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12 SUPERIOR COURT OF CALIFORNIA

13 COUNTY OF SAN FRANCISCO

14 UNLIMITED JURISDICTION

15 AMERICAN CIVIL LIBERTIES UNION OF
16 NORTHERN CALIFORNIA,

17 Petitioner,

18 v.

19 CALIFORNIA DEPARTMENT OF
20 CORRECTIONS AND REHABILITATION

21 Respondent.

No. CPF-10-510882

PETITIONER'S REPLY IN
SUPPORT OF VERIFIED PETITION
FOR WRIT OF MANDATE

Department: Dept. 302

Hrg. Date: Tuesday, Dec. 14, 2010

Hrg. Time: 9:30 am

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1 On November 30, this Court ordered CDCR to release all documents Petitioner requested, except
2 those CDCR believes are exempt from disclosure under the Public Records Act (“PRA”). In response,
3 CDCR released approximately 989 pages of documents, approximately 200 of which were federal
4 brochures and blank forms relating to federal drug law. Approximately 670 pages were redacted, some
5 quite heavily. Decl. of Nishan Bhaumik ¶¶ 3-4. CDCR also completely withheld approximately 120
6 documents. *See id.* ¶ 2; Decl. of Michael Risher ¶¶ 37 & Ex. 35. CDCR has failed to meet its burden
7 under the PRA of justifying such wholesale withholding of public records.

8 CDCR acknowledges that it has withheld at least five categories of information. CDCR Br. at 1-
9 7. A review of even the redacted documents indicates that CDCR also withheld information *outside*
10 these categories – ranging from crucial responsive information, such as the identity of the physician who
11 ordered the thiopental purchased by CDCR and packaging information for the thiopental in its
12 possession, to information that is obviously public, such as the first name of a state senator from a
13 newspaper article. Risher Decl. ¶¶ 10, 13, 26, 34 & Ex. 2, 5, 22, 32 at 396. CDCR also redacted some
14 information, the content of which is undiscernible, but the context suggestive: Undersecretary Scott
15 Kernan wrote in an internal CDCR email that the process of acquiring sodium thiopental was “[g]oing to
16 get very political quick.” *Id.* ¶ 10 & Ex. 3. The next sentence is redacted.

17 Even the redacted documents paint a vivid, albeit incomplete, picture of how far the government
18 was willing to go to acquire thiopental, searching as far as Pakistan and eventually sending agents on a
19 “secret mission” to conduct a lethal-drug swap with Arizona, all the while taking steps to avoid scrutiny
20 by the public and “the state bureaucracy.” The story revealed by these records – as well as the gaping
21 questions left open – are discussed in the Risher and Redmond declarations, respectively. These records
22 and declarations show that the public has an interest in, and the right to, the whole, unredacted story.

23 ARUGMENT

24 I. THE PRA PLACES THE BURDEN OF JUSTIFICATION ON CDCR

25 In California, “information concerning the conduct of the people’s business is a fundamental and
26 necessary right of every person.” Gov’t Code § 6250;¹ Cal. Const. Art. I, § 3(b)(1). Thus, “[a]ll public
27 records are subject to disclosure unless the Public Records Act expressly provides otherwise,” and the

28 ¹ All statutory references are to the Government Code unless otherwise indicated.

1 government has the burden to “justify withholding any record” or part thereof. *County of Santa Clara*
2 *v. Superior Court*, 170 Cal.App.4th 1301, 1320, 1321(2009); *accord IFPTE, Local 21 v. Superior*
3 *Court*, 42 Cal.4th 319, 336-37(2007); *see San Lorenzo Valley Comm. Advocates for Resp. Educ. v. San*
4 *Lorenzo Valley Unified Sch. Dist.*, 139 Cal.App.4th 1356, 1408 (2006) (absent exemption, disclosure
5 required even if based only on public’s “idle curiosity”). It can do this either by proving that the
6 requested records fall within a statutorily enumerated exemption in § 6254, or “that on the facts of the
7 particular case the public interest served by not disclosing the record clearly outweighs the public
8 interest served by disclosure of the record” (the “catchall exception”). § 6255(a); *see Santa Clara*, 170
9 Cal.App.4th at 1320-21. “Since disclosure is favored, all exemptions are narrowly construed.” *Id.* at
10 1321; *see* Cal. Const. Art. I, § 3(b)(2).

11 The government must meet its burden of showing that an exception to disclosure applies with
12 competent evidence, not speculation or self-serving assertions. *California State University v. Superior*
13 *Court*, 90 Cal.App.4th 810, 835 (2001) (“*CSU*”). When the government asserts the “catchall”
14 exception, its burden is particularly high and it “must demonstrate a ‘clear overbalance’ on the side of
15 confidentiality.” *Id.* at 884 (citation omitted).

16 When the applicability of an exemption depends on the content of the withheld record, the
17 Court must examine it in camera, except for those records that the CDCR has demonstrated² to be
18 protected under the attorney-client privilege or as absolutely protected attorney work product.
19 § 6259(a); *see* Evid. Code § 915. If the government has failed to meet its burden to justify disclosure
20 as to any record, the Court “shall order the public official to make the records public.” § 6259(b).

21 It bears emphasis at the outset that capital punishment is an issue of great importance to the
22 public. “Few issues in American society have generated as much impassioned debate as the death
23 penalty.” *Morales v. Tilton*, 465 F.Supp.2d 972, 973 (N.D. Cal. 2006). As the Ninth Circuit
24 emphasized in holding that the public has a First Amendment right to view executions, “[a]n informed
25 public debate is critical in determining whether execution by lethal injection comports with the
26 evolving standards of decency which mark the progress of a maturing society.” *California First*

27 ² The party claiming the privilege has the initial burden to show that it applies. *OXY Resources*
28 *California LLC v. Superior Court*, 115 Cal.App.4th 874, 894 (2004).

1 *Amendment Coalition v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002) (“*CFAC*”) (citation omitted).

2 Media and public interest in the records at issue here is extremely high; Petitioner has received
3 inquiries about these records from numerous national and local print, television, and radio media
4 outlets, and international human rights advocates. Decl. of Natasha Minsker ¶¶ 8-11. State Senator
5 Leno also sought the information from CDCR. *Id.* ¶12 & Ex. D. As San Francisco Bay Guardian
6 Executive Editor Tim Redmond explains, his 30 years of professional experience as a journalist teach
7 that “the public is concerned about every aspect of the execution process.” Decl. of Tim Redmond ¶7;
8 *see id.* ¶¶ 4-5 & Ex. A, B (submitted PRA request for same information but has received nothing)

9 **II. CDCR’S CONCLUSORY ASSERTIONS DO NOT SATISFY ITS BURDEN**

10 CDCR has redacted information from the overwhelming majority of documents produced and
11 entirely withheld some documents. It has the burden to show that each redaction and the withholding
12 of each document on the privilege log is justified under the PRA. Instead, CDCR overstates the scope
13 of the privileges its asserts, relies on conclusory assertions, and fails to demonstrate that the
14 information sought to be withheld actually implicates the privileges asserted. Because it has failed to
15 meet its burden, the Court must order CDCR to produce the withheld information. *See* § 6259(b).

16 CDCR proffers justifications for withholding five categories of information. *See* CDCR Br. at
17 1-7. CDCR also produced a privilege log setting forth 10 reasons for redacting or withholding
18 documents. Risher Decl. ¶ 37 & Ex. 35. It is unclear how some of the privilege log categories (such
19 as “Official Information”) correspond, if at all, to the categories CDCR discusses in its brief. Because
20 CDCR bears the burden under the PRA of establishing an exemption through the presentation of
21 evidence, not mere assertion, *CSU*, 90 Cal.App.4th 835, CDCR has waived any argument that
22 information can be withheld on the basis of shorthand reasons asserted solely on its privilege log but
23 unelaborated in its brief. We therefore address primarily the categories addressed in CDCR’s brief.

24 **A. Asserted Documents Do Not Constitute Exempt Gubernatorial Communications**

25 CDCR states that it has “withheld or redacted documents reflecting communications with the
26 Governor and his staff” under § 6254(*l*). CDCR Br. at 2. First, this exception applies only to
27 “correspondence of and to the Governor” and his staff. § 6254(*l*). In other words, the Governor or his
28 staff must be a party to the exchange. Second, this exception does not protect communications

1 between the Governor and other government employees: It “was intended to protect communications
2 to the Governor and members of the Governor’s staff from correspondents *outside of government*,” so
3 that private citizens can petition the executive in confidence. *California First Amendment Coalition v.*
4 *Superior Court*, 67 Cal.App.4th 159, 168 (1998) (“*CFAC*”) (emphasis added).

5 CDCR’s log shows much of the material it is withholding under this exemption to be
6 communication between CDCR officials, with no indication that the governor’s office was even
7 involved. *See, e.g.*, Risher Decl. ¶ 38 & Ex. 36. Other log entries do not make clear who, if anybody,
8 is in the governor’s office. *See id.* ¶ 39 & Ex. 37. Further, the log does not indicate that any of the
9 asserted documents involve individuals outside of government. CDCR has not met its burden of
10 demonstrating that the communications involve the Governor and his staff, and someone outside
11 government, as required by § 6254(l) and *CFAC*.

12 **B. CDCR Has Not Established Conditions For Applicability Of Deliberative Process**

13 CDCR states that it has withheld documents that “reflect[] CDCR’s decision-making process.”
14 CDCR Br. at 2. CDCR again overstates the scope of the privilege:

15 Not every disclosure which hampers the deliberative process implicates the deliberative
16 process privilege. Only if the public interest in nondisclosure clearly outweighs the public
17 interest in disclosure does the deliberative process privilege spring into existence. The burden
is on the [government] to establish the conditions for creation of the privilege.

18 *CFAC*, 67 Cal.App.4th at 172-73. CDCR has not explained why each document or portion thereof
19 withheld pursuant to this privilege hampers the deliberative process. CDCR has not even articulated,
20 let alone met its burden of “establishing the conditions” for applicability of this privilege. *Id.*³

21 **C. Speculation About “Safety” Does Not Clearly Overbalance The Public Interest In**
22 **Learning About CDCR Employees Involved In The Death Penalty**

23 CDCR has withheld information identifying “ministerial,” “administrative,” or “non-
24 managerial” CDCR employees and employees who carry out executions. CDCR Br. at 3.

25 *Non-managerial employees.* It has long been the law that “the name of every public ...

26 ³ As a general matter, Petitioner does not seek records that are covered by the attorney-client or absolute
27 work product privileges, but CDCR has not established that all documents as to which it asserts these
28 privileges fall within its scope. The Court should order CDCR to produce for in camera review all
documents as to which it asserts these privileges but as to which neither sender nor recipient is an
attorney. *See OXY Resources California*, 115 Cal.App.4th at 894; § 6259(a).

employee ... is a matter of public record.” *Local 21*, 42 Cal.4th at 331 (quoting 25 Ops.Cal.Atty.Gen. 90, 91, (1955)). In *Local 21*, our Supreme Court held disclosable the names, titles, and salary information of public employees because that information sheds light on how the government is spending public money, and the potential existence of “nepotism, favoritism, or financial mismanagement.” *Id.* at 333. The same is true of the information here, even as to support staff. It is unclear whether the redactions involve three or three hundred CDCR employees, a question that bears directly on the efficiency of the CDCR bureaucracy and the total amount of resources spent on acquiring the drug. *See* Redman Decl. at ¶9(d). Actual names, and not a mere headcount, also assist the public in detecting favoritism or nepotism, and permits inquiry into compensation and hence total cost. *Id.* Further, some CDCR employees performed “contracting and accounting duties,” a role that hardly fits CDCR’s characterization as “peripheral.” CDCR Br. at 3. CDCR’s apparent resort to a non-competitive bid contract implicates the public’s right to investigate potential favoritism and financial mismanagement. *See infra* note 8. The “vehement public debate” (CDCR Br. at 5) supports rather than undermines the case for disclosure.

CDCR invokes both the catchall and personnel-files exemptions. *See* Gov. Code §§ 6254(c), 6255. The analysis under each is the same: whether privacy interests clearly overbalance the public interest in disclosure.⁴ *See BRV, Inc. v. Superior Court*, 143 Cal.App.4th 742, 755 (2006). They do not. CDCR’s privacy argument rests on a speculative concern about “safety” for which it offers not a shred of evidence; our Supreme Court recently rejected this same argument in a case where the government fought disclosure of peace officer names, asserting the risk of retaliation by “persons who were hostile toward law enforcement officers.” *Commn. on Peace Ofcr. Standards & Training v. Superior Court*, 42 Cal.4th 278, 302 (2007) (“CPOST”). *Id.* at 299, 303. As in CPOST, CDCR’s mere assertion of “privacy and safety” concerns cannot justify non-disclosure because CDCR, as in this case, “offered no evidence that such a scenario is more than speculative.” *Id.* at 302, 303.⁵

⁴ Our Supreme Court has also rejected the argument that § 6254(c) provides any more protection for employee names than does the catchall exception. CPOST, *infra*, 42 Cal.4th at 299, 303.

⁵ The Supreme Court noted that certain categories of peace officers, such as “undercover officers,” may present unique cases because of “the special nature of their duties.” *Id.* at 303. CDCR has made no argument that executive assistants or other non-managerial CDCR employees have “special duties” akin to an undercover officer.

1 CDCR's response to these speculative safety concerns, moreover, is irrational. CDCR has
2 made public the names of decisionmakers, but not employees it claims played minor roles. *See*
3 *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 882 (9th Cir. 2002) (CDCR rule
4 limiting public viewing of execution violated First Amendment where "the notion of retaliation is pure
5 speculation"; if CDCR's safety concerns "to be credited, retaliation is at least as likely to be directed
6 against these decision makers as against low level execution staff").

7 Nor does *BRV*, which was decided before *CPOST*, suggest anything to the contrary. *BRV*
8 involved an internal report of an investigation into allegations of abuse and sexual harassment of
9 students by a school superintendent. 143 Cal.App.4th at 747. Although the report led to the
10 superintendent's separation of employment, the court rejected the argument that it fell under the
11 personnel-files exemption, and required its disclosure, even though the government had promised to
12 keep it confidential. *Id.* at 747, 759. The court only ordered the redaction of names of witnesses
13 interviewed for the report, such as "students, parents," and school employees. *Id.* *BRV* stands only for
14 the unremarkable proposition that individuals who report malfeasance by a public official, and many
15 of whom are *not* public employees, may retain an interest in confidentiality.

16 "A mere assertion of possible endangerment is insufficient to justify nondisclosure." *CPOST*,
17 302 (internal quotation marks, citation omitted). Given CDCR's failure to present any evidence of
18 safety risks, *CPOST* and *Local 21* require disclosure of identifying information about CDCR
19 employees engaged in "ministerial" and related functions.

20 *Those carrying out executions.* CDCR seeks to avoid disclosure of employees "responsible for
21 carrying out executions," invoking the Court's protective order in *Morales v. Woodford*.⁶ The identity
22 of these individuals sheds light on "the conduct of the public's business," §6252(c), and is of even
23 greater public interest than administrative employees, because of their centrality in the process.

24 Discovery orders in the *Morales* litigation do not affect CDCR's duties under the PRA. Civil
25 discovery exists to allow one party to obtain information relevant to *that case* from the opposing party;

26 ⁶ CDCR makes no argument that the *Morales* protective order justifies non-disclosure of non-managerial
27 employees. Moreover, the *Morales* order only applies to the handful of individuals who actually
28 perform the execution. It is unclear whether CDCR seeks to force a larger universe of individuals, *see*
CDCR Br. at 3("employees responsible for carrying out executions") under the narrow protective order.

1 the PRA exists to vindicate the public's right to learn about its government. *See County of Los*
2 *Angeles v. Superior Court (Axelrad)*, 82 Cal.App.4th 819, 829 n.9 (2000); *City of Hemet v. Superior*
3 *Court*, 37 Cal.App.4th 1411, 1420 n.11 (1995). Even confidential settlement agreements and
4 documents that a court has ruled need *not* be produced in discovery "must be produced" under the
5 PRA, "unless one or more of the statutory exemptions set forth in the CPRA apply." *Axelrad*, 82
6 Cal.App.4th at 826, 829-30; *Register Div. of Freedom Newspapers v. County of Orange*, 158
7 Cal.App.3d 893, 908-910 (1984) (ordering PRA disclosure of confidential settlement agreement).

8 The *Morales* order merely regulates how the attorneys in that case may use the information
9 obtained in discovery; it is irrelevant to this case, and Judge Fogel himself recently disclaimed "any
10 interest in meddling in" this litigation. Risher Decl. ¶ 35 & Ex. 33. CDCR has presented no evidence
11 to justify its conclusory assertions of safety. Indeed, history indicates that such concerns are
12 unwarranted. "No execution team member has ever been threatened or harmed by an inmate or by
13 anyone outside the prison because of his participation in an execution." *CFAC*, 299 F.3d at 882.

14 **D. CDCR's Unilateral Determination About What Information The Public "Needs"**
15 **Does Not Justify Concealing The Identity of Actual And Potential Drug Sources**

16 CDCR has withheld all information identifying actual and potential sources of sodium
17 thiopental, including the distributor it retained. CDCR contends that because the documents produced
18 reveal that CDCR obtained sodium thiopental from Arizona and an unspecified English distributor,
19 "the public has all the information it[] needs." CDCR Br. at 7.

20 Disclosure of the identity of persons that actually or potentially do business with our
21 government is necessary to allow the public to detect favoritism or fraud. *See CSU*, 90 Cal.App.4th at
22 833. *CSU* required disclosure of anonymous donors to a university-affiliated foundation who, in turn,
23 received licenses for luxury suites in a campus arena. "Determinations pertaining to the public's
24 business cannot be made without disclosure of the identities of" the individuals who do business with
25 the state. *Id.*; *see also CBS Broadcasting Inc. v. Superior Court*, 91 Cal.App.4th 892 (2001) (applicant
26 for government license "has subjected himself or herself to public review").⁷

27 ⁷ *CSU* and *CBS* apply this rule to natural persons. Any argument against disclosure of the business
28 entities at issue here is even more meritless, as corporations have no privacy rights. *See Roberts v. Gulf*
Oil Corp., 147 Cal.App.3d 770, 790-91 (1983).

1 CDCR has withheld information identifying about a dozen potential drug sources, in addition
2 to the 100 hospitals it contacted. CDCR Br. at 6; Risher Dec. ¶ 17 & Ex. 10. The public has a right to
3 learn the identity of actual and potential sources because the information would answer “whether the
4 drug was obtained legally from a reputable supplier.” Redmond Decl. ¶¶8, 9(f). It would also shed
5 light on why CDCR selected one source over others, whether the terms of the transaction were “fair
6 and reasonable” relative to other options, and “whether [CDCR afforded] any favoritism or advantage”
7 to the sources selected. *CSU*, 90 Cal.App.4th at 833; *cf. Lardner v. Dept. of Justice*, 638 F.Supp.2d 14,
8 28 (D.D.C. 2009) (identity of unsuccessful applicants for government benefit disclosable under
9 FOIA). The public cannot make any of these determinations knowing only that CDCR obtained the
10 drugs from Arizona and an unidentified source.⁸

11 The distributor’s apparent request for confidentiality does not alter this conclusion. *CSU*
12 rejected the argument that licensees’ request to remain anonymous justified nondisclosure because of
13 the public’s right to make “[d]eterminations pertaining to the public’s business,” which “cannot be
14 made without disclosure of the identities” of parties to state transactions. *CSU*, 90 Cal.App.4th at 833-
15 34. Because CDCR’s unidentified distributor obtained a “commercial benefit” from its dealings with
16 the state, it “entered into the public sphere” and “voluntarily diminished [its] privacy interests.” *Id.* at
17 834. Even contracts cannot override the public interest in disclosure. *See Freedom Newspapers*, 158
18 Cal.App.3d at 908-910 (requiring disclosure of confidential settlement agreements); *BRV*, 143
19 Cal.App.4th at 747, 759. A mere “request” can hardly do the same. And this justification does not
20 apply to the many unidentified potential sources whom CDCR does not claim requested anonymity.

21 Finally, CDCR has not presented any *evidence* of a risk of harm to justify its speculative safety
22 justification. *See supra* at Part II-C.

23 Because CDCR has not met its burden under the catchall standard, it has failed to establish a
24

25 ⁸ The public interest in disclosure is particularly acute because it appears that CDCR “pursue[d] a non-
26 competitive bid purchase.” Risher Decl. ¶ 32 & Ex. 30. In voting for a constitutional public right of
27 access, *see* Cal. Const., art. I, § 3, the electorate intended to make available information about potential
28 competitors the government “talk[ed] to before awarding a no-bid contract.” *See* Lye Decl. ISO Req.
for Jud. Not., filed herewith, Ex. A.

1 “necessity” under Evidence Code 1040. *See CSU*, 90 Cal.App.4th at 832 (rejection of catchall
2 exemption requires rejection of Evid. Code § 1040 exemption).

3 **E. CDCR Cannot Redact Information as “Non-responsive to request”**

4 CDCR has redacted some information as “non-responsive.” In some cases, this is the *only*
5 reason given for the redaction. Risher Decl. ¶ 40 & Ex. 38. This violates the PRA, because although
6 the government obviously does not have to produce records that are not requested, there can be no
7 justification for it to spend time redacting non-exempt information from documents that it does
8 produce. Moreover, Petitioner’s PRA request asked for *documents* relating to specific information,
9 not for just those parts of documents that contained that information, so the entire documents are
10 responsive. Finally, allowing the government to redact information in this way would force the public
11 to engage in the useless, wasteful formality of submitting a second request naming the document to
12 obtain it without redactions.

13 **F. CDCR Redacted Additional, Unacknowledged Categories Of Information**

14 CDCR clearly redacted more categories of information, ranging from the trivial to the
15 significant, than acknowledged in its brief. For example, it partially redacted the name of a state
16 senator from a newspaper article. *See Risher Decl.* ¶ 34 & Ex. 32 at 396. As to these unacknowledged
17 categories, CDCR has offered no justification and has therefore waived any argument. In other
18 instances, it is impossible to know the justification because so much information was redacted.

19 *Discernible, unjustified categories:*

- 20 • Drug packaging information: CDCR redacted packaging information, seemingly relating to lot
21 number and expiration date, from the sodium thiopental in its possession. *See Risher Decl.* ¶
22 26 & Ex. 22. These issues go directly to quality control and compliance with DEA regulations.
See Redmond Decl. ¶9(a).
- 23 • Identity of prescribing doctor: CDCR redacted the identity and DEA number of the doctor
24 who procured the drug. *See Risher Decl.* ¶ 10, 13 & Ex. 2, 5. Whether the ordering physician
25 is a CDCR employee or contractor, the information must be disclosed. *See supra* II-C&D.
The public has tremendous interest in knowing “which doctors may be violating their ethical
26 responsibility to protect life and not assist in taking life, and whether” and in what capacity
27 “these doctors work for public agencies.” *Redmond Decl.* ¶9(c).
- 28 • Identity of officials at DEA and documents from DEA: On August 18, 2010, CDCR requested
permission from a redacted official at DEA to import sodium thiopental from Pakistan. *See*
Risher Decl. ¶ 15 & Ex. 8. CDCR did not produce a response from DEA, although an October
18, 2010 internal CDCR email notes that DEA is “unwilling to provide a waiver.” *See id.* ¶ 33

1 & Ex. 31. A redacted DEA official provided CDCR with a list of companies registered to
2 import the drug, but CDCR did not provide this list. *Id.* An internal CDCR email also refers to
3 a redacted DEA official “who is in charge of import/export division” and to whom the email
4 sender spoke. *See id.* ¶ 29 & Ex. 28. The unproduced documents from DEA and redacted
5 identity of DEA officials shed light on whether CDCR has complied with federal requirements
6 and facilitate further inquiry with the federal government. *See* Redmond Decl. at ¶9(a).

7 *Other undiscernible redactions:* CDCR also redacted portions of emails, large and small;
8 context in some cases suggests that the information may not fall outside CDCR’s five categories:

- 9 • Undersecretary Kernan writes in one email “Going to get very political quick.” Risher Decl.
10 ¶ 10 & Ex. 3. The next sentence is redacted.
- 11 • A CDCR employee states in an email that the proposed contract with the unidentified drug
12 acquisition broker will “likely far exceed our delegated authority.” Text before and after is
13 heavily redacted. *Id.* ¶ 41 & Ex. 39 at 1083. In a related email string, Undersecretary Kernan
14 writes of this same proposed contract: “Needs to be addressed confidentially.” *See id.* ¶ 41 &
15 Ex. 39 at 1105. Large redactions appear before and after. *See id.*
- 16 • CDCR also redacted such large portions of some documents that the nature of the information
17 redacted is undiscernible. *Id.* ¶ 42 & Ex. 40.

18 *Missing from production:*

- 19 • CDCR has not provided any records relating to the cost of sending agents to Arizona to obtain
20 thiopental, or the cost of purchasing and sending the pancuronium that was provided in
21 exchange for that drug. *See* Risher Decl. ¶ 26. This information falls squarely within
22 Petitioner’s PRA request number 1. *See* Minsker Decl. ¶ 7 & Ex. A.

23 CONCLUSION

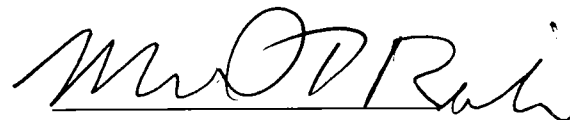
24 Relying on conclusory assertions, and overreaching with its redactions, CDCR has failed to
25 meet its burden of justifying the information withheld. Although CDCR wants a second bite at the
26 apple and has requested an order further briefing in the case of any disputes, CDCR Br. at 8, the Court
27 already ordered briefing on asserted exemptions and set the matter for hearing. Also, CDCR gets its
28 burden backwards. CDCR’s suggestion that Petitioner should identify and object to each redaction or
document CDCR lists on its privilege log “would reverse the presumption of openness contained in
the Act.” *Local 21*, 42 Cal.4th at 336-37. If CDCR wanted to show that it could withhold specific
information “on a case-by-case basis,” it had the burden, *id.*, and should have done so in the current
round of briefing. CDCR must therefore produce all withheld documents and unredacted versions of
previously produced documents, except insofar as it meets its burden of demonstrating the redaction or
withheld documents falls into a category that the Court determines to be exempt from disclosure based
on its review of documents and other competent evidence. § 6259(a), (b).

1 Dated:

12/13/2010

Respectfully submitted,

By:



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