

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALIZA COVER,)	
)	Supreme Court Docket No. 47004-2019
Petitioner-Respondent-)	
Cross Appellant)	Ada County District Court No.
)	CR01-18-03877
v.)	
)	
IDAHO BOARD OF)	
CORRECTION, IDAHO)	
DEPARTMENT OF)	
CORRECTION, and JEFFREY R.)	
RAY, Public Information Officer,)	
)	
Respondents-Appellants-)	
Cross Respondents)	

BRIEF OF APPELLANTS-CROSS RESPONDENTS

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

**HONORABLE LYNN NORTON
District Judge**

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STATEMENT OF THE CASE

Nature Of The Case

The Idaho Board of Correction, Idaho Department of Correction, and Jeffrey R. Ray, Public Information Officer (Respondents-Appellants-Cross Respondents – hereinafter “Respondents”) appeal the district court’s determination that one document (Trial Exhibit 40, Bates No. 654) at issue in a Public Records Act proceeding is not exempt and thus subject to public disclosure.

Statement Of The Facts And Course Of The Proceedings

On September 21, 2017, Professor Aliza Cover sent an email to Jeffrey Ray, Public Information Officer, at the Idaho Department of Correction (“IDOC”), requesting “records and information about” 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.” (Exhibits, p. 7¹) The parties stipulated prior to trial that Cover’s request was a legitimate public records request. (R., p. 1445, ¶ 32²). Ray provided information or records responsive to Cover’s request on September 22, 2017 (R., p. 1434, ¶ 4) and September 27, 2017 (R., p. 1434, ¶ 5). The

¹ Citations to “Exhibits.” refer to the exhibits requested on appeal, which can be found in the PDF file with the title starting “Conf.Exhibits-Cover.” The page numbering on this page of the exhibit is cut off in this record. The preceding page is numbered 6 and the following page is numbered 8.

² Citations to “R.” refer to the initial record filed October 18, 2019, which can be found in the PDF file with the title “Clerk.-Cover.”

parties stipulated that Respondents provided an incomplete set of records responsive to Cover's request. (R., p. 1435, ¶ 8).

On February 27, 2018, Cover filed a Petition for a Writ of Mandate with the Ada County District Court, seeking to compel the disclosure of the public records that Cover had requested but not received. (R., p. 1435, ¶ 9). On May 14, 2018, following a Show Cause hearing, the district court entered an Order Granting Peremptory Writ of Mandate Requiring Disclosure of Some Records and a Peremptory Writ of Mandate. Following a hearing on Respondents' Motion to Reconsider the court's writ of mandate, the district court vacated the writ and part of the order on September 17, 2018. (R., p. 1436, ¶ 13). The matter was subsequently scheduled for a court trial to consider whether Respondents were justified in withholding certain records as exempt.

Between March 14, 2018, and December 20, 2018, Respondents disclosed numerous additional records in response to Cover's September 21, 2017, request. (R., p. 1436, ¶ 14). Many of these records were duplicative, and some were not responsive to Cover's request but were provided in the interest of transparency. One document that was provided only in heavily, almost fully, redacted form was the document at Trial Exhibit 40, Bates Number 654. Trial Exhibit 40, Bates Number 654 is a letter that identifies a source of lethal injection chemicals that was used in the 2012 Leavitt execution. (Trial Transcript, pp. 324-325, Ls. 24-2³). However, the letter itself confirms a receipt of funds and a commitment to make chemicals available for a period of time after the date of the letter. (Trial Transcript, p. 218, Ls. 23-25). No lethal injection chemicals were received in response to the commitment represented by Trial Exhibit 40, Bates Number 654. (Trial

³ Citations to "Trial Transcript" refer to the transcript of the court trial, lodged on October 15, 2019, which can be found in the PDF file with the title "Trans.-Cover." This brief will refer to the page numbers on the transcript itself rather than the document (which contains the transcripts of more than one hearing).

Transcript, p. 221, L. 2). Respondents withheld this document on the basis it is exempt from disclosure pursuant to Idaho Code § 74-105(4)(a)(i) and Idaho Administrative Procedures Act (IDAPA) 06.01.01.135.06, which specifically exempts certain records that, if disclosed, could jeopardize the ability of the department to carry out executions.

The district court held a court trial on Cover's Verified Petition for a Writ of Mandate to Compel Disclosure of Public Records between January 28 and February 4, 2019. (Am.R., p. 1824.⁴). Before beginning her case-in-chief, Cover moved under Rule 41(b) to grant Petitioner's verified petition. (Am.R., p. 1824). The district court granted that motion in part and ordered the release of certain documents or portions of documents, including the entirety of Trial Exhibit 40, Bates Number 654. The district court then reconsidered its decision, upon Respondents' motion, as to Exhibit 40, page 654, and the trial proceeded. (Am.R., p. 1824).

On March 21, 2019, the district court filed its Findings of Fact, Conclusions of Law. (Am.R., p. 1824). The district court concluded that Respondents had failed to meet their burden of demonstrating a reasonable probability that harm could result from public disclosure of some of the previously withheld or redacted documents, or had failed to demonstrate that certain documents were withheld pursuant to a narrowly tailored exemption. One of the documents for which the district court concluded Respondents had failed to meet their burden was Exhibit 40, page 654. (Am.R., p. 1888). Specifically, the district court determined that Respondents provided only evidence of a generalized harm that may result from the public disclosure of Exhibit 40, page 654, and failed to demonstrate that the interest in confidentiality or security outweighed the public interest in disclosure. (Am.R., p. 1888).

⁴ Citations to "Am.R." refer to the amended record, which can be found in the PDF file with the title "AmendedClerk.-Cover."

The district court filed its Peremptory Writ of Mandate requiring the disclosure of certain documents on March 21, 2019. (R., pp. 1608-1611). Respondents complied with this Writ on May 17, 2019, as noted by Respondents' Declaration Certifying Compliance with Writ filed on that date. (R., p. 1817-1822). The only document the district court ordered to be released that Respondents continued to withhold was Trial Exhibit 40, Bates 654, pursuant to the district court's Order Granting Stay Pending Appeal, filed June 21, 2019.

Respondents timely appealed the district court's determination as to Exhibit 40, Bates Number 654.

ISSUES

- I. Whether the district court erred in determining the document located at Trial Exhibit 40, Bates 654, is a public record not subject to exemption from public disclosure pursuant to Idaho Code § 74-105(4)(a)(i) and Idaho Administrative Procedures Act (IDAPA) 06.01.01.135.06, and must therefore be disclosed to Petitioner-Respondent.
- II. Whether Appellants are entitled to their costs on appeal.

ARGUMENT

I.

The district court erred in determining the document located at Trial Exhibit 40, Bates 654, is a public record not subject to exemption from public disclosure pursuant to Idaho Code § 74-105(4)(a)(i) and Idaho Administrative Procedures Act (IDAPA) 06.01.01.135.06, and must therefore be disclosed to Petitioner-Respondent.

A. Introduction

The district court determined that the Respondents failed to meet their burden at trial of demonstrating that Trial Exhibit 40, Bates 654 is exempt from public disclosure pursuant to a narrowly defined exemption to the Idaho Public Records Act which exempts certain records that, if disclosed, could jeopardize the ability of the department to carry out executions. The district court first applied an erroneous standard of review, conflating the Public Records Act proceeding with an APA-style review of the agency's rule-making. Applying this standard, the district court determined that Board Rule 135.06 itself did not create a valid exemption to the Public Records Act. The district court erred in applying this standard to invalidate Board Rule 135.06, as a Public Records Act proceeding is not the appropriate forum to challenge agency rule-making, and the only inquiry for a district court in such a proceeding is whether specific records fall into narrowly-construed exemptions to the Public Records Act.

After applying that erroneous standard and finding that Board Rule 135.06 did not create a valid exemption to the Public Records Act, the district court erroneously conducted its own weighing pursuant to Idaho Code § 74-105(4)(a)(i). This weighing was erroneous for two reasons. First, the district court was not entitled to conduct its own weighing of the public interests described in Idaho Code § 74-105(4)(a)(i), but rather should have deferred to the Board of Correction's statutorily granted rule-making authority. Second, even if the district court was entitled to conduct its own weighing pursuant to Idaho Code § 74-105(4)(a)(i), the district court's

finding that the public interest in confidentiality did not clearly outweigh the public interest in disclosure related to Exhibit 40, Bates 654 was not supported by substantial and competent evidence. Specifically, the district court concluded that Respondents did not show a significant public interest in confidentiality as Respondents provided evidence of only a generalized harm that could result from the public disclosure of Exhibit 40, page 654, rather than specific evidence demonstrating a reasonable probability that harm could result from the disclosure. Respondents dispute this finding and submit the district court's conclusion is not supported by substantial and competent evidence. Finally, Respondents submit the overwhelming weight of the evidence adduced at trial demonstrates that Respondents met their burden of demonstrating that Trial Exhibit 40, page 654 is exempt from public disclosure pursuant to a narrowly defined exemption to the Idaho Public Records Act and that a specific harm would be reasonably probable to result if the record were publicly disclosed.

B. Standard Of Review

On appeal from denial of a public records request, the findings of the district court will not be disturbed on appeal if those findings are based on substantial and competent evidence. Hymas v. Meridian Police Dept., 156 Idaho 739, 743, 330 P.3d 1097, 1101 (Ct. App. 2014) (Hymas I), citing Bolger v. Lance, 137 Idaho 792, 794, 53 P.3d 1211, 1213 (2002). However, the appellate court exercises free review over questions of law. Id., citing Ward v. Portneuf Med. Ctr., Inc., 150 Idaho 501, 504, 248 P.3d 1236 (2011).

C. Argument

The district court erred in determining Trial Exhibit 40, Bates 654, is a public record not exempt from disclosure pursuant to Idaho Code § 74-105(4)(a)(i) and Idaho Administrative Procedures Act 06.01.01.135.06. The district court did not properly limit its inquiry and applied

an erroneous standard to invalidate the agency's rule and the exemption created by that rule. Furthermore, the district court's decision as to Exhibit 40, Bates 654 was not supported by substantial and competent evidence.

A Public Records Act proceeding presents a limited inquiry for the district court: whether particular public records are exempt from public disclosure pursuant to a narrowly construed exemption to the Public Records Act. Hymas v. Meridian Police Dept., 156 Idaho 739, 743, 330 P.3d 1097, 1101 (Ct. App. 2014) (Hymas I). This is an objective inquiry for the district court, and the court presumes that records are open to the public unless the withholding agency demonstrates that an exemption applies. Wade v. Taylor, 156 Idaho 91, 97, 320 P.3d 1250, 1255 (2014); I.C. § 74-102(1) (presumption that all public records in Idaho are open). As records are presumed to be open to the public, the claimed exemption to the Public Records Act must be narrowly-construed, and the withholding agency at all times bears the burden of proving that the 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 v. Idaho Dairy Products Commission, 107 Idaho 6, 11, 684 P.2d 983, 988 (1984).

Additionally, to maintain a claim of exemption, the withholding agency must demonstrate a reasonable probability that the disclosure of each withheld record could result in potential harm, and provide evidence showing the harm that may result. Hymas v. Meridian Police Dept., 156 Idaho 739, 747, 330 P.3d 1087, 1105 (Ct.App. 2014) (Hymas I). The harm demonstrated must be specific to the withheld document, rather than generalized or categorical. Hymas v. Meridian Police Dept., 159 Idaho 594, 602, 364 P.3d 295, 303 (Ct. App. 2015) (Hymas II). However, Respondents need not demonstrate that the claimed harm *will* occur if a particular record is

disclosed, only that harm is reasonably probable. Id. If Respondents fail to meet their burden of demonstrating that a record falls within a narrowly-construed exemption and its disclosure is reasonably likely to result in an identified harm, then the court must order the disclosure of the record. See, e.g., Dalton, 107 Idaho at 9; I.C. § 74-116. However, if the withholding agency does meet this burden, the trial court must enter an order supporting the agency's decision refusing disclosure and must not require disclosure of the record. I.C. § 74-116.

In a Public Records Act proceeding, the district court must make an objective inquiry into whether a withheld record falls within a narrowly-construed exemption to the Public Records Act and whether an identifiable harm would be reasonably probable to result if the record were publicly disclosed. This is the extent of permissible inquiry in such a proceeding. Wade v. Taylor, 156 Idaho at 96; I.C. § 74-115; I.C. § 74-116. A Public Records Act proceeding is not the appropriate forum to debate the legality or ethics of the death penalty. Nor is it a permissible forum to challenge the prudence of existing exemptions to the Public Records Act or the validity of a withholding agency's rules. A Public Records Act proceeding is clearly distinct from a proceeding brought under the Idaho Administrative Procedures Act, which is the appropriate forum to challenge an agency's statutory constructions. See, e.g., J.R. Simplot Co., Inc. v. Idaho State Tax Com'n, 120 Idaho 849, 862, 820 P.2d 1206, 1220 (1991). Proceedings under the Public Records Act place the parties in entirely different postures, involve different standards of review, and impose different penalties or remedies on the parties, as compared to proceedings under the Idaho Administrative Procedures Act. It is erroneous to conflate the Public Records Act proceeding here with a proceeding under the APA, and thereby use the proceeding to invalidate the agency's rule and the exemption to the Public Records Act created by that rule.

The district court erred in determining Trial Exhibit 40, Bates 654, is a public record not exempt from disclosure pursuant to Idaho Code § 74-105(4)(a)(i) and Idaho Administrative Procedures Act 06.01.01.135.06. This decision was in error for three reasons. First, the district court conflated this Public Records Act proceeding with a proceeding brought under the APA when the court imposed an APA-style review to analyze, and ultimately invalidate, Board Rule 135.06. The district court did not properly limit its inquiry to the only issue presented in a Public Records Act proceeding: whether the withholding agency can demonstrate that the withheld record falls into a narrowly-construed exemption to the Public Records Act and its disclosure is reasonably likely to result in an identified harm. Instead, the district court erroneously expanded its inquiry to consider the validity of Board Rule 135.06. The district court, having invalidated Board Rule 135.06, then erroneously engaged in its own weighing of the interests described by Idaho Code § 74-105(4)(a)(i). Second, the district court erred in its weighing of the interests described by Idaho Code § 74-105(4)(a)(i) when the court determined that the public interest in confidentiality did not clearly outweigh the public interest in disclosure. This finding was not supported by substantial and competent evidence. In fact, the overwhelming weight of the evidence at trial demonstrated that the public interest in confidentiality clearly outweighed the public interest in disclosure of Exhibit 40, Bates 654. Third, the district court did not properly apply the “reasonable probability of harm” standard elucidated by the Idaho Court of Appeals in Hymas. The district court erred when it determined that the Respondents had not demonstrated a specific harm that would be reasonably probable to occur if Exhibit 40, Bates 654 were publicly disclosed. The overwhelming weight of the evidence at trial demonstrated that a specific harm—the inability of the Idaho Department of Correction to carry out a statutory duty—would be reasonably probable to result if Exhibit 40, Bates 654 were disclosed.

1. The district court did not conduct a permissible inquiry for a Public Records Act proceeding, but instead conflated the Public Records Act proceeding with proceedings brought under the Administrative Procedures Act, and thus erroneously analyzed and invalidated Board Rule 135.06 and the exemption created by that rule.

The district court properly noted that this matter was a proceeding pursuant to the Public Records Act not the Administrative Procedures Act (Am.R., p. 1869). The district court also correctly noted that whether a record is exempt from disclosure under the Public Records Act is an objective inquiry for the court. However, the court failed to afford appropriate deference to the IBOC and IDOC in the creation of exemptions to the Public Records Act, specifically exemptions created pursuant to Idaho Code § 74-105(4)(a)(i), and the application of those properly created exemptions.

Whether a record is exempt from disclosure is an objective inquiry for both the records custodian and the district court. Wade v. Taylor, 156 Idaho 91, 96, 320 P.3d 1250, 1255 (2014). The first inquiry for the district court is whether the requested records are public records. If the court determines the requested records are public records, the court presumes the records are open to the public, unless the withholding agency demonstrates that an exemption applies. Id. at 97; I.C. § 74-102(1) (presumption that all public records in Idaho are open). To maintain a claim of exemption, the withholding agency must demonstrate a reasonable probability that the disclosure of each withheld record could result in potential harm, and provide evidence showing the harm that may result. Hymas v. Meridian Police Dept., 156 Idaho 739, 747, 330 P.3d 1087, 1105 (Ct. App. 2014) (Hymas I). The withholding agency must prove the likelihood of harm from disclosure of a document through evidence that is specific to the withheld record, rather than generalized or categorical. Hymas v. Meridian Police Dept., 159 Idaho 594, 602, 364 P.3d 295, 303 (Ct. App. 2015) (Hymas II). However, though the evidence must be specific, it need not demonstrate that the harm *will* occur if the record is disclosed, only that such harm is reasonably probable. Id.

At all times, the withholding agency bears the burden of demonstrating that an exemption applies to a withheld record. Wade v. Taylor, 156 Idaho at 96. As the Public Records Act presumes that all public records in Idaho are open, the withholding agency also bears the burden of proving that the 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 v. Idaho Dairy Products Commission, 107 Idaho 6, 11, 684 P.2d 983, 988 (1984). If it is not obvious that a record falls within a narrowly-construed exemption, then the record is not exempt. Id. If Respondents fail to meet their burden of demonstrating that a record falls within a narrowly-construed exemption and its disclosure is reasonably likely to result in an identified harm, then the court must order the disclosure of the record. See, e.g., Dalton, 107 Idaho at 9; I.C. § 74-116. However, if the withholding agency does meet this burden, the trial court must enter an order supporting the agency's decision refusing disclosure and must not require disclosure of the record. I.C. § 74-116.

The case law is clear that the district court must make an objective inquiry as to the application of claimed exemptions to each withheld or redacted record. Wade v. Taylor, 156 Idaho at 96. Respondents concede that the requirement for an objective inquiry by the district court prevents the court from deferring solely to the withholding agency in determining whether a particular record fits within a narrowly-construed exemption. This does not mean, however, that the district court's inquiry is unlimited or that the agency's rule-making decisions are not entitled to deference. In fact, the district court's objective inquiry in a Public Records Act proceeding is quite limited. The district court's objective inquiry is focused on whether the withheld or redacted record at issue falls within a narrowly-construed exemption. Wade v. Taylor, 156 Idaho at 96; I.C. § 74-115; I.C. § 74-116. A Public Records Act proceeding is not the appropriate forum to contest

whether particular exemptions created by statute or agency rule are desirable or prudent. Rather, the only objective inquiry for the district court is whether the withholding agency's action was justified by a finding that the record falls within a narrow exemption. Thus, the only inquiry for the district court was whether an existing exemption, when narrowly construed, applied to permit the continued withholding of Exhibit 40, Bates 654.

A. The district court improperly engaged in a rule-making, rather than a public records, analysis.

On appeal, this Court should find that the district court erred by engaging in an Administrative Procedures Act ("APA") review analysis in a Public Records Act proceeding. Though the district court clearly stated that this matter was a proceeding under the Public Records Act and therefore the court was not required, or indeed entitled, to grant deference to the agency, the district court did, in fact, engage in an APA-style review of Board Rule 135.06. The district court simply did so without also granting IBOC the deference it would have been granted pursuant to the APA. This Court should find the district erred when it determined that Board Rule 135.06 did not properly weigh the interests described in Idaho Code § 74-105(4)(a)(i), and erred in engaging in its own weighing. By determining that Board Rule 135.06 did not create a valid exemption to the Public Records Act, absent the court's own weighing, the court conducted an APA-style review of Board Rule 135.06.

As previously noted, a Public Records Act proceeding is not the appropriate forum to challenge the validity of an agency rule. Proceedings pursuant to the Public Records Act place the respective parties in substantially different postures than those brought pursuant to the APA. In proceedings pursuant to the Public Records Act, the district court is faced with two primary inquiries: (1) whether the documents requested are public records, and (2) if the documents are public records, whether an exemption applies. Wade v. Taylor, 156 Idaho at 97. The district court

presumes records are open to the public unless expressly proved otherwise, and narrowly construes exceptions to the Public Records Act. Id. If the district court finds that a narrowly construed exemption to the Public Records Act applies to a withheld document, the court must uphold the agency's withholding of the record. I.C. §§ 74-115; 74-116. The inquiry for a district court in a Public Records Act proceeding is not whether an exemption was properly created by an agency, but whether the existing, narrowly construed exemption, applies to a particular withheld document. That is the extent of the court's inquiry under the Public Records Act when determining whether records were properly withheld by an agency.

In contrast, a proceeding pursuant to the APA is a direct challenge to an agency's interpretation of statutes and its rule-making authority. One of the inquiries for a court in an APA proceeding can be whether, and to what extent, an agency's statutory construction should be followed. J.R. Simplot Co., Inc. v. Idaho State Tax Com'n, 120 Idaho 849, 862, 820 P.2d 1206, 1220 (1991). In such proceedings, the court is required to defer to the judgment of the agency as to the weight of the evidence on questions of fact, and is constrained in its review of the agency's decision-making. I.C. § 67-5279. Additionally, a court's review of an agency rule or action pursuant to the APA is clearly meant to give deference to the agency and guide the agency, as agency actions that are not affirmed must be remanded for further proceedings of the agency, as necessary. I.C. § 67-5279. This is in stark contrast to the punitive nature of the Public Records Act in the event a reviewing court deems the agency's decision withholding records to be frivolous or in bad faith. I.C. §§ 74-116; 74-117.

Proceedings under the Public Records Act and the APA are distinct and place the parties in substantially different postures. In proceedings under the Public Records Act, only the disclosure or withholding of records is at issue, whereas under the APA, the agency rule itself is

at stake. Despite the district court's recognition that the proceeding at issue was brought under the Public Records Act, not the APA, the district court conflated the relevant inquiries involved in these distinct proceedings by scrutinizing the process used by IBOC to adopt Board Rule 135.06, determining that process was insufficient pursuant to Idaho Code § 74-105(4)(a)(i), and therefore conducting its own weighing under Idaho Code § 74-105(4)(a)(i) rather than finding that Board Rule 135.06 created an applicable exemption. The district court erred in conflating these proceedings. On appeal, this Court should determine that the district court should have found that Board Rule 135.06 created an exemption to the Public Records Act, and should then have applied that exemption to Exhibit 40, page 654.

B. Even if the district court properly engaged in a rule-making analysis, the district court erred by failing to grant deference to IBOC in its rule-making.

If this Court, on appeal, determines that the district court did not err in scrutinizing IBOC's rule-making with regard to Board Rule 135.06, this Court should still determine the district court erred by not affording IBOC deference in its rule-making. Here, the district court should have afforded deference to IBOC in determining that Board Rule 135.06 provided a properly created exemption to the Public Records Act pursuant to Idaho Code § 74-105(4)(a)(i).

Though Respondents submit that this matter is a not a proceeding brought under the APA, and therefore the court should have simply found an exemption to the Public Records Act existed, case law discussing the deference to be given to an agency construction of a statute is instructive here in the event this Court determines the district court was justified in considering whether Board Rule 135.06 is valid. The Idaho Supreme Court has developed a four-prong test to determine the deference to be given an agency. J.R. Simplot Co., Inc. v. Idaho State Tax Com'n, 120 Idaho 849, 862, 820 P.2d 1206, 1220 (1991).

First, the court must determine whether the agency has been entrusted with the responsibility to administer the statute at issue. J.R. Simplot, Co., Inc., 120 Idaho at 862, 820 P.2d at 1220. The Idaho Board of Correction has clearly been entrusted with the responsibility to administer I.C. § 74-105(4)(a)(i). The IBOC has been expressly granted the control, direction, and management of the state penitentiary. Idaho Constitution, art. X., § 5; I.C. § 20-209; Burge v. State, 90 Idaho 473, 476, 413 P.2d 451, 452 (1966); Mahaffey v. State, 87 Idaho 228, 232, 392 P.2d 279, 281 (1964); State v. Reese, 98 Idaho 347, 348, 563 P.2d 405, 406 (1977). In accordance with this grant of authority, the Idaho Legislature enacted Chapter 2, Title 20, Idaho Code, creating the IBOC to control, direct, and manage Idaho's correctional facilities, and provide for the care and maintenance of all prisoners in its custody. Idaho Code §§ 20-212 and 20-244 empower the Board to make and adopt rules for the management of prison administration. Waggoner v. State, 121 Idaho 758, 760, 828 P.2d 321, 323 (Ct.App. 1991). Because the Legislature cannot foresee all practical difficulties IBOC may encounter while fulfilling its statutory duties, IDOC, an administrative agency, possesses any explicit or implied powers that are reasonably necessary to implement expressly granted powers. Vickers v. Lowe, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011).

Idaho Code §§ 19-2716 and 19-2716A grant IDOC specific authority to carry out executions. As previously stated, the death penalty is permissible under Idaho Code and Idaho's Constitution. As IDOC is tasked with administering and executing a death sentence, the Board's rulemaking power extends to executions. Properly conducted executions are integral to fulfilling the necessary, and expressly legislatively granted, powers of the Board. Lethal injection is the only lawful means of execution in the State of Idaho. I.C. § 19-2716. The evidence produced at trial demonstrated that disclosing the identity of a source of lethal injection chemicals may

interfere with IDOC's ability to obtain sources of lethal injection drugs, and therefore hinder the Department's ability to carry out executions. Board Rule 135.06 recognizes that carrying out an execution is an expressly legislatively granted power of the Board and Department and reflects the probability of harm to the ability to carry out this power if certain information is disclosed. IDAPA 06.01.01.135.06.

The Board properly promulgated Board Rule 135.06 pursuant to Idaho Code § 74-105(4)(a)(i), which exempts from disclosure records of the department of correction "of which the public interest in confidentiality, public safety, security and habilitation clearly outweighs the public interest in disclosure." In this statute, the Legislature explicitly permitted the Board to identify such records pursuant to its authority under section 20-212, Idaho Code. I.C. § 74-105(4)(a)(i). This is a broad grant of authority to IBOC. The Board is entitled to make "all necessary rules" to carry out its powers unless "inconsistent with express statutes or the state constitution." I.C. § 20-212. The Board is also exempted from most requirements of Chapter 52, Title 67, Idaho Code (IDAPA), including the requirement to make findings for or vote on new rules. I.C. § 20-212(1). Thus, though Idaho Code § 74-105(4)(a)(i) imposes a weighing requirement upon IBOC, the statute does so while referring to the Board's broad authority and limited administrative rule-making requirements under Idaho Code § 20-212. The Board was specifically entrusted to administer Idaho Code § 74-105(4)(a)(i) and was granted broad discretion in its rulemaking authority and identification of exempt records pursuant to that statute.

The second prong requires that the agency's construction of the statute be reasonable. J.R. Simplot, Co., Inc., 120 Idaho at 862, 820 P.2d at 1220. Here, the evidence produced at trial demonstrated that the agency's construction of Idaho Code § 74-105(4)(a)(i) is reasonable. Respondents stipulated at trial, and concede on appeal, that IBOC did not explicitly conduct the

balancing test referenced in Idaho Code § 74-105(4)(a)(i) prior to promulgating Board Rule 135.06. Yet, as previously noted, no explicit findings or procedures are statutorily required of IBOC. The concerns raised by the agency prior to the trial in this matter and the evidence presented at trial, demonstrate that Board Rule 135.06 is a reasonable construction of Idaho Code § 74-105(4)(a)(i). Specifically, the evidence at trial demonstrated that the interest in the confidentiality of the identity of the source of lethal injection chemicals is high, as public disclosure of the source's identity may jeopardize the ability of IDOC to carry out an execution. As IBOC and IDOC are tasked with carrying out lawfully ordered executions in the State of Idaho, it is reasonable to place a high importance on the public interest in confidentiality when considering information that could jeopardize the ability of IDOC to carry out a statutory duty of that agency.

Third, the court must determine whether the statutory language at issue expressly addresses the precise question at issue. J.R. Simplot, Co., Inc., 120 Idaho at 862, 820 P.2d at 1220. Here, the statutory language at issue is contained in the Public Records Act, specifically Idaho Code § 74-105(4)(a)(i). Idaho Code § 74-105(4)(a)(i) provides that certain records of IDOC are exempt, specifically those in which “the public interest in confidentiality, public safety, security and habilitation clearly outweighs the interest in disclosure *as identified pursuant to the authority of the Idaho board of correction under section 20-212, Idaho Code.*” I.C. § 74-105(4)(a)(i) (emphasis added). This statutory language does not address specific records of the department, and in fact expressly defers to the Board's authority to identify the records which must remain confidential pursuant to its rule-making authority. Though this statutory provision imposes a balancing test on IBOC, it also provides that the Board identify exempt records pursuant to its authority under Idaho Code § 20-212. As previously noted, Idaho Code § 20-212 exempts IBOC from almost all requirements of the APA, including any that would be applicable to conducting or

documenting a balancing test conducted pursuant to Idaho Code § 74-105(4)(a)(i). The Legislature is assumed to know the effect of its laws. Yet, the Legislature did not impose any additional requirements upon IBOC in the identification of exempt documents, and did not specify that the undertaking of the balancing test must be expressly noted or otherwise documented by the IBOC. The lack of express minutes or other documentation of the balancing test does not render Board Rule 135.06 inconsistent with Idaho Code § 74-105(4)(a)(i) or any other statutory provisions.

The final prong in determining the amount of deference to afford an agency is whether some of the rationales underlying the rule exist. J.R. Simplot, Co., Inc., 120 Idaho at 862, 820 P.2d at 1220. If some of the rationales exist and others are absent, the court must engage in a balancing test and ultimately determine whether a “cogent reason” exists for denying the agency deference. Id. Five rationales were discussed by the Idaho Supreme Court in J.R. Simplot, Co., Inc.: (1) repose (i.e., whether the Legislature has allowed the rule to persist unchallenged), (2) whether the agency’s interpretation is practical, (3) legislative acquiescence, (4) contemporaneous agency interpretations, and (5) agency expertise. Id. at 863-866, 1221-1223. The rationales most strongly favoring agency deference here are the practicality of the agency’s interpretation, legislative acquiescence, and agency expertise.

The agency’s interpretation of the statute at issue is practical. As previously noted, the agency has been granted the express authority pursuant to Idaho Code §§ 74-105(4)(a)(i) and 20-212 to identify certain records of the department of correction that are exempt from disclosure. Idaho Code §§ 19-2716 and 19-2716A impose a duty upon the department to carry out executions while Idaho Code §§ 20-212 and 20-244 empower the Board to promulgate rules necessary to carry out the express or implied powers of the IBOC and IDOC. Board Rule 135.06 exempts from

disclosure information that “could jeopardize the ability of the department to carry out an execution.” As carrying out executions is an express power and responsibility of IBOC and IDOC, any rule that protects from disclosure information that, if disclosed, could jeopardize the ability to carry out executions, safeguards the ability of the department to perform this responsibility. The evidence produced at trial demonstrated that the disclosure of a source’s identity could jeopardize the ability of the department to carry out executions. Thus, the Board’s interpretation of Idaho Code § 74-105(4)(a)(i) to protect from disclosure information that could jeopardize the department’s ability to carry out an execution, and the Department’s interpretation of the Board Rule to exempt the identity of the source, are practical and supported by the evidence at trial.

The Idaho Legislature has acquiesced to the Board’s extensive rule-making authority. The Legislature has granted the Board extensive authority to promulgate any rules necessary to carry out its responsibilities and has continued to grant the Board wide discretion in promulgating rules related to its duties in Idaho Code § 20-212 since 1947. Additionally, Board Rule 135.06 has existed since 2011, and the Legislature has not invalidated that rule.

The agency also has expertise and uses this expertise when promulgating rules. The Board and Department are granted wide discretion because they are viewed as possessing expertise. As previously noted, IDOC is granted the authority to carry out executions. I.C. §§ 19-2716; 19-2716A. The Public Records Act clearly exempts certain records of IDOC and charges the Board with conducting the necessary balancing test and identifying which records must remain exempt to allow the IDOC to carry out its legislatively mandated mission. I.C. § 74-105(4)(a)(i). The Legislature offers no guidance and imposes no requirements for the performance of this weighing, but instead specifically refers to the broad authority of the Board pursuant to Idaho Code § 20-212. The Legislature relied upon the Board’s expertise and knowledge to make these determinations.

C. Conclusion

The rationales discussed by the Idaho Supreme Court in J.R. Simplot, Co., Inc. support a grant of deference to the agency in promulgating rules pursuant to Idaho Code § 74-105(4)(a)(i). Though Respondents concede that such deference would not be given in an objective inquiry into whether a particular record fits within a narrowly-construed exemption, the district court should have afforded the agency deference in determining that Board Rule 135.06 is valid and does properly create a narrowly-construed exemption to the Public Records Act. Finding that Board Rule 135.06 constitutes an appropriate exemption, the district court should then have refrained from conducting its own balancing test pursuant to I.C. § 74-105(4)(a)(i). The only proper objective inquiry would have been for the court to determine whether the withheld documents were exempt pursuant to Board Rule 135.06 as the challenged record could jeopardize the ability of the department to carry out an execution.

Though Respondents discuss the factors elucidated by the Idaho Supreme Court in J.R. Simplot, Co., Inc., here, this Court should determine that these factors are relevant when an agency's statutory construction is challenged in an APA proceeding, not when the district court is charged with determining whether particular public records were exempt from disclosure pursuant to the Public Records Act. This Court should determine that the district court erred in addressing the validity of Board Rule 135.06 and subsequently engaging in its own weighing process pursuant to Idaho Code § 74-105(4)(a)(i). Here, the only inquiry for the district court was whether an exemption to the Public Records Act, specifically that created by Board Rule 135.06, applied to Exhibit 40, Bates 654. It was not within the district court's purview to determine whether Board Rule 135.06 should be accepted as an appropriate statutory construction of Idaho Code § 74-105(4)(a)(i).

The evidence at trial demonstrated that Board Rule 135.06 did create an exemption to the Public Records Act. The only remaining challenge for the district court, then, was to apply this exemption to Exhibit 40, Bates 654. As will be discussed more fully in the next section, the evidence at trial clearly demonstrated that Exhibit 40, Bates 654 falls within the exemption created by Board Rule 135.06 as the record's disclosure could jeopardize the department's ability to carry out an execution. The district court should have applied Board Rule 135.06 to conclude Exhibit 40, Bates 654 is exempt from disclosure.

2. The district court erred in its weighing of the interests described by Idaho Code § 74-105(a)(i) and erroneously determined that the public interest in confidentiality did not clearly outweigh the public interest in disclosure as related to Exhibit 40, Bates 654. This finding was not supported by substantial and competent evidence. The evidence at trial demonstrated that the document clearly falls within the narrow exemption created by Board Rule 135.06.

Even if the district court was permitted to engage in its own weighing of the interests described in Idaho Code § 74-105(4)(a)(i), the district court did not properly weigh the interests. The district court's finding that the public interest in confidentiality did not clearly outweigh the public interest in disclosure with respect to Exhibit 40, Bates 654 was not supported by substantial and competent evidence.

Following a court trial on Cover's public records request, the district court concluded that Respondents had failed to demonstrate that Exhibit 40, page 654 is exempt from public disclosure pursuant to Idaho Code § 74-105(4)(a) and IDAPA 06.01.01.135.06, which specifically exempt certain records that, if disclosed, could jeopardize the ability of the department to carry out executions. (Am.R., p. 1888). Accordingly, the district court ordered that Exhibit 40, page 654 be disclosed to Cover in response to her September 21, 2017, request. This finding was not supported by substantial and competent evidence and was not arrived at by an exercise of reason.

The United States Supreme Court has recognized that, as “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 death penalty is permissible under Idaho Code and Idaho’s Constitution, and IDOC is tasked with administering and executing a death sentence. I.C. §§ 19-2716 and 19-2716A. The only lawful means of carrying out a death sentence in Idaho is through lethal injection. I.C. § 19-2716.

Both Idaho Code § 74-105(4)(a)(i) and Board Rule 135.06 recognize the sole authority of the IBOC in promulgating rules related to and carrying out executions and IDOC in carrying out executions. Idaho Code § 74-105(4)(a)(i) carves out exemptions for IBOC and IDOC in the Public Records Act. Board Rule 135.06 specifically exempts certain records that, if disclosed, could jeopardize the ability of the department to carry out executions. Both the statute and rule acknowledge that certain records of IDOC must remain exempt to enable IDOC to satisfy its statutory responsibilities.

Board Rule 135.06 was promulgated by the Idaho Board of Correction in 2011, and was in effect at the time of Cover’s request in September 2017. This rule specifically provides that “[t]he 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.” Board Rule 135.06 was specifically adopted pursuant to the authority conferred on the IBOC in Idaho Code § 74-105(4)(a)(i), which provides that certain documents of the department of correction are exempt from public disclosure. Exempt documents include “[r]ecords 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.” I.C. § 74-105(4)(a)(i).

Although the district court considered the application of both Idaho Code § 74-105(4)(a)(i) and Board Rule 135.06 to Exhibit 40, Bates 654, it did not adequately address the competing public interests enumerated in Idaho Code § 74-105(4)(a)(i) and the application of Board Rule 135.06 as they relate to IDOC’s ability to carry out its statutory execution duties. The public has an interest in its governmental agencies carrying out their lawfully prescribed duties. Substantial and competent evidence produced at trial demonstrated that the public disclosure of the identity of a source of lethal injection chemicals to departments of correction may impede the ability of IDOC to obtain execution drugs in the future. If IDOC is unable to obtain execution drugs, it is unable to carry out lawfully imposed death sentences.

A. There is a strong public interest in protecting the source of execution drugs.

Evidence adduced at trial demonstrated that Respondents have consistently relied upon Board Rule 135.06 to withhold information and records that would identify sources of lethal injection chemicals used by IDOC for executions since 2011. In its response to Cover’s initial public records request, the department explicitly noted that the request was being denied, in part, pursuant to Board Rule 135.06. (Exhibits, p. 2707). Jeff Zmuda, who was the Deputy Director of IDOC and had been employed with IDOC in various capacities for over thirty years at the time of trial, testified that he relied upon Board Rule 135 in withholding Exhibit 40, Bates 654. (Trial Transcript, p. 220, L. 16). Zmuda further testified at trial that the identifying information of suppliers of lethal injection chemicals is exempt pursuant to Board Rule 135.06 because the public disclosure of such information may interfere with the department’s ability to carry out an

execution. (Trial Transcript, p. 331, Ls. 1-3). In further support of this concern, Zmuda testified that he has personally experienced difficulty in obtaining sources of lethal injection chemicals who are willing to provide the chemicals to departments of correction. (Trial Transcript, p. 291, Ls. 3-4). Zmuda's testimony was further bolstered by the accounts of other witnesses at trial.

Jeanne Woodford, a correctional consultant with nearly 30 years of experience with the California Department of Corrections, testified that when the identities of pharmaceutical companies who had supplied lethal injection chemicals to departments of correction were disclosed to the public in other cases, "anti-death penalty groups would organize protests [of that company], either in writing or in person." (Trial Transcript, p. 456, Ls. 17-24). Woodford reported knowing of these instances from her communications with directors of other departments of correction throughout the nation. (Trial Transcript, p. 456, Ls. 17-24). Woodford conceded that the public disclosure of the identity of a source could delay, or even permanently prevent, an execution. (Trial Transcript, p. 457, Ls. 8-9). Woodford also admitted that it has become increasingly difficult for departments of correction to obtain a willing supplier of lethal injection chemicals. (Trial Transcript, p. 465, Ls. 4-16). Woodford could not testify to the reason for the difficulty, as she indicated she had not been employed with the California Department of Corrections since 2006, and therefore had no involvement with obtaining lethal injection chemicals since that time. (Trial Transcript, p. 465, Ls. 4-16).

Stephen Silberman, an Industrial Organization Economist, testified at trial that one of the most obvious effects of disclosing the identity of a lethal injection chemical source would be to enable the public to boycott that source. (Trial Transcript, p. 484, Ls. 13-14). Silberman further agreed that one goal of a boycott is to change the company's behavior. (Trial Transcript, p. 491, Ls. 7-11). For companies subject to boycotts for supplying departments of correction with lethal

injection chemicals, the obvious change in behavior desired by the boycotters would be for the source to terminate its supply of those chemicals to corrections departments. Silberman agreed that a boycott of one source that provided lethal injection chemicals to departments of correction could have chilling effects on others in that same industry engaged in the same boycotted behavior. (Trial Transcript, p. 492, Ls. 4-10).

Cover testified that one of the main interests of the public in knowing the identity of a source would be to enable the public to stage boycotts against the source. (Trial Transcript, p. 624, Ls. 11-25). Cover agreed that one purpose of obtaining information about past sources of lethal injection chemicals would be to boycott that source. (Trial Transcript, p. 624, Ls. 11-18). Cover also conceded that it has become increasingly difficult for departments of correction to obtain lethal injection chemicals. (Trial Transcript, p. 626, Ls. 6-25). Although Cover did not definitively conclude that the disclosure of lethal injection chemical sources has resulted in the increased difficulty of obtaining chemicals, Cover did describe a correlation between the increased difficulty of obtaining sources and the greater secrecy exercised by departments of correction regarding sources. Cover admitted that one possible explanation of this correlation is that departments of correction are becoming more secretive regarding sources in an effort to preserve their remaining sources. (Trial Transcript, p. 626, Ls. 3-13).

Testimony from several witnesses concerning the difficulty in obtaining lethal injection chemicals was bolstered by media articles the district court considered in Exhibit 40. The district court specifically referred to a May 2012 article that cited the difficulty in obtaining lethal injection chemicals to explain the change in Idaho's execution procedures between the Rhoades execution in November 2011 and the Leavitt execution in June 2012. (Am.R., p. 1827, ¶ 15). The United States Supreme Court has likewise recognized the challenges faced by departments of correction

when attempting to obtain legal injection drugs, and directly attributed these obstacles to the actions of anti-death-penalty advocates who pressured pharmaceutical companies to refuse to supply execution drugs. Glossip v. Gross, 135 S.Ct. 2726, 2733 (2015).

The testimony presented at trial, coupled with the other evidence noted by the district court, clearly demonstrated the strong public interest in confidentiality related to the source of lethal injection chemicals. The evidence showed that identifying a source of lethal injection chemicals could impact the willingness of both the identified source and other sources engaged in the same conduct to supply execution drugs to departments of correction. Increased difficulty in obtaining a source of lethal injection chemicals could then jeopardize the ability of IDOC to carry out an execution, as lethal injection is the only lawful manner of executing an individual in Idaho. I.C. § 19-2716.

B. There is minimal public interest in the disclosure of Exhibit 40, Bates 654.

In contrast to the strong evidence of a public interest in maintaining the confidentiality of lethal injection chemical sources to secure the ability of IDOC to comply with its statutory execution duties, little evidence was presented that would tend to show a public interest in disclosure. Exhibit 40, Bates 654 contains identifying information of the source used in the 2012 execution of Richard Leavitt. (Trial Transcript, pp. 324-325, Ls. 24-2). Though the source identified in that document was used in the Leavitt execution, the document itself is not related to the Leavitt execution. Rather, Exhibit 40, Bates 654 is a letter from the source agreeing to provide IDOC with lethal injection chemicals for executions subsequent to the Leavitt execution. (Trial Transcript, p. 218, Ls. 23-25). Zmuda testified at trial that the source never produced chemicals pursuant to the agreement as no subsequent executions were conducted. (Trial Transcript, p. 221, L. 2). The source identified in Exhibit 40, Bates 654 does not have an existing contractual

relationship with IDOC and is no longer available to provide chemicals. (Trial Transcript, p. 220, Ls. 21-24). Exhibit 40, Bates 654 contains the company's name and contact information, the name of a representative of the company, and the name and contact information of the company representative's family member. (Trial Transcript, pp. 219-220). As the record is not related to the chemicals actually used in the Leavitt execution, or any execution, the document does not contain any information about the drug used in an execution (e.g. batch or lot number, chemical name or ingredients, chain of custody, storage information). Thus, the only information that the public would obtain from disclosure of Exhibit 40, Bates 654 is the identity of the source, the source's representative, and the representative's family member.

Dr. Lynn Paulsen, a retired pharmacist with about 45 years of experience, testified that knowing the identity of a source would not demonstrate whether a specific drug or dose used in an execution was stable, potent, or "safe." (Trial Transcript, p. 531, Ls. 8-15). Paulsen further agreed that revealing the source of execution drugs used in an execution would not provide the public with information about whether the execution caused suffering for the condemned. (Trial Transcript, pp. 532-533, Ls. 25-22). Zmuda testified at trial that the source identified in Exhibit 40, page 654 was a compounding pharmacy at the time of the 2012 execution. Thus, Paulsen testified at length regarding the quality control issues she observed when auditing multiple compounding pharmacies. (Trial Transcript, pp. 510-521). Paulsen indicated that the concerns were so significant, that the health system for which Paulsen was employed terminated their contracts with twenty-five of the sixty-one pharmacies Paulsen audited. (Trial Transcript, p. 513, Ls. 18-20). Interestingly, when discussing her survey of compounding pharmacies, Paulsen testified that "all of those on paper looked good." (Trial Transcript, p. 521, L. 7). This is significant because how the pharmacy looks "on paper" is the only information that could be reasonably

discovered if Exhibit 40, Bates 654 were released now nearly eight years after the named source provided drugs to IDOC. It was clear from Paulsen's testimony that very little information of public interest could be acquired simply from the source's identity or how the source looked "on paper" nearly a decade ago.

Cover testified that she knows of no evidence showing that the 2011 or 2012 executions were "botched" or caused suffering to the condemned individuals. (Trial Transcript, pp. 627-629). Cover also admitted that knowing the source of lethal injection chemicals used in the 2011 or 2012 executions would not provide the public with information about whether other sources or alternatives were available to IDOC in 2011 or 2012. (Trial Transcript, p. 631, Ls. 18-25).

Based on the nature of the information contained in Exhibit 40, Bates 654, and the testimony presented about the limited usefulness of that information in determining the effectiveness and humaneness of the drug used in the 2012 Leavitt execution, it is clear that there is very little public interest in disclosure of this document.

C. The evidence produced at trial does not support the district court's findings.

That the district court's findings related to Exhibit 40, Bates 654 are unsupported by substantial and competent evidence is apparent from the court's disparate treatment of Exhibit 40, Bates 654 and Exhibit 40, Bates 655. This is also apparent from the court's conclusion that Exhibit 40, Bates 654 be disclosed in completely unredacted form.

The evidence presented at trial does not support the disparate treatment of Exhibit 40, Bates 654 and Exhibit 40, Bates 655. Unlike Exhibit 40, Bates 654, the district court concluded that the Respondents had met their burden with respect to Exhibit 40, Bates 655, and thus could continue to withhold most of that document. Both documents contain similar information, including information that would identify the supplier. (Trial Transcript, pp. 219-220; p. 222, Ls. 16-23).

Exhibit 40, Bates 655 was described at trial as a DEA form that provides a chain of custody for execution chemicals. (Trial Transcript, p. 222, Ls. 12-13). Zmuda testified that Exhibit 40, Bates 655 was a form directly related to the 2011 execution of Paul Ezra Rhoades, and thus contains information on both the source and actual drugs used in the 2011 execution. (Trial Transcript, p. 325, Ls. 9-24). Both documents relate to executions that were completed over five years before Cover's 2017 public records request. According to the testimony, revealing the source's identity contained in either document would not provide significant information to the public regarding whether the drugs used in the 2011 or 2012 executions were effective and humane. The testimony related to the challenges faced by departments of correction in obtaining lethal injection chemical suppliers and the chilling effect of protests and boycotts of suppliers is equally applicable to both sources. Zmuda evinced similar uncertainty as to whether either source possessed the appropriate licenses or was subject to oversight at the time of the executions. (Trial Transcript, pp. 324-326). This information could minimally support a public interest in disclosure given Paulsen's testimony that, in general, an unregulated pharmacy would be more likely to produce unstable or impotent drugs (Trial Transcript, p. 537-538, Ls. 22-9). Zmuda's uncertainty regarding the regulatory processes to which the sources identified by Exhibit 40, Bates 654 and Exhibit 40, Bates 655 were subject at the time those sources provided execution drugs to IDOC was equal as to both sources, and thus the minimal public interest in disclosure related to that issue was also equal as to both.

The only difference between the two sources presented at trial was that the source identified by Exhibit 40, Bates 654 was not, at the time of trial, able to provide lethal injection chemicals to IDOC because the source, at that time, did not meet regulatory requirements. (Trial Transcript, p. 220, L. 21). Zmuda was not able to testify whether the source identified by Exhibit 40, Bates 655 was available or unavailable to IDOC. The district court does not provide any cogent reason for

treating these two documents differently, and the evidence produced at trial does not support such disparate treatment where the testimony and evidence demonstrating the strong public interest in confidentiality applied equally to both Exhibit 40, Bates 654 and Bates 655. The evidence at trial clearly supports that the documents should be treated the same. The evidence further clearly demonstrates that both documents are exempt pursuant to Board Rule 135.06.

The district court compelled the disclosure of Exhibit 40, Bates 654 in completely unredacted form. (Am.R., p. 1888). In addition to source-identifying information, Exhibit 40, Bates 654 also contains the identifying information of a family member of the source (Trial Transcript, pp. 219-220). The identification of a family member unrelated to the 2011 and 2012 executions is not responsive to Cover's request, and is information for which the public interest in confidentiality is high, and the public interest in disclosure nonexistent. The court's failure to exempt this information further supports the conclusion that the district court's findings related to Exhibit 40, Bates 654 are unsupported by substantial and competent evidence.

D. Conclusion

A Public Records Act proceeding is limited to the determination of whether particular records are exempt from public disclosure pursuant to a narrowly construed exemption to the Public Records Act. Hymas I, 156 Idaho at 743, 330 P.3d at 1101. It is not the forum to debate the constitutionally, legality, or ethics of the imposition of the death penalty. The death penalty is constitutional in the United States and Idaho. As such, there must exist a constitutional means of carrying out the death penalty. Glossip, 135 S.Ct. 2726, 2732-33 (2015), citing Baze v Rees, 553 U.S. 35, 47, 128 S.Ct. 1520 (2008). In Idaho, the Idaho Department of Correction is tasked with administering and executing a death sentence through lethal injection, which is the only lawful method of carrying out a death sentence in Idaho. I.C. §§ 19-2716 and 19-2716A. In recognition

of IDOC's statutory responsibilities related to executions, IBOC promulgated Board Rule 135.06 which exempts from public disclosure any information that could jeopardize the ability of the department to carry out an execution. The Idaho Board of Correction promulgated this rule pursuant to the express authority granted in Idaho Code § 74-105(4)(a)(i). Though the district court considered the application of both the statute and the rule to Exhibit 40, Bates 654, the district court failed to give adequate weight to the public's interest in its governmental agencies carrying out their lawfully prescribed duties, including executions, and gave too great weight to the court's view of the public interest in the disclosure of a source.

Substantial and competent evidence produced at trial demonstrated that the public disclosure of the identity of a source of lethal injection chemicals to departments of correction may impede the ability of IDOC to obtain execution drugs in the future. If IDOC is unable to obtain execution drugs, it is unable to carry out lawfully imposed death sentences. Thus, the evidence demonstrated that there is an overwhelming interest in confidentiality related to the identity of the source of lethal injection chemicals to IDOC as there is a reasonable probability that, if the identity of the source were revealed, IDOC would suffer the specific, identified harm of being unable to carry out its statutory duties related to executions. The evidence at trial failed to demonstrate more than a minimal interest in the public disclosure of Trial Exhibit 40, Bates 654, especially where that document identifies a source used by IDOC in 2012 and where the document provides no information about any actual chemicals received by IDOC or used in any execution. The evidence established that the minimal public interest in disclosure of an agreement to potentially provide execution drugs that were never actually provided was outweighed by the significant public interest in ensuring IBOC and IDOC are able to carry out their statutory duties.

Thus, the district court's conclusion that Respondents had not met their burden with respect to Trial Exhibit 40, Bates 654 was not supported by substantial and competent evidence, and was therefore in error.

3. The district court did not properly apply the "reasonable probability of harm" standard elucidated by the Idaho Court of Appeals in *Hymas*.

The district court correctly noted that, in order to maintain a claim of exemption, the withholding agency must demonstrate a reasonable probability that disclosure of each withheld record may result in harm. (Am.R., p. 1876). However, the district court erroneously applied this standard to Exhibit 40, Bates 654. The district court's finding that Respondents had failed to demonstrate that a specific harm would be reasonably probable to result from the disclosure of Exhibit 40, Bates 654 was not supported by substantial and competent evidence.

The Idaho Court of Appeals in *Hymas I* held that a withholding agency bears the burden of demonstrating that the disclosure of each withheld record could result in potential harm, and provide evidence showing the harm that may result. 156 Idaho at 747, 330 P.3d at 1105. The withholding agency must prove the likelihood of harm from disclosure of a document through evidence that is specific to the withheld record, rather than generalized or categorical. *Hymas II*, 159 Idaho at 602, 364 P.3d at 303. However, though the evidence must be specific, it need not demonstrate that the harm *will* occur if the record is disclosed, only that such harm is reasonably probable. *Id.* The proper inquiry for the district court is to determine whether the withholding agency provided sufficient proof that connects a reasonable probability of a specific harm to the production of each withheld document. *Hymas II*, 159 Idaho 594 at 602.

Here, the district court found that Respondents had not met their burden to show a reasonable probability that a specific harm would result from the disclosure of Exhibit 40, Bates 654. (Am.R., p. 1888). The district court did, however, find that Respondents had met their burden

to show a reasonable probability that a specific harm would result from the disclosure of Exhibit 40, Bates 655 (Am.R., p. 1889). This disparate treatment of the two documents when determining whether there is a reasonable probability that harm could result from the disclosure is consistent with the district court's disparate treatment of the documents when balancing the competing interests described in Idaho Code § 74-105(4)(a)(i). Respondents incorporate herein their arguments against the disparate treatment of Exhibit 40, Bates 654 and Exhibit 40, Bates 655 as elucidated in Section 2 of this Argument. Just as there is no cogent reason to treat Exhibit 40, Bates 654 and Exhibit 40, Bates 655 differently when addressing the public interests in confidentiality and disclosure, there similarly exists no cogent reason for the disparate treatment of these two records when determining the probable harm that could reasonably result from disclosure.

Respondents incorporate herein their discussion of the evidence produced at trial, as described in Section 2 of the Argument above. Specifically, Respondents note that the specific harm identified was the same for both Exhibit 40, Bates 654 and Exhibit 40, Bates 655: that disclosure of the source could jeopardize the department's ability to carry out lawfully ordered executions, for which the department is statutorily responsible. The evidence on this harm—including the increasing difficulty of obtaining lethal injections drugs testified to by Zmuda, Woodford, Cover, and Paulsen, and the chilling effect of boycotts on both identified and unidentified suppliers testified to by Silberman—was the same and applied equally to both Exhibit 40, Bates 654 and Exhibit 40, Bates 655. Though the evidence of probable harm presented by Respondents cannot be generalized or categorical, it can be common to several withheld documents. Hymas II, 159 Idaho 594 at 602. Respondents have previously described the minimal differences between Exhibit 40, Bates 654 and Exhibit 40, Bates 655. None of those differences

mitigated the risk of harm linked to the disclosure of either document, and none of the differences justified the disparate treatment of these two records.

The district court's disparate treatment of Exhibit 40, Bates 654 and Exhibit 40, Bates 655 again demonstrates that the district court's findings as to the harm of disclosure of Exhibit 40, Bates 654 are not supported by substantial and competent evidence. Respondents met their burden to demonstrate a specific harm that would be reasonably probable to result if the records were disclosed.

II.

As the prevailing party on appeal, Respondents are entitled costs.

If Respondents are the prevailing party on appeal, Respondents are entitled to costs pursuant to Idaho Appellate Rule 40.

CONCLUSION

A Public Records Act proceeding presents a limited inquiry for the district court: whether records withheld from disclosure pursuant to a Public Records Act request fall within a narrowly construed exemption to the Public Records Act and whether the disclosure of the withheld records would be reasonably probable to result in a specific, identified harm. Here, the district court erroneously expanded its inquiry to analyze, and ultimately invalidate, the withholding agency's rule which created the relied-upon exemption. After invalidating Board Rule 135.06, and the exemption created by the rule, the district court then engaged in its own weighing under Idaho Code § 74-105(4)(a)(i). This weighing was in error. The district court's findings that Respondents failed to meet their burden to demonstrate that Exhibit 40, Bates 654 fell within a narrowly construed exemption to the Public Records Act and its disclosure would be reasonably likely to result in an identified harm were not supported by substantial and competent evidence.

Respondents request this Court vacate the district court's judgment and peremptory writ requiring the disclosure of Exhibit 40, Bates 654, and deem Exhibit 40, 654 exempt from disclosure under the Public Records Act as it fits within a narrowly-construed exemption created by Board Rule 135.06 and its disclosure would be reasonably likely to cause a specifically identified harm.

DATED this 24th day of January, 2020.

/s/ Jessica Kuehn
JESSICA KUEHN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24th day of January, 2020, served a true and correct copy of the foregoing BRIEF OF APPELLANT-CROSS RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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