

1 Michael T. Risher (CA SBN 191627)
2 mrisher@aclunc.org
3 Linda Lye (CA SBN 215584)
4 llye@aclunc.org
5 AMERICAN CIVIL LIBERTIES UNION
6 FOUNDATION OF NORTHERN CALIFORNIA
7 39 Drumm St., 2nd Floor
8 San Francisco, California 94111
9 Telephone: 415-621-2493
10 Facsimile: 415-255-8437

11 Attorneys for Plaintiffs
12 AMERICAN CIVIL LIBERTIES UNION OF
13 NORTHERN CALIFORNIA and
14 SAN FRANCISCO BAY GUARDIAN

15 UNITED STATES DISTRICT COURT
16
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA
18
19 SAN FRANCISCO DIVISION

20 AMERICAN CIVIL LIBERTIES UNION
21 OF NORTHERN CALIFORNIA; SAN
22 FRANCISCO BAY GUARDIAN,

23 Plaintiffs,

24 v.

25 DRUG ENFORCEMENT
26 ADMINISTRATION,

27 Defendant.

CASE NO.: 3:11-cv-01997 RS

**PLAINTIFFS' REPLY IN SUPPORT OF
PRELIMINARY INJUNCTION MOTION**

Hearing Date: May 12, 2011

Time: 1:30 pm

Dept.: Courtroom 3, 17th Floor

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I. INTRODUCTION

DEA does not dispute that Plaintiffs are entitled to prompt production of documents, or that they will suffer irreparable harm absent immediate compliance with FOIA. DEA's only argument in opposition to Plaintiffs' motion is mootness. But Plaintiffs' motion is not moot because DEA has failed to conduct an adequate search.

Plaintiffs seek 12 categories of documents relating to state efforts to import a Schedule III controlled substance, sodium thiopental. At least ten states have obtained imported sodium thiopental, and DEA has seized the drug from at least five of them. Federal law requires documentation when sodium thiopental is imported, and DEA policy requires documentation when DEA assumes custody of drugs. None of this has been provided. Yet DEA now contends that Plaintiffs' motion is moot because, after conducting an initial search, DEA has produced a sum total of 27 pages of emails involving two states, California and Arizona, and DEA has initiated a supplemental search that has yielded an unspecified number of additional pages.

The threadbare results of DEA's initial search and its declaration suggest that DEA unreasonably limited the search to email records in a single office at DEA Headquarters. But we are left to guess as to the nature of the search because DEA's declaration provides no description of the offices searched, "the files searched and the search procedures." *Zemansky v. EPA*, 767 F.2d 569, 573 (9th Cir 1985) (requiring "detailed" "[a]ffidavits describing agency search procedures") (citation omitted). DEA has thus failed to meet its burden of "demonstrat[ing] that it has conducted a search reasonably calculated to uncover all relevant documents." *Id.* at 571 (internal quotation marks, citation omitted).

In any event, "the record itself reveals 'positive indications of overlooked materials.'" *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999) (citation omitted). DEA has not produced extensive documentation that must exist and that even the most cursory of initial searches should have yielded: DEA has failed to produce any of the forms mandated by federal law when sodium thiopental is imported or any of the documentation mandated by DEA policy when the agency assumes custody of

1 drugs. Further, Plaintiffs have independent knowledge of at least three responsive
 2 documents that should have been located in the initial search, yet were not produced. Nor
 3 has DEA produced any emails relating to the eight states other than California and
 4 Arizona known to have obtained imported sodium thiopental or any of the five states from
 5 which DEA is known to have assumed custody of the drug.

6 DEA's conclusory declaration fails to alleviate any concern that its supplemental
 7 search will cure the patent inadequacy of "the original search (which failed to locate any
 8 of these possibly numerous and important documents)" because DEA fails to "disclose
 9 *how many* additional documents [will be] produced in the subsequent search, or offer any
 10 description of the nature of these documents," or even the search methodology. *Oglesby*
 11 *v. United States Dept. of Army*, 79 F.3d 1172, 1185 (D.C. Cir. 1996) (reversing summary
 12 judgment for agency on adequacy of search).

13 Given the inadequacy of DEA's efforts to search for documents, a preliminary
 14 injunction remains necessary to ensure that DEA produces the documents to which
 15 Plaintiffs are statutorily entitled before the scheduled executions.

16 **II. BACKGROUND**

17 **A. Federal documentation requirements**

18 Federal law and policy require substantial documentation when Schedule III
 19 controlled substances such as sodium thiopental are imported or seized. DEA should have
 20 these records but has failed to produce them.

21 **1. Importation requires an import declaration on DEA Form 236**

22 Federal law prohibits importation of sodium thiopental except by a "person ...
 23 properly registered under the Act (or exempt from registration)." 21 C.F.R. §1312.11(b);
 24 *see* 21 U.S.C. § 957(a). This prohibition applies when the government imports drugs.
 25 Office of Legal Counsel, 6 U.S. Op. Off. Legal Counsel 577, 1982 WL 170725 (1982).

26 Anyone who imports a controlled substance must file a detailed import declaration
 27 on DEA Form 236, *attached as* Appendix A, for "each consignment of controlled
 28 substances to be imported." 21 C.F.R. §§1312.11(c); *see also* 1312.18(b). The form

1 must identify the importer, consignor in the country of exportation, and the import broker
 2 (if any), and must set forth a “complete description of the controlled substances to be
 3 imported,” and other specified information. 21 C.F.R. §1312.18(c). The form must be
 4 filed in quintuplicate, with one copy submitted to the DEA’s Import/Export Unit located at
 5 DEA Headquarters. 21 C.F.R. §§1312.18 (b), (c), 1312.19(b), 1321.01.

6 **2. DEA seizures of drugs must be documented on multiple DEA**
 7 **forms and various DEA’s databases**

8 DEA has adopted extensive “policies and procedures pertaining to the processes
 9 used to seize, account for, safeguard, and dispose of drugs and weapons.” United States
 10 General Accounting Office, Seized Drugs and Weapons: DEA Needs to Improve Certain
 11 Physical Safeguards and Strengthen Accountability (Nov. 1999), GAO/AIMD-00-17
 12 (“GAO Report”) at 28, *attached as* Exhibit 6 to Decl. of Natasha Minsker ISO Reply.

13 “Drug evidence may change hands several times from seizure to disposition.” *Id.*
 14 at 8. DEA therefore requires “complete and accurate documentation” at each link in the
 15 chain of custody. *Id.* at 14. DEA thus requires completion of a “Report of Drug Property
 16 Collected, Purchased, or Seized” on form DEA 7. *Id.* DEA chemists analyze the drugs,
 17 and document the results on form DEA 86. *See id.* at 8, 14. Any transfer of drugs to other
 18 parties must be documented on form DEA 12. *See id.* at 14. DEA further requires
 19 “evidence accountability records” on form DEA 307. *See id.* Bulk seizures must be
 20 documented through photographs, and evidence labels must be signed by two agents. *Id.*

21 In addition, information must be entered into various databases. Evidence
 22 technicians are required to enter receipt of drug evidence into “DEA’s Laboratory
 23 Evidence Management System.” *Id.* at 8. Information must also be inputted into DEA’s
 24 central database known as STRIDE (System to Retrieve Information from Drug
 25 Evidence), which is accessible from DEA headquarters. *Id.* at 8, 28.¹

26
 27 ¹ Although the GAO Report dates from 1999, information currently on DEA’s website
 28 indicates that STRIDE remains in use in updated form. *See*
<http://www.justice.gov/dea/foia/stride.html>

DEA also enters “new and updated investigative information” into IMPACT (Investigative Management Program and Case Tracking System), “a web-based case management system” for “the establishment, recording, accessibility, and analysis of information pertaining to DEA investigative activities.” Office of Information Systems, DEA, Privacy Impact Assessment for the Investigative Management Program and Case Tracking System (February 4, 2008) at 2, 5, *attached as* Exhibit 7 to Minsker Reply Decl.

B. At least ten states obtained imported sodium thiopental and DEA is known to have seized the supply from five states

At least ten states – Alabama, Arizona, Arkansas, California, Georgia, Kentucky, Nebraska, South Carolina, South Dakota, and Tennessee – have obtained imported supplies of sodium thiopental. *See* Minsker Reply Decl. at ¶5.

DEA has now taken custody of sodium thiopental in the possession of at least five states: Alabama, Georgia, Kentucky, Tennessee, and South Carolina. *See id.* at ¶¶3-4, 6.

C. DEA’s dilatory response to Plaintiffs’ January 4, 2011 FOIA request

On January 4, 2011, Plaintiffs requested 12 categories of information relating to state efforts to import, purchase, and acquire sodium thiopental for executions. Decl. of Natasha Minsker ISO PI (Doc. 10) at ¶20 & Exh. 11. The letter sought, *inter alia*:

- records of communications between DEA and state officials regarding importation of sodium thiopental for executions (Request 1);
- records of internal DEA communications regarding importation, transfer, or purchase of sodium thiopental by state officials for executions (Request 4);
- records of communications between DEA and any private individual regarding importation, transfer, or purchase of sodium thiopental by state officials for executions (Request 6);
- records of communications between DEA and other federal agencies regarding importation, transfer, or purchase of sodium thiopental by state officials for executions (Requests 7 and 8);
- records regarding any actual importation, transfer, or purchase of sodium thiopental by state officials for executions, including “declarations under 21 CFR § 1312.18b” and “DEA form 236” (Requests 9 through 11).

See id. at Exh. 11.

On January 18, 2011, DEA acknowledged the urgency of Plaintiffs' FOIA request by granting expedited processing. *See id.* at ¶23 & Exh. 13. DEA now states that it completed an initial search for responsive documents on February 8, 2011. Decl. of Katherine L. Myrick (Doc. 20-1) at ¶5. Yet it was not until after Plaintiffs filed this complaint and contacted counsel for DEA that it first offered to provide records. *See* Decl. of Linda Lye ISO *Ex Parte Application* (Doc. 13) at ¶10. At that time, and before Plaintiffs filed this motion, DEA contended that it could not commit to finish processing Plaintiffs' request by a date certain because, as to some records, it needed to consult with other agencies, *see id.* at ¶¶11-12, a process it should have completed long ago.²

Concerned that DEA would not voluntarily agree to complete processing of their FOIA request *before* the upcoming executions, Plaintiffs had no choice but to file this motion.

Although DEA represented that as of April 27, 2011, all requests for consultation had been sent out (*see id.* at ¶13), it now appears that DEA did not send out the requests until May 2, 2011 (*see* Myrick Decl. (Doc. 20-1) at ¶7 & Exh. E), a week after Plaintiffs' filed their preliminary injunction motion and nearly four months after Plaintiffs' January 4, 2011 request. *See* Notice of Motion & Motion (Doc. 8), filed April 28, 2011.

Irrespective of DEA's delay, it is now clear that any need to consult does not – contrary to DEA's position before Plaintiffs' filed this motion – limit DEA's ability to complete processing by a date certain: DEA can request the other agencies to reply by a date certain, and has done so here. *See* Myrick Decl. (Doc. 20-1) at ¶7 & Exh. E.

D. DEA's response fails to include many expected documents

Approximately one week after Plaintiffs' filed this motion, DEA responded to Plaintiffs' FOIA request. DEA's response (attached as Exhibit 2 to Minsker Reply Decl.)

² FOIA requires agencies to determine whether to comply with a request within 20 working days of receipt. *See* 5 U.S.C. §552(a)(6)(A)(i). In "unusual circumstances," an agency may grant itself a 10-day extension but must provide written notice of any such extension. 5 U.S.C. §552(a)(6)(B)(i). While consultation with other agencies constitutes "unusual circumstances" warranting a 10-day extension, *see* 5 U.S.C. § 552(6)(B)(iii)(III), DEA never provided written notice that it was seeking an extension to consult with other agencies and, even assuming it had, well over 30 working days have passed.

1 consisted of 27 pages and identified an additional 12 pages that DEA may produce at a
 2 subsequent date after consulting with other agencies. *See* Minsker Reply Decl. at ¶¶7-8.

3 The same day, DEA filed its opposition to this motion, claiming mootness in light
 4 of its response. *See* Def's Opp. (Doc. 20). DEA's supporting declaration states that "the
 5 DEA Office of Diversion performed a search and identified responsive documents
 6 maintained at DEA's headquarters." *See* Myrick Decl. (Doc. 20-1) at ¶5. The 39 pages
 7 identified in the production apparently represent the fruits of that search. *See id.* at ¶¶5, 7-
 8 8. DEA further represents that it initiated a supplemental search of records on April 27,
 9 2011, at "DEA Headquarters and from DEA Field Divisions that may have responsive
 10 records regarding known seizures/surrenders of sodium thiopental from State authorities,"
 11 and that it will "complete the processing of any responsive records as a result of these
 12 supplemental searches, not requiring further consultations with other Federal agencies, on
 13 or before May 16, 2011." *Id.* at ¶6.³ The declaration does not describe any further
 14 particulars of the initial search at Headquarters or the supplemental April 27, 2011 search.

15 The 27 pages produced on May 6, 2011, consist entirely of email strings and one
 16 email attachment, relating to California and Arizona. The documents do not contain any
 17 documents that are not emails or an attachment thereto. DEA's search yielded no import
 18 declarations, no DEA forms, no letters that were mailed to or from DEA, and no
 19 information in any database maintained by DEA. In addition, DEA's production lacks at
 20 least three responsive documents of which Plaintiffs are aware and that would be located
 21 at DEA headquarters. *See* Minsker Reply Decl. at ¶¶10-16 & Exhs. 3-5.

22 **III. ARGUMENT**

23 DEA has a statutory obligation to make a good faith effort to conduct a search
 24 reasonably calculated to produce the records sought. Plaintiffs' motion for a preliminary
 25 injunction is not moot because the documents produced as a result of DEA's initial search

26
 27 ³ Although Plaintiffs proposed in their opening papers a tiered production as an
 28 accommodation to DEA, with documents bearing on the imminent Arizona execution to
 be produced by May 16, 2011, and remaining documents to be produced by June 7, 2011,
 DEA asserts that it can complete processing of the entire request by May 16, 2011.

1 establish the woeful inadequacy of that search, and DEA's conclusory declaration makes
 2 clear that its supplemental search will fare no better. A preliminary injunction requiring
 3 DEA to conduct an adequate search is necessary to prevent irreparable injury to Plaintiffs.

4 **A. FOIA requires DEA to conduct a search reasonably calculated to**
 5 **uncover all relevant documents**

6 To prevail on a claim that it has fully discharged its FOIA disclosure obligations,
 7 an agency must "show beyond material doubt ... that it has conducted a search reasonably
 8 calculated to uncover all relevant documents." *Weisberg v. United States Dept. of Justice*,
 9 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also Zemansky v. United States EPA*, 767 F.2d
 10 569, 571 (9th Cir. 1985) (adopting *Weisberg* standard). In determining what documents
 11 are relevant, "an agency also has a duty to construe a FOIA request liberally." *Nation*
 12 *Magazine v. United States Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). "If ... the
 13 record leaves substantial doubt as to the sufficiency of the search," the agency cannot
 14 prevail. *Truitt v. Dept. of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The court applies a
 15 'reasonableness' test to determine the 'adequacy' of a search methodology, consistent
 16 with congressional intent tilting the scale in favor of disclosure." *Campbell v. United*
 17 *States Dept. of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998) (citation omitted).

18 A search is "inadequate" where "the record itself reveals 'positive indications of
 19 overlooked materials.'" *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321,
 20 327 (D.C. Cir. 1999) (citation omitted). Applying this principle, courts have found
 21 searches inadequate in numerous circumstances.

22 First, failure to search an office "likely to turn up the information requested"
 23 renders a search "deficient." *Id.* at 326, 327 (agency's search inadequate where it failed to
 24 search records in Georgia) (internal quotation marks, citation omitted); *see also Krikorian*
 25 *v. Dept. of State*, 984 F.2d 461, 468-69 (D.C. Cir. 1993) (reversing summary judgment for
 26 agency where it had not searched offices with potentially responsive documents).

27 Second, an agency "cannot limit its search to only one record system if there are
 28 others that are likely to turn up the information requested." *Campbell*, 164 F.3d at 28

(internal quotation marks, citation omitted). An agency “must revise its assessment of what is ‘reasonable’ in a particular case to account for leads that emerge during its inquiry.” *Id.* Thus, *Campbell* required the agency to conduct a further search where in the course of the initial search, the agency “discovered information suggesting the existence of documents that it could not locate without expanding the scope of its search.” *Id.*

Third, courts have called into question the adequacy of searches where the requester independently confirms the existence of responsive documents that the agency failed to produce. *See, e.g., Krikorian*, 984 F.2d at 468 (reversing summary judgment for agency where requester “found Department documents relevant to his request ... that the Department had evidently failed to locate”); *Founding Church of Scientology of Washington, D.C., Inc. v. NSA*, 610 F.2d 824, 834-35 (D.C. Cir. 1979) (reversing summary judgment for agency where requester learned, through separate FOIA litigation against other agencies, of existence of responsive documents that agency failed to produce); *Oglesby v. United States Dept. of Army*, 79 F.3d 1172, 1185 (D.C. Cir. 1996) (summary judgment for agency unwarranted where record suggested that another FOIA requester had obtained documents from agency and published book based on records).

Moreover, the government bears the burden of demonstrating adequacy through affidavits, which “are sufficient ... only if they are relatively detailed in their description of the files searched and the search procedures.” *Zemansky*, 767 F.2d at 573 (internal quotations marks, citation omitted). An agency cannot prevail where it provides “little more than conclusory adjectives and does not provide sufficient detail for the court itself to determine the search’s adequacy.” *Morley v. CIA*, 508 F.3d 1108, 1121 (D.C. Cir. 2007); *see also Nation Magazine*, 71 F.3d at 891 (declaration “did not describe [agency’s] recordkeeping system in sufficient detail to permit [court] to identify what subject matter files ... might hold responsive information”).

///

///

B. Plaintiffs' have a likelihood of succeeding on the merits because DEA has failed to show that it has undertaken an adequate search

Plaintiffs are likely to succeed on the merits of their claim that DEA has failed to produce records because DEA has not shown "beyond material doubt ... that it has conducted a search reasonably calculated to uncover all relevant documents." *Weisberg*, 705 F.2d at 1351. Indeed, the record demonstrates the inadequacy of DEA's search.

1. DEA's cursory initial search is self-evidently inadequate

After four months, DEA has now revealed the results of its "initial search for records at DEA Headquarters." Myrick Decl. (Doc. 20-1) at ¶5. That search yielded a grand total of 39 pages, 27 of which have been produced and 12 of which are pending consultation with other agencies. *Id.* at ¶8. The 27 pages consist exclusively of emails and one attachment thereto, pertaining to California and Arizona. There are no emails relating to any of the other eight states known to have obtained imported sodium thiopental or any of the five from which we know DEA actually assumed custody. There are none of the required DEA forms, import declarations, information from DEA databases, or letters mailed to or from DEA. Minsker Reply Decl. at ¶¶10-16. Four categories of documents that should have been located after a reasonably adequate search of DEA Headquarters are missing.⁴

First, even though at least ten states have obtained imported sodium thiopental, *see supra* at II-B, and an import declaration must be filed on DEA Form 236 in quintuplicate for "each consignment of controlled substances to be imported," 21 C.F.R. §§1312.11(c), 1312.18(b), DEA apparently did not locate a single DEA Form 236 at its headquarters.⁵ DEA's declaration strongly suggests one reason for the omission. It appears that DEA's initial search involved only the Office of Diversion. *See* Myrick Decl. (Doc. 20-1) at ¶5.⁶

⁴ The omission cannot be explained by the possibility that these documents are among the 12 pages awaiting consultation because none of these documents would have been generated by another agency. *Cf.* Myrick Decl. (Doc. 20-1) at ¶7 (consultation sought where information "generated by other Federal agencies").

⁵ These documents are responsive to Request 9. *See* Minsker Reply Decl. at ¶15.

⁶ The only alternative explanation is that none of the states complied with the law when importing the drug. If that is the case, it raises serious questions as to why the DEA has

Such a limited search was patently inadequate because Form 236 must be filed with DEA's Import/Export Unit, *see* 21 C.F.R. §1312.18(b), and a November 11, 2010 email string produced by DEA makes clear that DEA had at that time at least one pending request by a state to import sodium thiopental. *See* Minsker Reply Decl., Exh. 2 at 19, *attached as* Appendix B. The November 11, 2010 email made "untenable" any assumption DEA might have harbored that it could limit its search to the Office of Diversion, and instead required it to "expand[] the scope of its search" to records at the Import/Export Unit. *Campbell*, 164 F.3d at 28. DEA's declaration does not indicate whether that unit has ever been searched, and absent a showing that it searched all offices "likely to turn up the information requested," the search is "deficient." *Valencia-Lucena*, 180 F.3d at 326, 327 (internal quotation marks, citation omitted).

Second, although DEA has assumed custody of at least five states' supply, *see supra* at II-B, DEA's initial search has not produced any of the myriad documents – such as forms DEA 7, 12, 86, and 307, or entries into DEA's "Laboratory Evidence Management System," "STRIDE" or "IMPACT" databases – required by DEA policies when drugs are seized or investigations conducted. *See supra* at II-A-2. And while DEA's initial search produced emails about California and Arizona (two states from which it has *not* seized sodium thiopental), it contained no emails about the five states from which it did assume custody of the drug. *See* Minsker Reply Decl. at ¶¶10, 16.⁷

This omission is particularly glaring in light of a March 28, 2011, email string produced by DEA, with the subject line "Prison unauthorized possession of Sodium Thiopental Schedule 3N," which pastes into the email the following statement, which in turn had earlier been "reported in the DEA NEW Clips":

DEA registrants in your area may or may not have in their possession the controlled substance sodium Thiopental please do a check of said prisons in your area and see if they have now or in the past requested or received this drug via unauthorized means. Please attempt to confiscate any and all controlled

apparently not seized all of the imported controlled substances still in the possession of corrections departments in California, Arizona, Arkansas, Nebraska, and South Dakota.

⁷ These documents are responsive to Requests 4 & 9-11. *See id.* at ¶16.

substances and you may used the AFD case number (G3-11-2022) on your DEA 7 and 7a's for drugs and documents pertaining to the illegal acquisition of this drug. I will grant those who will need access to Impact on an as need basis. Thanks

*See Minsker Reply Decl., Exh. 2 at 26, attached as Appendix C.*⁸

It strains credulity that while DEA's search yielded emails relating to questions surrounding the *potential* for a seizure in Arizona, no records exist relating to the five *actual* seizures known to have occurred. It is equally implausible that an email directing DEA agents to "do a check" of prisons and "attempt to confiscate any and all controlled substances" acquired "via unauthorized means" would not have generated any email traffic or related documentation other than the lone email string included here.

In any event, DEA's failure to produce anything other than emails indicates that DEA limited its search exclusively to email records, even though many non-email documents – both DEA forms and database entries – must exist as to the actual seizures/surrenders of sodium thiopental in five states. *See Campbell*, 164 F.3d at 28 (agency "'cannot limit its search to only one record system if there are others that are likely to turn up the information requested'"). The March 28, 2011 email, by specifically referencing form DEA 7 and the IMPACT database, "suggest[ed] the existence of" other documents, that DEA was required to search. *Id.* at 28.

Third, Plaintiffs are aware of the existence of at least three letters addressed to DEA entities located at DEA headquarters that are responsive to Plaintiffs' request but are missing from DEA's production. *See Minsker Reply Decl. at ¶¶11-14 & Exhs. 3-5.*⁹ These include a letter from California officials to DEA's Office of Diversion, *see id.* at ¶12 & Exh. 3, the very entity that according to DEA "performed a search." Myrick Decl. (Doc. 20-1) at ¶5. The other two documents are two letters sent to DEA Administrator Michele Leonhart requesting investigations of states from which DEA subsequently seized sodium thiopental. *See Minsker Reply Decl. at ¶¶13-14 & Exhs. 4-5.* Plaintiffs' identification of documents responsive to their request, but that DEA has failed to

⁸ The original "DEA NEW Clips" containing this statement is *not* included in the documents produced by DEA.

⁹ These documents are responsive to Requests 1 & 6. *See id.* at ¶¶12-14.

1 produce, preclude any finding that DEA's search is adequate. *See, e.g., Krikorian*, 984
 2 F.2d at 468; *Founding Church of Scientology*, 610 F.2d at 834; *Oglesby*, 79 F.3d at 1185.

3 Fourth, the documents produced (Minsker Reply Decl., Exh. 2) point to the
 4 existence of other documents which DEA has failed to produce. Page 14 is a December 6,
 5 2010, email in which a CDCR official asks DEA whether the list of companies registered
 6 to import drugs is a "public record." The production does not contain a reply. Page 23 is
 7 an October 8, 2010, inquiry from Phil Millman of Chemique Pharmaceuticals asking DEA
 8 to "outline the steps" necessary to import sodium thiopental for California. A DEA
 9 official then forwards the email to another DEA official, requesting that s/he "contact Mr.
 10 Millman and assist him." The production does not contain any follow-up contacts with
 11 Mr. Millman. Page 38 is an April 4, 2011, internal DEA email inquiring whether DEA
 12 intends to seize drugs from Arizona; the last email in the chain states: "No, We have not
 13 received information that would cause us to seize the drugs from the prison system." But
 14 the production does not contain any correspondence setting forth the information that
 15 DEA has received pertaining to the Arizona drugs. DEA unreasonably failed to follow up
 16 on the "leads that emerge[d]" from these emails. *Campbell*, 164 F.3d at 28.

17 Defendant has a statutory duty to "conduct[] a search reasonably calculated to
 18 uncover all relevant documents." *Weisberg*, 705 F.2d at 1351. Yet its declaration states
 19 only that its initial search "identified responsive documents maintained at DEA's
 20 headquarters." Myrick Decl. (Doc. 20-1) at ¶5. "Conclusory statements that the agency
 21 has reviewed relevant files are insufficient" to satisfy the agency's burden. *Nation*
 22 *Magazine*, 71 F.3d at 890. Indeed, the four categories of obviously responsive documents
 23 discussed above that should have been identified, but were not, "leaves substantial doubt
 24 as to the sufficiency of the search." *Truitt*, 897 F.2d at 542.

25 ///

26 ///

27 ///

28 ///

1 **2. DEA has not shown its supplemental search to be adequate**

2 DEA cannot cure the inadequacy of its initial search by representing vaguely that it
3 will complete a supplemental search of DEA Headquarters and Field Divisions.¹⁰

4 First, DEA's declaration only states that it is searching those Field Divisions "that
5 may have responsive records regarding *known* seizures/surrenders of sodium thiopental
6 from State authorities." Myrick Decl. (Doc. 20-1) at ¶6 (emphasis added). Thus, DEA's
7 supplemental search apparently excludes those Field Divisions where seizures/surrenders
8 are now known to have occurred. Yet California, Arizona, Arkansas, Nebraska, and South
9 Dakota all have imported sodium thiopental over which DEA has not been known to have
10 assumed custody. Minsker Reply Decl. at ¶6. DEA's initial production – which includes
11 emails pertaining to a potential seizure of drugs in Arizona – demonstrates that responsive
12 documents are "likely to turn up" (*Valencia-Lucena*, 180 F.3d at 327) even in Field
13 Divisions where a "known seizure/surrender" has not occurred: One of the emails found
14 at DEA headquarters states that, as of April 4, 2011, the agency did not intend to seize
15 Arizona's supply because it had "not received information that would cause us to seize the
16 drugs." Minsker Reply Decl, Exh. 2 at 38. This suggests that the DEA did receive *some*
17 information, perhaps housed in its Field Division encompassing Arizona.

18 Second, even *assuming* DEA's supplemental search extends to all Field Divisions
19 where states are known to have obtained imported sodium thiopental, DEA, as with its
20 initial search, has failed to provide *any* information about "the structure of the agency's
21 file system, the scope of the search performed, and the method by which it was
22 conducted." *Septon v. FBI*, 365 F.Supp.2d 91, 97 (D. Mass. 2005). Its declaration states
23 only that "[d]ocuments have been received as a result of these supplemental search
24 efforts." Myrick Decl. (Doc. 20-1) at ¶6; *see Morley*, 508 F.3d at 1122 (reversing
25 summary judgment for agency where it "provide[d] no information about the search

26 _____
27 ¹⁰ The supplemental search was initiated on or about April 27, 2011, the day Plaintiffs'
28 informed DEA they would file this motion. *See* Myrick Decl. (Doc 20-1) at ¶6; Lye Decl.
(Doc. 13) at ¶14. DEA's eleventh-hour search "casts some doubt on the thoroughness of
[its]...investigation." *McGehee v. CIA*, 697 F.2d 1095, 1099 n.13 (D.C. Cir. 1983).

strategies”); *Nation Magazine*, 71 F.3d at 891 (same where agency “did not describe its recordkeeping system in sufficient detail”). Thus, there is no assurance that DEA has expanded its supplemental search beyond the narrow scope of its inadequate initial search (which appears to have been restricted to emails sent or received by the DEA Office of Diversion) to include all relevant offices, paper records, DEA forms, and DEA databases.

Because DEA’s declaration “does not disclose *how many* additional documents were [identified] in the subsequent search, or offer any description of the nature of these documents, the court [cannot] properly conclude that” either the initial search, “which failed to locate any of ... possibly numerous and important documents,” or the supplemental search was “‘reasonably calculated to uncover all relevant documents.’” *Oglesby*, 79 F.3d at 1185 (emphasis in original) (quoting *Truitt*, 897 F.2d at 542).

3. Plaintiffs’ motion is not moot because Defendant has not established that its initial and supplemental searches will produce all non-exempt material

Defendants’ cursory search does not moot Plaintiffs’ motion. While “Defendant[] correctly cite[s] authority for the proposition that the production of *all* nonexempt material, ‘however belatedly,’ moots FOIA claims,” *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (emphasis added, citation omitted), Defendant has failed to “show beyond material doubt ... that it has conducted a search reasonably calculated to uncover all relevant documents.” *Wesiberg*, 705 F.2d at 1351. *Papa*, on which DEA relies, declined to find the case moot where – exactly as here – the defendants “cited nothing in the record certifying that all the records in existence that must be produced have been produced” and “[t]he affidavits on which defendants rely merely state that certain documents were produced; they do not detail the methods used to search for documents and never state that all documents have been produced.” *Papa*, 281 F.3d at 1013.

IV. CONCLUSION

For the foregoing reasons, the Court should issue a preliminary injunction motion ordering DEA to conduct a search reasonably calculated to uncover all relevant documents

1 and an affidavit attesting to compliance and the basis for any withholding.¹¹ The
2 unreasonable inadequacy of DEA's initial search underscores the need for a Court order
3 requiring DEA's prompt compliance with its statutory obligations.¹²

4
5 Dated: May 10, 2011

Respectfully submitted,

6 By: _____/s/
7 Linda Lye

8 Michael T. Risher
9 Linda Lye
10 AMERICAN CIVIL LIBERTIES UNION
11 FOUNDATION OF NORTHERN CALIFORNIA
12 39 Drumm Street
13 San Francisco, CA 94111
14 Tel: (415) 621-2493
15 Fax: (415) 255-8437

16
17 Attorneys for Plaintiffs
18
19
20
21

22 ¹¹ Plaintiffs reserve the right to challenge, after the preliminary injunction phase, the
23 adequacy of any search performed and the basis for withholding any information.

24 ¹² Plaintiffs submit a revised proposed order to reflect DEA's response subsequent to the
25 filing of this motion. First, the revised proposed order emphasizes DEA's duty to conduct
26 an adequate search, something Plaintiffs did not previously anticipate to be necessary.
27 Second, in an effort to accommodate DEA, Plaintiffs previously proposed a "tiered"
28 production to obtain documents bearing on the imminent Arizona execution by May 16,
2011 and the remainder by June 7, 2011. DEA apparently does not seek a tiered
production, and warrants that it can complete processing by May 16, 2011. *See* Myrick
Decl. (Doc. 20-1) at ¶6. Because DEA's position is that it can complete processing of the
request by May 16, 2011, Plaintiffs' propose a single production deadline of May 16,
2011, to avoid any disputes over which records bear on the Arizona execution.

Appendix A

U. S. Department of Justice / Drug Enforcement Administration

OMB APPROVAL
No. 1117 - 0009**CONTROLLED SUBSTANCES IMPORT / EXPORT DECLARATION***(Read Instructions on reverse before completing)*

See reverse for Privacy Act

1. CHECK ONE <input type="checkbox"/> IMPORT DECLARATION Nonnarcotic Substances in Schedules III, IV, V <input type="checkbox"/> EXPORT DECLARATION Nonnarcotic Substances in Schedules III, and IV and all substances in Schedule V		U.S. CUSTOMS CERTIFICATION Date of Departure / Arrival Name of Carrier / Vessel Date of Certification Signature of Customs Official
IMPORTER/EXPORTER (Name and Address) DEA REGISTRATION NO.		BROKER OR FORWARDING AGENT, IF USED (Name and Address)

2. CONTROLLED SUBSTANCES TO BE IMPORTED OR EXPORTED

2a. NAME AND QUANTITY OF DRUG or PREPARATION <i>(Enter names as shown on labels; numbers and sizes of packages; strength of tablets, capsules, etc., CSA Drug Code and NDC Number)</i>	2b. CONTROLLED SUBSTANCE CONTENT OF DRUG OR PREPARATION expressed as acid, base or alkaloid. <i>(Enter names of controlled substances contained in the drug; compound, or preparation)</i>	2c. DATE IMPORTED/EXPORTED AND ACTUAL QUANTITY <i>(Completed by registrant at time of transaction)</i>

3. <input type="checkbox"/> FOREIGN <input type="checkbox"/> DOMESTIC PORT OF EXPORTATION (last U.S. Customs Port) AND APPROX. DEPARTURE DATE	<input type="checkbox"/> FOREIGN <input type="checkbox"/> DOMESTIC PORT OF IMPORTATION (first U.S. Customs Port) AND APPROX. ARRIVAL DATE
4. MODE OF TRANSPORT; NAME OF VESSEL / CARRIER (if known)	NAME OF ALL INTERMEDIATE CARRIERS
5. NAME AND ADDRESS OF FOREIGN CONSIGNEE/CONSIGNOR	

I hereby certify that the above named substance(s) to be ☐ Imported, ☐ Exported, are intended for ☐ Legitimate medical need, ☐ Scientific research, ☐ Other (If intended for reexport beyond the country of destination described in block 5 above, attach documentation per Title 21, CFR 1312.27.)

If used as "Export Declaration", attach documentation that importation is not contrary to the laws or regulations of the country of destination.

SIGNATURE OF AUTHORIZED INDIVIDUAL OF IMPORTER/EXPORTER, BROKER OR FORWARDING AGENT	DATE	NAME OF FIRM AND TELEPHONE NUMBER

Appendix B

(b)(6)

From: (b)(6)
Sent: Thursday, November 11, 2010 1:50 PM
To: Boggs, Gary
Subject: Re: Today's call

Yes, I did get the number and code although my Blackberry doesn't seem to be in sync to consistently receive email. The only import I'm aware of is the one in process to the state of California.

(b)(6)

Liaison and Policy Section
Office of Diversion Control

----- Original Message -----

From: Boggs, Gary
To: (b)(6)
Sent: Thu Nov 11 13:24:40 2010
Subject: Today's call

(b)(6)

Did you get the call in number and passcode? Also do you know how many imports we have approved for thiopental over the past year and whether we have any pending requests?

Appendix C

(b)(6)

From: (b)(6),(b)(7)(C),(b)(7)(F)
Sent: Monday, March 28, 2011 3:06 PM
To: Rannazzisi, Joseph T.
Subject: RE: Prison unauthorized possession of Sodium Thiopental Schedule 3N - Have attached the news report

(b)(5),(b)(7)(A)

I'll wait to hear from you.

(b)(6),(b)(7)(C),(b)(7)(F)

Assistant Special Agent in Charge
U.S. Drug Enforcement Administration
Phoenix Division

(b)(6),(b)(7)(C),(b)(7)(F)

From: Rannazzisi, Joseph T.
Sent: Monday, March 28, 2011 11:59 AM
To: (b)(6),(b)(7)(C),(b)(7)(F)
Subject: Re: Prison unauthorized possession of Sodium Thiopental Schedule 3N - Have attached the news report

(b)(6),
(b)(7)(C)

(b)(5),(b)(7)(A)

I am in a hearing and will be out in 45 minutes.

From: (b)(6),(b)(7)(C),(b)(7)(F)

Sent: Monday, March 28, 2011 02:57 PM

To: Rannazzisi, Joseph T.

Cc: Boggs, Gary

Subject: FW: Prison unauthorized possession of Sodium Thiopental Schedule 3N - Have attached the news report

(b)(5),(b)(7)(A)

just wanted to make sure you guys knew. It's been all over the media here that AZ was getting from the same source as GA, so if we snatch some from our prison, it's going to be big news.

Stay out of trouble.

(b)(6),(b)(7)(C),(b)(7)(F)

Acting Special Agent in Charge

U.S. Drug Enforcement Administration

Phoenix Division

(b)(6),(b)(7)(C),(b)(7)(F)

From: (b)(6)

Sent: Monday, March 28, 2011 7:54 AM

To: (b)(6)

Subject: Prison unauthorized possession of Sodium Thiopental Schedule 3N - Have attached the news report

As reported in the DEA NEW Clips:

DEA registrants in your area may or may not have in their possession the controlled substance sodium Thiopental please do a check of said prisons in your area and see if they have now or in the past requested or received this drug via unauthorized means. Please attempt to confiscate any and all controlled substances and you may use the AFD case number (G3-11-2022) on your DEA 7 and 7a's for drugs and documents pertaining to the illegal acquisition of this drug. I will grant those who will need access to Impact on an as need basis. Thanks

ATLANTA | Prison officials across the country have been going to extraordinary and in at least one case, legally questionable lengths to obtain a scarce lethal-injection drug, securing it from middlemen in Britain and a manufacturer in India and borrowing it from other states to keep their executions on schedule, according to records reviewed by the Associated Press.

"You guys in AZ are life savers," California prisons official Scott Kernan emailed a counterpart in Arizona, with what may have been unintentional irony, in appreciation for 12 grams of the drug sent in September. "Buy you a beer next time I get that way."

The wheeling and dealing come amid a severe shortage of sodium thiopental, a sedative that is part of the three-drug lethal-injection solution used by nearly all 34 death penalty states. The shortage started last year, after Hospira Inc., the sole U.S. manufacturer of the drug and the only sodium-thiopental maker approved by the Food and Drug Administration, stopped making it.

As supplies dwindled, at least six states Arizona, Arkansas, California, Georgia, Nebraska and Tennessee obtained sodium thiopental overseas, with some citing Georgia as the trailblazer.

Documents obtained through open-records requests show Georgia managed to execute inmates in September and January after getting the drug from Dream Pharma, a distributor that shares a building with a driving school in a gritty London neighborhood. Dream Pharma's owner has not returned several calls and emails for comment, and an AP reporter who visited the office last week was told the owner was not available.

Recently, however, the Drug Enforcement Administration seized Georgia's entire supply effectively blocking the scheduling of any further executions because of concerns over whether the state circumvented the law. "We had questions about how the drug was imported to the U.S.," agency spokesman Chuvalo Truesdell said, declining to elaborate.

Federal regulations require states to register with the DEA before importing a controlled substance and to notify the agency once they have it. John Bentivoglio, a former Justice Department attorney who represents a condemned Georgia inmate, said in a February letter that Georgia appears to have broken those rules, and that such violations mean "adulterated, counterfeit or otherwise ineffective" sodium thiopental could be used in executions, subjecting prisoners to extreme pain in violation of the constitutional ban on cruel and unusual punishment.

Georgia Corrections Department spokeswoman Joan Heath said only that the state is cooperating with federal investigators to "make sure we're in regulatory compliance with the DEA over how we handle controlled substances."

Kathryn Hamoudah of Georgians for Alternatives to the Death Penalty praised the DEA for forcing Georgia to "give up its black market drugs."

Defense attorneys elsewhere have called on the Justice Department to investigate whether their states broke the law in the way they obtained sodium thiopental. But most of the states that swapped or imported it have said they followed protocol. And the DEA has refused to say whether it is investigating them.

(b)(6)

Group Supervisor

DE Atlanta Division

(b)(6)