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8 SUPERIOR COURT OF CALIFORNIA
9 CITY AND COUNTY OF SAN FRANCISCO

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11 AMERICAN CIVIL LIBERTIES UNION OF) No. _____
NORTHERN CALIFORNIA,)
12) VERIFIED PETITION FOR
Petitioner,) PEREMPTORY WRIT OF MANDATE
13) AND WRIT OF MANDATE
v.)
14) [Cal. Civ. Proc. Code §§ 1085,1086,
15 CALIFORNIA DEPARTMENT OF) 1088.51, 1095]
CORRECTIONS AND REHABILITATION,) Department: 301/302
16 Respondent.) Hrg. Date: Tuesday, Nov. 30, 2010
17) Hrg. Time: 9:30 am
18)

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20 INTRODUCTION

21 1. This is a suit to enforce the California Public Records Act. On October 7, 2010, Petitioner
22 American Civil Liberties Union of Northern California submitted a request to obtain records
23 relating to the Respondent California Department of Corrections and Rehabilitation's recent
24 acquisition of sodium thiopental, one of the substances that Respondent uses as part of its
25 lethal-injection protocol for executing condemned inmates. Although Respondent has
26 admitted that at least some of the responsive records are subject to disclosure, it has yet to
27 provide any responsive records. Petitioner therefore asks this court for (1) a peremptory writ
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1 of mandate to compel Respondent CDCR to provide those records that the CDCR agrees
2 are subject to disclosure immediately and without further delay; (2) to the extent there are
3 exceptional circumstances that make it unreasonable for the CDCR to provide any such
4 records immediately, a peremptory writ of mandate to compel Respondent CDCR to
5 provide an estimated date that the records at issue will be available, as required by
6 Government Code § 6253(c); (3) a peremptory writ of mandate compelling the CDCR to
7 provide Petitioner with a list of all records that the CDCR is withholding, specifying the
8 exemptions for each record that CDCR contends to be applicable; and (4) a writ of mandate
9 compelling the CDCR to produce all requested records except those records that the Court
10 holds are exempt from disclosure.

11
12 PARTIES

- 13 2. Petitioner American Civil Liberties Union of Northern California (“ACLU-NC”) is a
14 nonprofit public interest organization with a longstanding goal of advancing free-speech
15 and open-government rights. The ACLU-NC is a member of the public under Government
16 Code § 6252(b) and is beneficially interested in the outcome of these proceedings; it has a
17 clear, present and substantial right to the relief sought herein and no plain, speedy and
18 adequate remedy at law other than that sought herein.
- 19 3. Respondent California Department of Corrections and Rehabilitation (“CDCR”) is a public
20 agency within the meaning of Government Code § 6252(d).
- 21 4. The CDCR is in possession of the records sought by this Petition.

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23 JURISDICTION AND VENUE

- 24 5. This court has jurisdiction under Government Code § 6258, 6259, Code of Civil Procedure
25 §§ 1060, and 1085, and Article VI section 10 of the California Constitution.
- 26 6. Venue is proper in this Court: Because the California Attorney General has an office
27 located in the City and County of San Francisco, any suit against the CDCR that may be
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1 brought in Sacramento may also be commenced and tried in this Court. Govt. Code
2 § 6259; Code Civ. Pro. § 401(1). The records in question, or some portion of them, are
3 situated in the County of Sacramento, meaning that suit may be brought in that County.
4 Govt. Code § 6259; Code Civ. Pro. § 401(1). Also, the suit could be brought in
5 Sacramento because the CDCR resides in, and the acts and omissions complained of herein
6 occurred in, Sacramento. *See* Code Civ. Pro. §§ 393, 394(a).

7
8 THE CALIFORNIA PUBLIC RECORDS ACT

- 9 7. Under the California Public Records Act, Government Code § 6250 *et seq.* (“PRA”), all
10 records that are prepared, owned, used, or retained by any public agency, and that are not
11 subject to the PRA’s statutory exemptions to disclosure must be made publicly available
12 for inspection and copying upon request. Govt. Code § 6253.
- 13 8. The PRA requires the government to determine whether to disclose records within 10 days
14 of receiving a request, unless “unusual circumstances” justify a 14-day extension of that
15 period. *Id.* § 6253(c). The government must then promptly inform the requesting party of
16 what records will be disclosed and provide an estimate of when they will be available. *Id.*
17 It must then promptly provide a copy of the records to the requesting person or allow
18 inspection of the records. *Id.* § 6253(b). The statute does not allow the government to
19 delay or obstruct the copying of public records. *Id.* § 6253(d).
- 20 9. Whenever it is made to appear by verified petition to the superior court of the county where
21 the records or some part thereof are situated that certain public records are being
22 improperly withheld from a member of the public, the court shall order the officer or
23 person charged with withholding the records to disclose the public record or show cause
24 why he or she should not do so. The court shall decide the case after examining the record
25 in camera (if permitted by the Evidence Code), papers filed by the parties and any oral
26 argument and additional evidence as the court may allow. *Id.* § 6258.
- 27 10. If the Court finds that the failure to disclose is not justified, it shall order the public official
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1 to make the record public. *Id.* § 6259(b).

2 11. The California Constitution provides an additional, independent right of access to
3 government records: “The people have the right of access to information concerning the
4 conduct of the people’s business, and, therefore, the meetings of public bodies and the
5 writings of public officials and agencies shall be open to public scrutiny.” CAL. CONST.,
6 ART. 1 § 3(b)(1).

7
8 FACTS

9 12. The CDCR uses sodium thiopental as part of its lethal-injection protocol when it carries out
10 executions at San Quentin, as set forth in Title 15 of the California Code of Regulations.
11 15 C.C.R. §§ 3349.1.1(q); 3349.4.5 (g)(5)(A), (B).

12 13. At the end of September, 2010, the CDCR asserted in federal court that its supply of
13 sodium thiopental was going to expire on October 1, 2010 and that the CDCR would be
14 unable to acquire a new supply until 2011. This, claimed the government, meant that the
15 courts should allow the execution to go forward even though they did not have enough time
16 to review the new execution protocol, because any delay would push the execution date
17 beyond October 1 and the CDCR would then be unable to proceed until it obtained a new
18 supply of thiopental, in early 2011. *See Morales v. Cate*, --- F.3d ----, 2010 WL 3749394,
19 at *1, 3 (9th Cir. Sept. 28, 2010). Both the state and federal courts rejected this argument,
20 and the execution did not occur.

21 14. On October 6, 2010 the CDCR informed the federal District Court that “the California
22 Department of Corrections and Rehabilitation obtained twelve grams of sodium thiopental
23 on September 30, 2010. The drug expires in 2014.” *Morales v. Cate*, No. 06-cv-00219-JF
24 (N.D. Cal.), Document 426. A copy of this filing is attached to this Petition as Exhibit A.

25 15. These revelations were widely reported in the press. The press also reported that CDCR
26 refused to divulge where it had obtained this supply.

27 16. On October 7, 2010, ACLU-NC Program Assistant Ana Zamora sent a PRA request to the
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1 CDCR's PRA Coordinator by FAX and first class mail, on behalf of Petitioner ACLU-NC
2 and ACLU-NC Death Penalty Policy Director Natasha Minsker. A copy of this request is
3 attached to this Petition as Exhibit B. This request asks for various records relating to the
4 CDCR's acquisition, use, and destruction of sodium thiopental, including records
5 relating to how much the CDCR paid for the newly acquired sodium thiopental, where it
6 acquired the drug, what it did with its previous supply, and copies of the packaging and
7 inserts that came with the drug, including instructions for use.

8 17. All of the records requested in Exhibit B are public records as defined in the PRA.

9 18. On October 14, 2010, the CDCR responded to the ACLU-NC's October 7 request by
10 stating that it would require an additional 14 days to determine whether to disclose the
11 documents. A copy of this response is attached to this petition as Exhibit C. This response
12 did not state any estimated date or time when the records would be made available.

13 19. Fourteen days later, on October 28, 2010 Ms. Zamora called CDCR Coordinator Pat
14 Champion to ask about the status of the request for records. Ms Champion said she did not
15 know the status of the request but would check and provide a response the following day.

16 20. On Monday November 1, 2010, Ms. Zamora received a further response from the CDCR,
17 which had apparently been sent by facsimile shortly after 5:00 p.m. on Friday, October 29.
18 This response is attached as Exhibit D to this Petition. This response stated that the PRA
19 request would be "partially denied." No records were attached, and this response failed to
20 state any estimated date or time when the admittedly disclosable public records would be
21 made available.

22 21. By stating in Exhibit D that the request would be "partially denied," the CDCR indicated
23 that it would comply with some part of the request. (References to "admittedly disclosable
24 records" in this Petition refer to these records).

25 22. The CDCR response attached as Exhibit D also listed more than ten legal provisions that
26 the CDCR asserted as reasons to deny the request in part.

27 23. On November 3, 2010, Ms. Zamora called Ms. Champion to ask when the admittedly
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1 disclosable public records would be available. Ms. Champion stated that she did not know
2 the answer to this question; Ms. Zamora asked her to try to obtain the necessary
3 information and the two of them agreed to discuss the matter the following day.

4 24. On November 4, Ms. Zamora again called Ms. Champion, but Ms. Champion was still
5 unable to provide an estimated date when the admittedly disclosable public records would
6 be available.

7 25. Later on November 4, Ms. Zamora sent to Ms. Champion by FAX and first-class mail a
8 letter from ACLU-NC Staff Attorney Michael Risher, attached as Exhibit E. This letter
9 discussed the relevant facts and law and then specifically requested that the CDCR
10 “[p]lease provide the estimated date and time that the records will be available immediately
11 and in writing.” It also requested that the admittedly disclosable public records themselves
12 be provided without further delay.

13 26. As of the time this Petition was verified, the CDCR has not responded to this letter or
14 provided Petitioner with any of the requested records.

15
16 **FIRST CAUSE OF ACTION**

17 **For Writ of Mandate for Violation of the California Public Records Act, Gov’t Code §§ 6250 et**
18 **seq., Cal. Civ. Proc. Code § 1085, & Article I, § 3 of the California Constitution**

19 (Petitioner ACLU-NC v. Respondent CDCR)

20 27. Petitioner incorporates herein by reference the allegations of paragraphs 1 through 26
21 above, as if set forth in full.

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1 28. Petitioner, as stated in the October 7 PRA request, was at all times ready to tender any
2 required fees for the identifiable public records requested.

3 29. The PRA requires that the government make disclosable records available to the public
4 promptly and without delay.

5 30. The CDCR's failure to provide the records that the ACLU-NC requested on October 7,
6 2010 and that the CDCR has admitted to be disclosable, violates this duty to provide
7 records promptly and without delay.

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9 **SECOND CAUSE OF ACTION**

10 **For Writ of Mandate for Violation of the California Public Records Act, Gov't Code §§ 6250 et**
11 **seq., Cal. Civ. Proc. Code § 1085, & Article I, § 3 of the California Constitution**

12 (Petitioner ACLU-NC v. Respondent CDCR)

13 31. Petitioner incorporates herein by reference the allegations of paragraphs 1 through 30
14 above, as if set forth in full.

15 32. Under Government Code § 6253(c), "if the agency determines that the request seeks
16 disclosable public records, the agency shall state the estimated date and time when the
17 records will be made available" when it informs the requesting party of whether or not
18 disclosable records exist.

19 33. The CDCR's failure to provide the ACLU-NC with an estimated date and time when any
20 of the requested records, even those CDCR has admitted to be disclosable, will be made
21 available violates this mandatory provision of law.

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23 **THIRD CAUSE OF ACTION**

24 **For Writ of Mandate for Violation of the California Public Records Act, Gov't Code §§ 6250 et**
25 **seq., Cal. Civ. Proc. Code § 1085, & Article I, § 3 of the California Constitution**

26 (Petitioner ACLU-NC v. Respondent CDCR)
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1 34. Petitioner incorporates herein by reference the allegations of paragraphs 1 through 33
2 above, as if set forth in full.

3 35. Defendants have failed to provide a list of responsive documents that it contends are
4 exempt from disclosure, specifying the exemption(s) it contends to be applicable to each
5 such document.

6 36. Production of such a list will streamline this litigation and aid in this Court's review of
7 Defendant's contentions. The Court has the authority to order production of such a list
8 under the Public Records Act and its inherent authority.

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10 **FOURTH CAUSE OF ACTION**

11 **For Writ of Mandate for Violation of the California Public Records Act, Gov't Code §§ 6250 et**
12 **seq., Cal. Civ. Proc. Code § 1085, & Article I, § 3 of the California Constitution**

13 (Petitioner ACLU-NC v. Respondent CDCR)

14 37. Petitioner incorporates herein by reference the allegations of paragraphs 1 through 36
15 above, as if set forth in full.

16 38. Defendants have failed to release the requested records to Petitioner as required by the
17 PRA and Article I, § 3 of the California Constitution.

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19 WHEREFORE, Petitioner prays as follows:

20 1. That the Court issue a writ of peremptory writ of mandate directing Respondent CDCR to
21 provide Petitioner ACLU-NC with all admittedly disclosable records, meaning those records that the
22 CDCR agrees must be disclosed under the PRA, immediately and without further delay;

23 2. To the extent there are exceptional circumstances that make it unreasonable for the CDCR
24 to provide any admittedly disclosable records immediately, that the Court issue a peremptory writ of
25 mandate directing Respondent CDCR to provide Petitioner ACLU-NC with an estimated date that
26 those records will be available;

27 3. That the Court issue a peremptory writ of mandate directing Respondent CDCR to provide
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1 Petitioner ACLU-NC and the Court with a list of any responsive records that it has not released to
2 petitioners, with an explanation of why each such record is not subject to release;

3 4. That the Court issue a writ of mandate directing Respondent CDCR to provide Petitioner
4 ACLU-NC with all remaining requested records except those records that the Court determines may
5 lawfully be withheld, or an order to show cause why it should not do so;

6 5. That Petitioners be awarded their attorneys' fees and costs;

7 6. For such other and further relief as the Court deems proper and just.

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9 Dated: 16 November, 2010

10 By: Michael T. Risher

11 Michael T. Risher
12 Attorney for Petitioner ACLU-NC

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17 **VERIFICATION**

18 I, Jahan C. Sagafi, am Vice Chair of the American Civil Liberties Union of Northern California. I
19 have read this VERIFIED PETITION FOR PEREMPTORY WRIT OF MANDATE AND WRIT OF
20 MANDATE in the matter of AMERICAN CIVIL LIBERTIES UNION OF NORTHERN
21 CALIFORNIA v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION
22 and am informed, and do believe, that the matters herein are true. On that ground I allege that the
23 matters stated herein are true. I declare under penalty of perjury under the laws of the State of
24 California that the foregoing is true and correct.

25
26 DATED: 16 Nov 2010

27 Jahan C. Sagafi
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VERIFICATION

I, Ana Zamora, am a Program Assistant with the American Civil Liberties Union of Northern California. I have read paragraphs 16, 18-20, and 23-26 of the foregoing VERIFIED PETITION FOR PEREMPTORY WRIT OF MANDATE AND WRIT OF MANDATE in the matter of AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. The facts alleged in those paragraphs are within my own knowledge and I know these facts to be true. Because of my familiarity with the relevant facts relating to my communications with respondent in this case, I also verify this petition. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: 11/16/2010


