# SUPERIOR COURT OF CALIFORNIA
# COUNTY OF MARIN

DATE: 12/11/15 TIME: 9:00 A.M. DEPT: E CASE NO: CV1504195

PRESIDING: HON. PAUL HAAKENSON

REPORTER: CLERK: JOEY DALE

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| PETITIONER: AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CA.<br><br>vs.<br><br>RESPONDENT: CA. DEPT. OF CORRECTIONS AND REHAB. | |

NATURE OF PROCEEDINGS: WRIT – VERIFIED PETITION FOR PEREMPTORY WRIT OF MANDATE AND WRIT OF MANDATE [PETR] AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

RULING

The petition for peremptory writ of mandate and writ of mandate by American Civil Liberties Union of Northern California ("ACLU-NC") is granted.

By December 22, 2015, respondent California Department of Corrections and Rehabilitation ("CDCR") shall file and serve a list of "any responsive records that it has not released to Petitioner, describing with specificity each document and identifying the exemptions that it contends apply." (Verified petition, p.15:22-25.) Respondent is also directed to submit the withheld documents to the court, under seal, for *in camera* review, consistent with the below-described format and timeline.

Except for those records identified in its exemption log, CDCR shall promptly provide ACLU-NC with all records responsive to its California Public Records Act ("PRA") requests dated August 14, 2015 and September 4, 2015, that have not already been produced.

As outlined below, the hearing on this petition is continued to January 8, 2016, at 9:00 a.m. The court gives both parties leave to submit additional declarations and supplemental memoranda as described below.

**Petitioner's requests under the PRA.**

In August and September 2015, ACLU-NC requested copies of all records falling into a total of 26 categories. (Verified petition, Exhs.A, B.) These requests reasonably describe identifiable records. "Except with respect to public records exempt from disclosure by express provisions of law," CDCR must make the records promptly available to ACLU-NC upon its payment of required fees. (Govt. Code §6253, subd.(b).)

CDCR complied in part. It made 40 pages available in response to ACLU-NC's first request, and 10 pages available in response to ACLU-NC's second request. (Verified petition, Exhs.C, D.) Alleging that CDCR is "unlawfully withholding non-exempt records" (petition, ¶56), ACLU-NC commenced this action on November 18, 2015. CDCR later produced 83 pages in response to the first request, and 57 pages in response to the second request. (McClease declaration supporting opposition, ¶¶5-6 and Exhs.C, D.)

The PRA "establishes a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency, and the record must be disclosed unless a statutory exception is shown." (*Sander* v. *State Bar of California* (2013) 58 Cal.4th 300, 323.) "Creating a general right of access subject to exemptions places the burden on an agency to show that a particular public record is exempt from disclosure." (*Sacramento County Employees' Retirement System* v. *Superior Court* (2011) 195 Cal.App.4th 440, 453.)

"Since disclosure is favored, all exemptions are narrowly construed." (*American Civil Liberties Union of Northern Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 67 (citation omitted).) CDCR estimates the "number of exempt responsive records in this case" to be "well over 79,000." (Opposition memorandum, p.1:19-21.) CDCR has not yet provided information sufficient to show that any of the "well over 79,000 records" actually is exempt.

**The claimed exemptions and extent of the withholding.**

In its opposition memorandum, CDCR primarily cites as exemptions: (1) the attorney-client and work product privileges (Govt. Code §6254, subd.(k), Evidence Code §952); (2) "[p]reliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure" (Govt. Code §6254, subd.(a)); and (3) "[r]ecords of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes" (Govt. Code §6254, subd.(f)).)

CDCR argues that ACLU-NC offers only "unfounded supposition and assumption" to support its claim of further responsive records. (Opposition memorandum, p.3:15-16.) It cites several examples of what it describes as ACLU-NC's mistaken assumptions. In her declaration, CDCR attorney Kelly McClease states that CDCR has no records of post-February 2013 communications "with pharmaceutical companies, pharmacies or suppliers about acquisition of drugs included in its new lethal injection protocol," that would be "covered by the ACLU-NC's August 14, 2015 records request item 8." (¶7.) This statement fails to parallel the content of request item 8. Item 8 is not limited to communications with "pharmaceutical companies, pharmacies or suppliers," and does not concern only drugs included in the new protocol.

As another example of "supposition and assumption," CDCR cites petitioner's allegation that CDCR necessarily had communications with other states concerning lethal injection drugs. (Verified petition, ¶41(c).) McClease's declaration does not reach the subject of communications with other states. (Compare opposition memorandum, p.3:27-4:10, with McClease declaration, ¶¶5-8.) Further, CDCR acknowledges past communications with other states, but indicates that it already provided those documents pursuant to litigation in 2010. In 2010, CDCR finalized a regulation providing for a three-drug protocol. Its new proposed regulations provide for a one-drug protocol. Considering the well-known impact of drug shortages on states' efforts to carry out executions (see, e.g., *Glossip* v. *Gross* (2015) 135 S.Ct. 2726, 2733-2734), it seems highly unlikely that CDCR would have had *no* post-May 2013 communications with any manufacturer, any individual or any other state agencies "regarding drugs intended or considered for use in executions." (Verified petition, Exh.A, request items No.8, 9. See also Zamora declaration supporting petition, ¶¶12-14, 21, 36-44, 54.)

At any rate, McClease's declaration confirms that the hard drive of her computer stores "at least 79,387 email files related to lethal injection drugs and protocols." (See ¶9.) Such files may be found on the computers of other CDCR attorneys as well. (Id.) Thus, the primary issue here is not whether CDCR has records additional to those disclosed. It is whether those additional records are exempt from disclosure because they are "either privileged attorney-client communications, attorney work product, drafts, or subject to a combination of two or all three of those exemptions." (McClease declaration, ¶9.)

Citing *Haynie* v. *Sup. Ct.* (2001) 26 Cal.4$^{th}$ 1061, CDCR argues that it should not be required to produce an exemption log. The holding in *Haynie* applied to an agency's obligations at the pre-petition stage. As noted in *Haynie*, courts have ordered production of a records inventory "when a petition to compel disclosure has been filed, the agency claims the records are protected by an exemption, and the records are being transmitted to the court for in camera review to evaluate the claim." (Id. at 1072-1075.) In its opposition memorandum, CDCR acknowledges this court's ability to require an exemption log. (Opposition memorandum, p.5:5-7. See also Govt. Code §6259, subd.(a), and, e.g., *State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1193 (finding required submission of a list/index of requested documents to be "consistent with the language and spirit of the [PRA]").)

The court exercises its discretion to require that CDCR produce such a log and transmit the withheld records to the court for in camera review.

To fully evaluate CDCR's claims, the court has no alternative to requiring such production. It cannot simply assume that CDCR is entitled to one of the claimed exemptions for all of the 79,000-plus records. For instance, CDCR argues that records withheld as drafts "are just drafts of the final regulations submitted to the Office of Administrative Law." (Opposition memorandum, p.5:14-16.) However, public records may not be excluded simply because they are "drafts." The "drafts" exemption covers "[p]reliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure." (Govt. Code §6254, subd.(a).) Nothing before the court indicates that the drafts "are not retained by the public agency in the ordinary course of business," or that "the public interest in withholding those records clearly outweighs the public interest in disclosure." CDCR simply urges—as a general proposition--that "the public interest in obtaining a draft is minimal, given that the public has the final version of the regulation and the voluminous rulemaking file." (Opposition, p.5:17-19.) The court disagrees. Section 6254(a) sets forth a balancing test to be applied with all "drafts" that are not retained by the public agency in the ordinary course of business. The public interest in non-disclosure must "clearly" outweigh the public interest in disclosure. Even if none of the drafts was "retained by the public agency in the ordinary course of business," CDCR offers no particular reason for withholding any of the drafts. On the other hand, the public has a significant interest in learning the extent to which CDCR considered and rejected other alternatives.

The court also disagrees with CDCR's view that the attorney-client privilege and attorney work product exemptions could be determined through a mere "mechanical application." (Opposition memorandum, p.5:12-14.) "[T]he proper focus in the privilege inquiry is not whether the communication contains an attorney's opinion or advice, but whether the relationship is one of attorney-client and whether the communication was confidentially transmitted in the course of that relationship." (See *County of Los Angeles Board of Supervisors* v. *Superior Court of Los Angeles County* (2015) 235 Cal.App.4th 1154, 1174, citing *Costco Wholesale Corp.* v. *Superior Court* (2009) 47 Cal.4th 725, 733. See also, e.g., *Zurich American Ins. Co.* v. *Sup. Ct.* (2007) 155 Cal.App.4th 1485, 1503-1504 (otherwise routine, non-privileged communications "do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda").) CDCR fails to provide information sufficient for a determination that any particular record is exempt under Government Code section 6254, subdivision (k).

CDCR also cannot justify non-disclosure by making generalized assertions about threats to security and privacy. (*American Civil Liberties Union of Northern Cal., supra,* 202 Cal.App.4th at 73-75.)

**Content of the log and organization of records.**

Given the volume of records at issue, CDCR is required to tab and provide an index for all records submitted for in camera review.

CDCR is to submit the log in a format permitting evaluation of the claimed exemption as to each of the withheld records. To the extent possible, the log should have a heading for each of the 26 request categories, followed by a list of responsive documents (including tab number) within that category. Each reference to a record should correspond to the tab on the actual record. For each record listed, CDCR shall not only identify the exemption(s) claimed to apply, but provide sufficient information about the context and timing of the record to permit a meaningful evaluation. The information should include dates, subject matter, authors and recipients, as well as an explanation of the need for non-disclosure. If such information would reveal the exempt information, that portion of the explanation may be redacted from the log provided to Petitioner.

An agency "must describe '*each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.'" (*American Civil Liberties Union of Northern Cal., supra,* 202 Cal.App.4th at 83 (citation omitted).)

**Schedule for submission of the log and further proceedings.**

CDCR asks that if the court orders preparation of a log or in camera review, it devise a "realistic" schedule. CDCR acknowledges having a 10-day log-production deadline in the earlier San Francisco Superior Court case involving the PRA and lethal injection protocol. (See opposition memorandum, p.5:27-6:11. See also Lye declaration supporting ex parte application filed November 23, 2015, ¶¶6-10, and Exhs.1, 2.) However, it maintains that the requests in the 2010 proceeding were far more limited.

The present requests extend to subjects beyond "CDCR's acquisition, use, and destruction of sodium thiopental." (Lye November 2015 declaration, ¶6.) Nonetheless, CDCR provided for a public comment period ending on January 22, 2016. (Verified petition, ¶43.) The court must devise a procedure which allows ACLU-NC to receive the information in time for its meaningful response. As the court wrote in *Sims v. Department of Corrections and Rehabilitation* (2013) 216 Cal.App.4th 1059, 1073:

> The public participation contemplated by the APA is not a numbers game. A hearing is "on the merits" and "meaningful" only if the interested public has timely received all available information that is relevant to the proposed regulations, accurate, and as complete as reasonably possible.

By December 22, 2015, CDCR is to file and serve its exemption log, and any additional declarations and a supplemental memorandum of up to 15 pages. Also by December 22, 2015, it is to lodge with the court the withheld records for an in camera review. ACLU-NC may file and serve a supplemental memorandum of up to 15 pages by December 30, 2015. The parties are to arrange service of the papers so as to achieve actual delivery to the other party by no later than the following court day after filing. The hearing on this petition is continued to January 8, 2016, at 9:00 a.m. in Department E.

The court will consider extending these deadlines if the public comment period is extended. The court does not have authority to order extension of the public comment period in the context of this litigation. CDCR, however, seemingly has the power to extend such time and afford itself more time to comply with this order. CDCR may notify the court of such extension through a letter brief served on ACLU-NC, an ex parte application for a continuance prior to December 22, 2015, or by stipulation extending the above described deadlines.

CDCR may not limit its search for responsive records to files on the computer of CDCR attorney Kelly McClease. If CDCR determines in the course of its review that certain responsive records are not exempt, it shall make those records available to ACLU-NC without further delay, and in no event later than December 21, 2015. Its supplemental memorandum or declarations should then identify the additional records provided.

The court understands that absent such extension, both parties and the court will be challenged with burning the midnight oil over the holidays to address this order. Nevertheless, equity and justice demands as much.

***Parties must comply with Marin County Superior Court Local Rules, Rule 1.10(B) to contest the tentative decision. In the event that no party requests oral argument in accordance with Rule 1.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 1.11.***