unredacted like 200,

¹²² The execution plans for Leavitt were released completely unredacted beginning at pages 312, 391, 1387, 1391, 1528, 316, 395, 321, 400, 325, 404, (but then the same information was redacted at 811, 807, 815, 786 for Rhoades without explanation). Other execution plans include for IDOC at pages 1726-1730, CAPP at page 778, ICC at page 782, IMSI at page 796, ISCI at page 801, or SBWCC at page 818. No specific explanations were offered at trial for the redactions at page 770, or for redacted information in the organizational charts of the execution plans. The organizational chart at page 1663 was released completely unredacted, while organizational charts at 1343, 1345, 1375, 1383, 1420, and 1730 were redacted with no explanation of the difference.

¹²³ The Court has cited the first page of the document, although the minutes may be multi-page with redactions on subsequent pages.

6/5/12, page 1348 must be unredacted like 1146,
5/31/12, page 1379 must be unredacted like 1135,
5/24/12, page 1118 must be unredacted like 218.

Agency Representative Meeting minutes beginning¹²⁴ at pages:

11/17/11 page 1194 must be unredacted like page 136,
11/10/11 pages 1095 and 234 must be unredacted like 117,
11/8/11 page 1105 must be unredacted like 131,
11/3/11 pages 1108 and 1179 must be unredacted like 123,
11/1/11 page 1177 must be unredacted like 120,
5/24/12 page 1112 must be unredacted like 146,
5/31/12 pages 1142 and 1378 must be unredacted like 152,
6/7/12 pages 159 and 1161 must be unredacted like 158,
6/11/12 page 1163 must be unredacted like 161.

No specific explanations were provided for the agenda redactions on pages 1611, 1144, 1149, or 1351 or no evidence was provided as to what probable harm would result from release of information on those pages so those items must be unredacted.

Exhibit 40, page 2046, has two redactions while an earlier release of this same document only had one in Exhibit 4, p. 2046. Further, Zmuda failed to testify as to any basis for probable harm on the disclosure of the time the demonstrator lot opened or closed during previous executions. The Court orders the entire page 2046 to be disclosed.

Additionally, the "Debrief for Planning" section is completely unredacted at page 139 for Rhoades. Then, pages 1084-1086, 1621-1623, and 1639-1641 are all same document with different redactions with no explanation for the inconsistent redactions. Pages 1084-1086, 1621-1623, and 1639-1641 must be disclosed in unredacted form. Pages 1654-1655 is a different document with similar information without explanation for its redactions. Pages 1654-1655 must also be provided in unredacted form.

No basis was provided for the redactions in the execution planning and tracking timeline at pages 1296-1299 or for the food unit plans at pages 1153, 1155, 1480, 1508. Page 1482 was released unredacted. Because the Respondents failed to show specific

¹²⁴ The Court has cited the first page of the document, although the minutes may be multi-page with redactions on subsequent pages.

evidence of a reasonable probability of harm related to this information, these documents must be provided in unredacted form.

Page 680 contains mental health information relayed by a condemned to a clinician. However, this information is not contained in a medical, counseling or treatment record -- rather it was e-mailed by the clinician to at least six people with no evidence presented by the Respondents that these additional people were mental health or medical providers. The Respondents have failed to show this information falls within the narrow exemption in Board Rule 108.04.a.ix. so the information must be released.

Pages 2491-2492 include health information for Rhoades that was redacted without further explanation. However, this information is not contained in a medical record but rather is titled "Fact Sheet" and appears to have been prepared to respond to questions from the public. The Respondents have failed to show there is a reasonable probability of harm for release of this information or that it falls within the narrow exemption in Board Rule 108.04.a.ix.

Page 669, 689, 2385 have more than just names redacted. While this contains dietary information of a family member, the Respondents have failed to show public interest is outweighed by a narrow exemption requiring withholding. Therefore, only the family member names should remain redacted and the remainder of the information must be released.

The Respondents have also failed to show a reasonable probability of harm if information other than the names is released for pages 1084-1086, 1621-1623, and 1639-1641. Therefore, the names can remain redacted but the remaining information must be released.

At page 681 and between pages 2412, 2414-2416, the actual medical condition of a family member visiting the condemned is not responsive to public records request so the Respondents can continue to withhold this information.

Page 734-735 is a letter written by Leavitt to the Warden. The Respondents have shown the actual names and offender numbers should be withheld since that information is identifying information of family members, as well as the offender name and status of his son on page 737. However, Respondents have failed to show the last

box on 735 is in a medical record within a narrow exemption. Telephone restrictions are discussed in the publicly-released Standard Operation Procedure for executions. Therefore, the Respondents have failed to show a reasonable probability of harm if the information at the bottom of page 735 or the discussion of the telephone restrictions is released. Those portions must be unredacted.

Additionally, Zmuda also failed to testify as to any reasonable probability of harm in the release of information on lines 9, 10 and 11 on page 737 so that information must also be unredacted.

There is personally identifying information which should continue to be withheld which includes birthdates listed on pages 700 and 2276; a social security number on page 2277; and the condemned's mother's address on page 2278. The Respondents have shown a reasonable probability of harm if this personal information is released publicly.

Three paragraphs down on page 776 included a medical condition of an offender at South Boise Women's Correctional Center which not responsive to Cover's records request just because this medical contingency existed at the time of the execution. This information also appears on page 1561. The Respondents can continue to withhold that information.

To the extent that only a redacted version of page 656 remains in IDOC's custody and there was no evidence presented that it was redacted after the statute requiring retention of unredacted records, the Court will not require the release of an unredacted version.

Although page 654 is not a record of drugs used in the Leavitt execution, it is a receipt from a compounding pharmacy that provided the drugs for the Leavitt execution. That receipt was for drugs for a later execution, although none have occurred. Zmuda testified that no lethal injection chemical source he contacted between May 2012 and September 2017 said it will not supply lethal injection chemicals if its identity was revealed to the public. The parties stipulated that IDOC made no promises to this source that its identity or other information would be kept confidential.¹²⁵ Zmuda's testimony at trial was that the source in page 654 can no longer provide lethal injection

¹²⁵ Stipulated Fact, ¶ 34.

chemicals to IDOC because that source cannot comply with current regulations. Dr. Paulson's testimony was that regulation of compounding pharmacies was strengthened in 2014 in response to prior "botched" executions of other states. The only evidence cited for the probable harm from releasing page 654 was a general reference to a chilling effect on other potential sources if a source's identity was known.

Under *Hymas I*, Respondents must demonstrate a reasonable probability that disclosure of each requested record could result in potential harm, and provide evidence demonstrating the harm that might result. *Hymas I* requires the agency to satisfy its burden with evidence demonstrating the harm that might result from disclosure of each document. If Respondents fail to meet this burden, the Court shall order disclosure. Based upon the evidence and testimony presented at trial, the Respondents have failed to satisfy its burden of a reasonable probability of harm or specific evidence that demonstrates the harm that might result from public disclosure of page 654 just based on an allegation of a general chilling effect. The evidence is that the specific compounding pharmacy cannot meet the more stringent regulations required of compounding pharmacies but other states have performed executions after the more stringent regulations have been enacted. Related to page 654, the public interest in disclosure outweighs the evidence presented by the Respondents that release of the no-longer-available source might impair its ability to conduct future executions. Therefore, the Court will order disclosure of page 654.

Page 655 identifies the source and other information about the lethal injection drugs used in the Rhoades execution in 2011. Zmuda testified he did not know if this source was a pharmacy or a compounding pharmacy, whether it was subject to any state regulation or oversight, or whether that source could provide drugs or chemicals for future executions. The parties stipulated that IDOC made no promises to this source that its identity or other information would be kept confidential. No evidence was presented about whether this source was contacted since 2011 about providing lethal injection drugs. The cross examination of Woodford established that a supplier of lethal injection drugs in Texas had been subjected to protests when its identity became publicly known. Director Reinke specifically cited to issues in other states, including Texas, led to his decision to move from a three-drug protocol after the Rhoades

execution because of his difficulty in obtaining lethal injection drugs and the complications other states had as well. Zmuda also testified that he had difficulty finding sources for lethal injection drugs or chemicals in conversations after Cover's records request. However, Zmuda's conversations that occurred after Cover's records request is not information he would have had at the time that page 655 was withheld. Zmuda knew that record existed since it was in his possession even though it had not been part of the general packet redactions/disclosures in September 2017. But the Court is required to reach its determination as of the time of the initial public records response, not as of the time of the trial.

The Respondents met its burden of a showing of probable harm with specific evidence relating that harm to page 655 if it is disclosed. The Court next considers whether the Respondents have shown that page 655 is exempt by a narrow statutory or rule exemption.

Zmuda testified that page 655 was withheld pursuant to Board Rule 135.06, the part stating that the Department will not disclose any other information wherein the disclosure of such information could jeopardize the Department's ability to carry out an execution. The parties stipulated that IBOC never made an explicit determination that the public interest in confidentiality, public safety, security and habilitation clearly outweighs the public interest in disclosure prior to the promulgation of Board Rule 135.06. Further, neither Zmuda, Mabe or Ray testified that they, as custodian of such record, weighed the evidence in page 655 under this standard prior to the decision to withhold the record. Therefore, the Court will conduct this balancing test considering all of the evidence available to the custodian at the time the record was withheld in September 2017.

Based upon the evidence, the agency has failed to show there was any interest in habilitation of an offender or public safety that would be caused if an execution could not be performed because a source would not supply lethal injection drugs or chemicals because of public release of a past source. The offender would remain incarcerated with the death sentence until drugs could be obtained, the protocol could be changed, laws or rules could be amended, and such execution could be performed. Other states have continued to perform executions using other protocols. Therefore, the agency's

interest in habilitation of an offender or public safety does not outweigh the public interest in disclosure.

However, there is evidence of the agency's interest in confidentiality and security in the record. The death penalty is legal in Idaho, a jury made the unanimous determination that the sentence was justified under the circumstances of the crime, all legal remedies and appeals are exhausted, and the court issues a death warrant. The State has a demonstrated interest in ensuring confidentiality of a source to be able to carry out its statutory duty of execution and in security for offenders on death row and in Idaho penal institutions. While the agency's interest cannot be in execution at all costs while disregarding all laws and regulations, the Idaho legislature enacted Idaho Code § 19-2716A on July 1, 2012 to permit any pharmacy, prescriber, manufacturer, distributor or other entity to provide lethal injection drugs or chemicals to IDOC, to shield IDOC employees involved in executions from liability, and to exempt them from laws and regulations related to pharmacies to ensure that execution after a legal death sentence can continue in Idaho. Board Rule 135.06 was also put in place to assure executions can continue. While Board Rule 135.06 uses the language of "could" jeopardize, Zmuda's testimony was that at the time page 655 was actually reviewed, he applied the standard of "possible" harm and then later reviewed that document and determined that there would probably be harm if page 655 was released. In reviewing the evidence in the record as a whole, and the statutory framework for IDOC carrying out death penalty executions in Idaho, the Court is satisfied that the Respondents have shown that the information in page 655 falls within a narrow statutory and rule exemption that permits withholding of a potential future source for lethal injection drugs or chemicals and that the agency's interest in confidentiality and security outweigh the public interest in knowing this lethal injection drug supply source. Therefore, the Court will not order disclosure of Exhibit 40, page 655, since the withholding of such information was justified pursuant to Board Rule 135 and Idaho Code § 74-105(4)(a)(i) and Board Rule 135.

To the extent a specific page number or series is not addressed in this decision but has been withheld, the Respondents presented no evidence at trial related to that record and why such information was withheld. Since the Respondent bears the burden

of proof on each redaction, not just general categories of redactions, and no evidence was presented justifying redactions, any redactions not mentioned in this decision are not justified and such record must be released in its entirety.

E. Whether Respondents diligently searched for responsive records

Respondents also have the burden to demonstrate they performed a diligent search for responsive documents prior to responding to Cover's request on September 27, 2017. While the Respondents made some efforts to collate and review records in May of 2017, it is clear that they did not review all records maintained in the custody of IDOC or IBOC as of May 2017. No further review was conducted in September 2017. It is obvious that many of the records subsequently disclosed pursuant to this litigation were maintained in IDOC's custody in September 2017.

Under the version of Idaho Code § 74-101(3) in effect at the time of Cover's request, the "Custodian" of the records meant the person having personal custody and control of the public records in question. An official designation as a custodian was made for Ray and for Mabe at the time.

Mabe had the records on her computer and looked through the records, although she misapplied the exemptions. She at least searched what she had.

Ray, however, a designated custodian, did not search the records he was provided and did not make any inquiry into whether he had all of the records in the general packet. He cannot be shielded because he trusted in Mabe's ability to review records since he was the designated custodian actually making the denial of part of the records—especially since his testimony was that it was "not my thing" to diligently search for records for which he was a designated custodian.

To the extent Ray or Mabe did not actually have records within their custody and control, then the custodian was any public official having custody of, control of, or authorized access to public records and includes all delegates of such officials, employees or representatives. Records in the Central Office basement and vacant offices were within the custody and control of the department and the department is not shielded from its responsibility to diligently search by its lack of a diligent adherence to a file plan. Similarly, IDOC is not shielded from its responsibility to search the records at other facilities just because no one bothered to ask until July

20, 2018, after filing an affidavit that it had searched and secured all records. The emphasis on the word “known” in a sworn affidavit filed with this Court is disingenuous since the affidavit was filed with the intent to have this Court rely on its representation that IDOC had conducted an adequate search at the time it was filed. A search was required when the request was made. The Court provided plenty of opportunity for an additional search before the show cause hearing. Such diligent search was not conducted before the show cause hearing or before the July 19, 2018 affidavit was filed.

F. Ray’s refusal to disclose was in bad faith

Under I.C. § 74-117, “[i]f the court finds that a public official has deliberately and in bad faith improperly refused a legitimate request for inspection an copying, a civil penalty shall be assessed against the public official,” up to \$1,000.

This bad faith extends beyond misapplying statutes or regulations, and must actually be improper. “Bad faith” includes “dishonesty in belief or purpose.”¹²⁶ However, this is not just fraud or corruption. It can be a complete failure to act when a statutory duty to act has been imposed—such as the statutory duty of the Public Information Officer, a designated records custodian for the Idaho Department of Corrections, to fulfill his statutory responsibility to review records subject to a Public Records Act request to make an objective determination whether those records should be withheld or disclosed.

Further, the improper withholding must also be deliberate. The plain meaning of “deliberately”¹²⁷ in this context means, “with full awareness of what one is doing: in a way that is intended or planned.”

Based upon all of the evidence presented, the Court finds Ray’s partial denial of records at pages 1 through 49 and complete denial of records at pages 50 to 653 was deliberately and in bad faith improperly withheld. The Respondents stipulated the

¹²⁶ *Cobbley v. City of Challis*, 143 Idaho 130, 135, 139 P.3d 732, 737 (2006), citing Black's Law Dictionary 134 (7th ed.1999)). See also *Uniontown Newspapers, Inc. v. Pennsylvania Dept. of Corrections*, 185 A.3d 1161, 1175 (Pa. Commw. Ct. 2018); *Pinson v. United States Dep't of Justice*, 245 F. Supp. 3d 225, 243 (D.D.C. 2017); and *Sandoval v. United States Dept. of Justice*, 296 F. Supp. 3d 1, 14 (D.D.C. 2017).

¹²⁷ Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/deliberately>, accessed Mar. 17, 2019.

records were improperly withheld. Ray was clearly the designated records custodian for IDOC tasked with the statutory responsibility for maintaining and releasing those records, had been trained in public disclosure, and knew the records existed. Yet, he did nothing to fulfill his responsibilities other than trust that others would. Ray did not even open the digital files to see what he had actually denied, did not ensure the records he received were complete, or inquire into how the decision was made to deny any portions of the records. Further, he did not fulfill the expectation that the custodian of the records would conduct a proper review, applying the statutory presumption of disclosure against the probable harm of disclosure, and balance the agency's interest against the public interest. His inquiry and review was so lacking as to be an improper withholding that was performed deliberately and in bad faith given his testimony that it was "not my thing" to review records before disclosure. Ray's testimony at trial is substantial evidence his lack of a good faith compliance with Idaho's Public Records Act and avoidance of his mandatory duties under its provisions rising to the level of bad faith for his lack of a minimum diligent effort to ascertain facts about the records he ultimately signed a Notice of Action denying access.

The Court hereby orders Jeffrey Ray to pay a \$1,000.00 civil penalty under I.C. § 74-117 for his failure to disclose the records. Such fine is to be paid to the Ada County Clerk's Office to be paid into the general treasury for the State of Idaho.

To the extent that others were records custodians after September 27, 2017 who were not named parties in this litigation, the Court cannot order a fine for their conduct.¹²⁸

G. Whether refusal to provide records was frivolous

A court shall award reasonable costs and attorney fees to the prevailing party if it finds that the request or refusal to provide records was frivolously pursued. Idaho Code § 74-116(2) states,

¹²⁸ The Petitioner suggests that the Court may fine a public official who was not named as a party in this litigation. The Court finds no notice or opportunity to be heard was provided to any public official other than Ray. The Court finds imposition of a civil penalty without notice and an opportunity to be heard is improper. Further, the Petitioner suggests that the \$1,000 civil penalty applies to each individual record withheld. The Court also does not read the plain language of the statute to allow a penalty of \$1,000 per page and the Petitioner has not cited any legal authority for imposing a civil penalty in such a manner. Therefore, the Court imposes a single \$1,000 penalty for the single public records act request involved in this litigation.

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.

It remains the Respondents burden to prove that records withheld were not frivolously withheld. That burden never shifts to the Plaintiff. *Hymas II*, 159 Idaho at 602.

Hymas II discusses the definition of frivolous in a public records act context:

A court shall award reasonable costs and attorney fees to the prevailing party if it finds that the request or refusal to provide records was frivolously pursued. I.C. § 74–116(2). Under a separate title, the Idaho Code defines frivolous as conduct “not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.” I.C. § 12–123(1)(b)(ii); see *also* BLACK'S LAW DICTIONARY 451 (8th ed.2004) (defining a “frivolous defense” as one that has no basis in law or fact). However, a party's position is not frivolous simply because the district court concludes that it fails as a matter of law. *Garner v. Povey*, 151 Idaho 462, 468, 259 P.3d 608, 614 (2011).

Courts have found that where an agency ignored the plain and unambiguous language of a statute or ordinance, its conduct was unreasonable and not in conformance with applicable law. See, e.g., *Gardiner v. Boundary Cnty. Bd. of Comm'rs*, 148 Idaho 764, 769, 229 P.3d 369, 374 (2010), *overruled on other grounds by City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012). On the other hand, courts have found that where an agency's improper application of a statute was nonetheless reasonable, the agency acted in conformance with applicable law. See *Randel*, 152 Idaho at 909, 277 P.3d at 356 (2012).

Hymas II, 159 Idaho at 602 .

The issue of reasonableness of the agency's action is determined at the time of the Petitioner's request, not at the time of the hearing or trial.

In this case, Respondents neglected to provide over 600 pages of records responsive to Professor Cover's request that the Respondents knew existed when Cover made her request.

Mabe's explanation for failing to provide the full records released to Berkeley only four months earlier was not supported by citing to any statutory or rule authority for the withholding.

In evaluating her testimony, she appeared to be inadequately trained as a designated records custodian related to maintaining or disclosing agency records but lack of training does not make her opposition to disclosure not frivolous since she obviously held responsive records that had previously been publicly released.

Further, it is clear from testimony that neither Zmuda or Ray actually reviewed the records disclosed to Cover or withheld from Cover in September 2017.

If Zmuda or Ray would have opened the digital files to review them before release, it would have been obvious that all responsive records had not been included. Neither did.

Ray's trial testimony of not opening the digital files to review them, explaining "that is not my thing...I have a lot going on and I didn't have occasion to, I know her to be a reliable person," establishes that his withholding the records was frivolous.

Zmuda's explanation that he thought Mabe understood that the entire general packet was to be released also lacks a showing of merit since he also did not actually review the digital files to ensure Mabe had complied with his instruction.

Zmuda's failure to disclose the Harris Pharma record in response to the 2015 records request indicating no records were found even though it was maintained in his files, refusal to have anyone look in the archives to discover the August 2011 letter from the IDOC Director Reinke to the Secretary of the California Department of Corrections and Rehabilitation seeking lethal injection drugs that was clearly responsive, and filing an affidavit with the court indicating all responsive records had been located and secured the day before he even made a request of IDOC employees to provide such records is frivolous conduct.

Further, through the course of this litigation, the Respondents' position that they were not required to release information in its custody if it wasn't "known" is contrary to the statutory requirements of the Public Records Act. To allow willful ignorance of records clearly in its custody until litigation ensues and beyond, completely negates the

intent of the Public Records Act that public records be open for inspection and copying with a presumption for public release.

The Public Records Act requires an affirmative duty for a records custodian to actually look and release of any records in the custody of the agency. It makes no exceptions for records poorly indexed, improperly filed, maintained in more than one location, or abandoned in desks or basements. If the Respondent maintains a record, it is implicit that its negligence in maintaining the records is not a shield to production.

The agency has a statutory responsibility to maintain a file and disposition plan. It can certainly dispose of records under its disposition plan. But if the records are not properly disposed of in accordance with that plan, they are still maintained in its custody and subject to disclosure under the Public Records Act if requested. If IDOC chooses to maintain records in boxes and basements for years without review, then it bears the responsibility of those choices.

“[W]hen the district court is reviewing a petition to access public records, the district court's inquiry is whether the exemption from disclosure was justified at the time of the refusal to disclose rather than at the time of the hearing.” *Wade v. Taylor*, 156 Idaho 91, 96 (2014).

The Respondents have failed to meet their burden to show the withholding of records in September 2017 was not frivolous. Further, they have failed to show the subsequent failure to affirmatively search for records was also not frivolous.

The partial disclosure of 49 pages and withholding of over 2,000 pages without diligent search is not justified. While the court ultimately has permitted withholding certain information within these documents for specific purposes, the overwhelming majority of the information withheld in September 2017 was released pursuant to this litigation.

Therefore, the Petitioner is the prevailing party and an award of attorney fees and costs to the Petitioner for her efforts in pursuing this litigation because of the Respondents' frivolous partial denial of her September 2017 public records request is warranted. On May 28, 2018, the Petitioner has filed a Memorandum of Fees and Costs in the amount of \$16,557.87 for fees up to April 5, 2018 for prevailing at the show cause

hearing and Respondents filed a Notice of Non-Objection to that memorandum. The Court awards Petitioner \$16,557.87 in fees and costs incurred up to April 5, 2018.

Petitioner has also filed a memorandum of fees and costs related to the order to compel which is subject of a scheduling order for decision. The court will rule on that motion separately since it only addresses fees incurred in filing the motion to compel.

The Petitioner must file any supplemental memorandum for fees and costs incurred since April 6, 2018 within fourteen days of the date the Judgment is entered in this case. I.C. § 74-116(2).

CONCLUSION

Based upon the foregoing findings of fact and conclusions of law, the Court dismissed Respondent's First Affirmative Defense; found for Respondents on Respondent's Third Affirmative Defense; and found the Petitioner withdrew her request for any records identifying names of the on-site physician or staff, contractors, consultants, and volunteers serving on an escort or medical teams; and telephone numbers except those on pages 654 and 655.

In addition to the lists noted above, the Court also found these telephone numbers should also remain redacted since they are not responsive to Cover's request: phone numbers at pages 1332, 1445, 1525, and 1755; and names appearing in any activity logs in pages 740-743, 835-950, and 1888-1951, or already redacted in pages 669, 689, 2385, 1084-1086, 1621-1623, and 1639-1641.

On the Second Affirmative Defense, the Court finds Respondents were justified in withholding the exempt portions of records including redactions on:

- 1) Presentence investigation records on Exhibit 40, pages 720, 2272 to 2275;
- 2) Execution and escort team members identifying information including training dates on Exhibit 40, pages 1, 5, first box on 434, 662, 693, 749, 703, 706, and 711, 1952-1965, and 751; and work location information on pages 763 and 768; and the handwritten confidential cash log.
- 3) CERT team location on pages 91, 94, 96, 153, 157, 230, 231, 244, 299, 570, 575, 578, 630, 635, 1285, 2378-2384, 2391-2397, and 2400-2406; but pages 1139, 1143, 1145, 1160, 1286, 1305, 1341, 1352, 1370, 1373, 1376, 1448, 1461, 1500, 1502, and 1504 must be redacted consistent with page 91; and page 230.
- 4) Law enforcement agency support at pages 776, 1332, and 1334-1335.
- 5) Radio and communication plans on pages 701, 1093, 1114, 1242, 1391, 1444, 1633, 1754, and 1756-1758.

- 6) Site-specific security procedure or operations and emergency plans with assignment, staging, staffing, demobilization, after action, and contingency plans pages 1223 (although 1609 should be unredacted consistently with 1223), 1715-1717, 1762-1887, 1260, 1300, 1302, 2066-2067, 2378-2384, 2391-2397, 2400-2406, 1975-1980, 730-743, 1332, 1334-1335, 1353-1363, 1365-1367, 1419, 1424-1443, 1452, 1456-1459, 1667-1674, 1709-1714, 1720-1725, 1734-1753, 1322, 1324-1325, 1327-1328, 1330-1331, the demobilization plan beginning at page 15 (although the same beginning at page 1091 should be redacted the same), 1115 and 2229, 1511, 2234, 1334, 1337 (although 1618 and 2354 need to be redacted consistently), 1532, and 1704-1707, and 1561.
- 7) Maps at pages 1731-1733 only.
- 8) Non-drug supplier information at 778-834, and 1296.
- 9) Agendas and meeting minutes must be released with the least restrictive redactions:
 - Command and General Staff minutes beginning at pages:
 - 11/18/11, page 1195 must be unredacted like page 250,
 - 11/17/11, page 1191 must be unredacted like 248,
 - 11/10/11, pages 1087-1088 must be unredacted like 234-235,
 - 11/8/11, page 1097 must be unredacted like 218,
 - 11/1/11, page 1184 must be unredacted like 204,
 - 10/25/11, pages 1164 and 195 must be unredacted like page 91,
 - 10/27/11, page 1170 must be unredacted like 200,
 - 6/5/12, page 1348 must be unredacted like 1146,
 - 5/31/12, page 1379 must be unredacted like 1135,
 - 5/24/12, page 1118 must be unredacted like 218.
 - Agency Representative Meeting minutes beginning at pages:
 - 11/17/11 page 1194 must be unredacted like page 136,
 - 11/10/11 pages 1095 and 234 must be unredacted like 117,
 - 11/8/11 page 1105 must be unredacted like 131,
 - 11/3/11 pages 1108 and 1179 must be unredacted like 123,
 - 11/1/11 page 1177 must be unredacted like 120,
 - 5/24/12 page 1112 must be unredacted like 146,
 - 5/31/12 pages 1142 and 1378 must be unredacted like 152,
 - 6/7/12 pages 159 and 1161 must be unredacted like 158,
 - 6/11/12 page 1163 must be unredacted like 161.
- 10) Only the family member names on pages 669, 689, 2385 and names on pages 1084-1086, 1621-1623, and 1639-1641; and the family member's actual medical condition on page 681 and between pages 2412, 2414-2416; names and offender numbers on pages 734-735; offender name and status of his son on page 737; personally identifying information on pages 700, 2276, 2277, 2278; medical condition of unrelated inmate on three paragraphs down on page 776 and 1561.
- 11) Page 655.

On all other claims in the Second Affirmative Defense, the Court finds in favor of the Petitioner and the Court enters a Writ of Mandate that any records in the exempt

binders or within the custody and control of the Respondents not withheld above are to be released in their unredacted form. The Court will return the exempt binders to the Respondents to release the records.

The Court hereby orders Jeffrey Ray to pay a \$1,000.00 civil penalty under I.C. § 74-117 for his failure to disclose the records. Such fine is to be paid to the Ada County Clerk's Office to be paid into the general treasury for the State of Idaho.

The Court find the Petitioner is the prevailing party and awards Petitioner \$16,557.87 in fees and costs incurred up to April 5, 2018.

Any supplemental memorandum of costs or fees pursuant to I.C. § 74-116(2) from April 6, 2018 until Judgment must be filed by Petitioner within fourteen days of Judgment.

ORDERED Signed: 3/20/2019 05:48 PM



Lynn Norton
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2019, 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

PHIL MCGRANE
Clerk of Court


Deputy Clerk Signed: 3/21/2019 08:06 AM

