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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. _____

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
VERIFIED PETITION FOR WRIT
OF MANDATE

Department: 301/302

Hrg. Date: Tuesday, Nov. 30, 2010

Hrg. Time: 9:30 am

CASE No. _____

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF VERIFIED COMPLAINT

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I. INTRODUCTION

On October 7, 2010, Petitioner American Civil Liberties Union of Northern California (“ACLU-NC”) requested records from Respondent California Department of Corrections and Rehabilitation (“CDCR” or “Department”) relating to the Department’s recent well-publicized acquisition of sodium thiopental, a drug that the CDCR uses in its lethal-injection execution process. The CDCR has so far *admitted* that some of the requested records are publicly disclosable, but has refused to provide any of those documents or even to say when it will provide them, despite an express mandatory duty to do so. In addition, CDCR has refused to identify the responsive documents it contends are not subject to disclosure. This suit therefore requests the following writs of mandate under the enforcement provisions of the California Public Records Act to compel the CDCR to do the following:

1. A peremptory writ commanding the CDCR to immediately produce all of the admittedly disclosable records.
2. A peremptory writ commanding the CDCR to immediately identify all responsive documents that it contends are not subject to disclosure and its reason for non-disclosure.
3. An alternative writ commanding the CDCR to release all responsive documents or show cause why it need not do so.

Because this suit seeks a writ of mandate under the PRA, “[t]he times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time.” Cal. Gov’t Code § 6258.¹

II. FACTS

The facts are taken from the verified Petition (“Pet.”),² which serves as the factual basis in PRA enforcement suits. *See* § 6259(a).

The California Department of Corrections and Rehabilitation uses sodium thiopental, which is a federal controlled substance, as the first drug in its three-drug lethal-injection protocol when it carries out executions at San Quentin. 15 C.C.R. § 3349.4.3; Pet. ¶12. During the September, 2010, litigation surrounding the scheduled execution of Albert Brown, the government informed the state and federal

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

² More precisely, the Verified Petition for Peremptory Writ of Mandate and Writ of Mandate, filed with this memorandum.

1 courts that its supply of this drug was going to expire on October 1, 2010. Pet. ¶ 13. This, claimed the
2 government, meant that the courts should allow the execution to go forward even though they did not
3 have enough time to review the new execution protocol, because any delay would push the execution
4 date beyond October 1 and the CDCR would then be unable to proceed until it obtained a new supply
5 of thiopental, which would not occur until early 2011. *Id.*

6 Both the state and federal courts rejected this argument, and the execution did not occur. *Id.*
7 Then, on October 6, 2010 the CDCR informed the federal court hearing the matter that “the California
8 Department of Corrections and Rehabilitation obtained twelve grams of sodium thiopental on
9 September 30, 2010. The drug expires in 2014.” Pet. ¶ 14. This development was widely reported in
10 the press; the media also reported that CDCR refused to divulge where it had obtained this supply.
11 Pet. ¶ 15.

12 On October 7, 2010, the ACLU-NC sent a Public Records Act request to the CDCR, asking for
13 specific records relating to the CDCR’s acquisition of sodium thiopental, including records showing
14 where it obtained it, how much it paid for it, and copies of the packaging and the package inserts,
15 including any instructions for using the drugs. Pet. ¶ 16, Exh. B.

16 On October 14, 2010, the CDCR responded to the ACLU-NC’s October 7 request by stating
17 that it would require an additional 14 days to determine whether to disclose the documents. Pet. ¶ 18,
18 Exh. C. This response did not state any estimated date or time when the records would be made
19 available. *Id.* Fourteen days later, on October 28, 2010 ACLU-NC Program Assistant Ana Zamora
20 called CDCR Coordinator Pat Champion to ask about the status of the request for records. Pet. ¶ 19.

21 On November 1, the ACLU-NC received a further response from the CDCR, stating that that
22 our request would be “partially denied.” Pet. ¶ 20, Exh. D. CDCR did not deny the request in full,
23 thereby admitting that at least some of the requested records are disclosable. Pet. ¶ 21, Exh. D. No
24 records, however, were attached, and this response, too, failed to state the estimated date or time when
25 any records, let alone the admittedly disclosable records, would be made available. Pet. ¶ 20, Exh. D.
26 The October 29 response also listed a number of provisions that the CDCR asserted as reasons that it
27 would deny parts of the request but did not describe the documents it contended to be exempt. Pet.
28 ¶ 22, Exh. D.

On November 3, 2010, Ms. Zamora again called Ms. Champion to ask when the admittedly disclosable records would be available. Ms. Champion stated that she did not know the answer to this question and that she would back the next day with the answer. Pet. ¶ 23. On November 4, Ms. Zamora once again called Ms. Champion but Ms. Champion was still unable to provide an estimated date when the admittedly disclosable records would be available. Pet. ¶ 24. Later on November 4, Ms. Zamora faxed Ms. Champion a letter that discussed the relevant facts and law and specifically requested that the CDCR “[p]lease provide the estimated date and time that the records will be available immediately and in writing,” as required by Government Code § 6253(c). It also asked that the records themselves be provided without further delay. Pet. ¶ 25, Exh. E.

The CDCR has not responded to this letter. Pet. ¶ 26.

III. ARGUMENT

Over a month ago, Petitioner ACLU-NC made a targeted request for documents under the PRA. Asserting various exemptions from disclosure, Respondent CDCR “partially denied” the request, *see* Pet. ¶ 20, Exh. D, thereby admitting that at least some responsive documents are subject to disclosure. To date, however, CDCR has failed to produce a single document, or even state when responsive documents will be made available. The California Constitution and the Public Records Act establish a strong policy of public access and impose the mandatory duty on CDCR promptly to disclose non-exempt public records. A writ of mandate therefore lies to compel CDCR immediately to disclose the records which it has already conceded to be disclosable. *See* § 6253(b) (public agency “shall make the records promptly available...”). As to the records CDCR contends are exempt, the Court should issue an order compelling CDCR to produce an index of all such responsive records, specifying as to each record the exemption(s) it contends to be applicable, so that litigation over the remaining contested records can proceed in an orderly fashion. *See State Bd. of Equalization v. Super. Ct.* (1992) 10 Cal. App. 4th 1177, 1193 (affirming trial court’s order requiring responding agency to “prepar[e] a list of the documents which are sought”).

A. Summary of the PRA and its Enforcement Procedures

In California, “information concerning the conduct of the people’s business is a fundamental

1 and necessary right of every person.” § 6250.³ See CAL. CONST. ART. I, § 3(b)(1) (“the people have
2 the right of access to information concerning the conduct of the people’s business, and, therefore ...
3 the writings of public officials and agencies shall be open to public scrutiny.”).⁴

4 To ensure broad access to this information, the PRA defines “public record” broadly so as to
5 include “every conceivable kind of record that is involved in the governmental process.” *Versaci v.*
6 *Super. Ct.* (2005) 127 Cal. App. 4th 805, 813 (citation omitted); see § 6252(e) (“Public records”
7 includes any writing containing information relating to the conduct of the public’s business prepared,
8 owned, used, or retained by any state or local agency regardless of physical form or characteristics.”).
9 In addition, the PRA strict time limits on the government. A public agency that receives a request for
10 public records must respond to that request within 10 days by either providing the records in question,
11 by refusing to disclose the records and explaining in writing its authority to do so, or, in unusual cases,
12 requesting an additional 14 days to consider the request. § 6253(c).

13 The public agency must also include in its determination an estimate of when the records will
14 be available: “When the agency dispatches the determination, and if the agency determines that the
15 request seeks disclosable public records, the agency *shall* state the estimated date and time when the
16 records will be made available.” *Id.* (emphasis added).

17 Once it has determined that it will release records, the agency is required to produce them
18 “promptly.” § 6253(b). The government must not “delay or obstruct” the inspection or copying of
19 public records. § 6253(d). These statutory provisions reflect the legislature’s recognition that “the
20 *timeliness* of disclosure often is of crucial importance” under the PRA. *Wilder v. Super. Ct.*, 66 Cal.
21 App. 4th 77, 84 (1998) (quoting *Powers v. City of Richmond*, 10 Cal.4th 85, 118 (1995) (George, J.,
22 concurring)).

23 Public records are presumptively open to the public; therefore, an agency must release all
24 requested records unless it can demonstrate either (1) that the requested records fall under one of the
25 Act’s stated exemptions listed in § 6254, or (2) that on the facts of the particular case the public

26 _____
27 ³ All statutory references are to the Government Code unless otherwise indicated.

28 ⁴ The litigation surrounding the CDCR’s lethal-injection process does not affect its duty to provide
public records to any member of the public, including person involved in that litigation. *County of Los
Angeles v. Super. Ct. (Axelrad)* (2000) 82 Cal. App. 4th 819, 826 (2000).

1 interest served by not disclosing the record clearly outweighs the public interest served by disclosure
2 of the record. *See* § 6255(a); *Comm'n on Peace Officer Standards and Training v. Super. Ct.* (2007)
3 42 Cal. 4th 278, 288 (hereinafter "*CPOST*"). Where an agency withholds responsive records on the
4 basis of a statutory exemption, "the agency ...must disclose that fact." *Haynie v. Super. Ct.* (2001) 26
5 Cal. 4th 1061, 1072 (citing § 6255). The agency bears the burden of justifying nondisclosure.
6 § 6255(a); *CPOST*, 42 Cal. 4th at 296. Even if parts of a particular document are exempt, the agency
7 must disclose the remainder of the document. § 6253(a); *CPOST*, 42 Cal. 4th at 301-02.

8 If the government fails to comply with these statutory provisions, the PRA authorizes a person⁵
9 to file a petition for a writ of mandate "to enforce his or her right to inspect or to receive a copy of any
10 public record or class of public records." § 6258;⁶ *see also Wilder v. Super. Ct.* (1998) 66 Cal. App.
11 4th 77, 82.

12 After a petition has been filed, and if an agency continues to claim that responsive records are
13 statutorily exempt from disclosure, courts, in a procedure approved by the California Supreme Court,
14 have "ordered the [public agency] to lodge under seal the records for which an exemption was claimed
15 and provide the petitioner with an index of the records being lodged." *Haynie*, 26 Cal. 4th at 1073; *see*
16 *also* § 6259(a) (providing for *in camera* review of contested documents).

17 "If the court finds that the public official's decision to refuse disclosure is not justified under
18 Section 6254 or 6255, he or she shall order the public official to make the record public." § 6259(b).⁷

19 ⁵ Under the PRA, "person" includes an organization such as the ACLU-NC. § 6252(c).

20 ⁶ Section 6258 states in relevant part:

21 Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court
22 of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record
or class of public records under this chapter.

23 ⁷ Section 6259 states in relevant part:

24 (a) Whenever it is made to appear by verified petition to the superior court of the county where the
records or some part thereof are situated that certain public records are being improperly withheld from
25 a member of the public, the court shall order the officer or person charged with withholding the records
to disclose the public record or show cause why he or she should not do so. The court shall decide the
26 case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the
Evidence Code, papers filed by the parties and any oral argument and additional evidence as the court
may allow.

27 (b) If the court finds that the public official's decision to refuse disclosure is not justified under Section
28 6254 or 6255, he or she shall order the public official to make the record public. If the judge determines
that the public official was justified in refusing to make the record public, he or she shall return the item
to the public official without disclosing its content with an order supporting the decision refusing

1 And under general provisions of law, mandate lies to force a public agency that has failed to take an
2 action that the law requires. *See Bradley v. Lacy* (1977) 53 Cal. App. 4th 883, 887 (1997) (mandate to
3 compel District Attorney to take action on accusation that he had “ignored”). Mandamus also lies to
4 compel the government to act in a timely manner. *See Morris v. Harper* (2001) 94 Cal. App. 4th 52
5 (mandate to force state agency to issue licenses after unreasonable delay).

6 Writs of mandate may be either alternative or peremptory. C.C.P. § 1087. An alternative writ
7 commands the respondent to do an act or to show cause why it need not do so. *Id.* The peremptory
8 writ simply commands the respondent to act. *Id.* The PRA specifically contemplates that a court may
9 issue either a peremptory writ of mandate or an alternative writ and order to show cause. § 6259(a).
10 The court may issue a peremptory writ so long as the respondent is given 10 days notice. C.C.P.
11 § 1088. After receiving this notice, respondent then has 5 days to file a written response. *Id.* § 1107.
12 As noted above, the PRA requires that “[t]he times for responsive pleadings and for hearings in these
13 proceedings shall be set by the judge of the court with the object of securing a decision as to these
14 matters at the earliest possible time.” Gov’t Code § 6258. Mandate also lies to enforce the
15 constitutional right to public records. *See Katzberg v. Regents of Univ. of California* (2002) 29 Cal.
16 4th 300, 306-07, 326-27.

17 Petitioner in this matter intends to serve Respondent CDCR with the Petition and this
18 Memorandum of Points and Authorities before filing suit so that the CDCR has a opportunity to
19 respond before any hearing and this Court may issue any appropriate peremptory writ at the first
20 hearing on this matter. *See* C.C.P. § 1107.

21 **B. The Court should issue a peremptory writ ordering the CDCR immediately to**
22 **produce all admittedly disclosable records**

23 CDCR has already admitted that some of the requested records are subject to public disclosure.
24 CDCR has a mandatory duty to release these records immediately.

25 The statute is clear: “Except with respect to public records exempt from disclosure by express
26 provisions of law, each state or local agency, upon a request for a copy of records that reasonably
27 describes an identifiable record or records, *shall* make the records *promptly* available....” § 6253(b)
28 _____
disclosure.

1 (emphasis added). CDCR's October 29, 2010 response stated that Petitioner's request was "partially
2 denied" and asserted various statutory exemptions in support thereof. Pet. ¶¶ 20-21 & Ex. D. CDCR
3 did *not*, however, deny the request "in full." As a result, it has acknowledged that some of the
4 requested records are disclosable, but has failed to make those records available or even to state when
5 it would do so. "[T]he remedy of mandamus lies to compel the[] performance" of CDCR's mandatory
6 duty to disclose the documents that it concedes are exempt from disclosure. *Knoff v. City of San*
7 *Francisco* (1969) 1 Cal. App. 3d 184, 197 ("the word 'shall' must be construed as mandatory").

8 Any argument by CDCR that it requires additional time to produce the admittedly disclosable
9 records is without merit. The PRA imposes on CDCR a duty not only to release the documents, but to
10 do so "promptly." § 6253(b). The Legislature intended to require "disclosure of public information at
11 a time when the material still was newsworthy," and to prohibit the government from delaying the
12 release of information. *Powers v. City of Richmond*, 10 Cal. 4th 85, 118 (1995) (George, J.,
13 concurring); see *Filarsky v. Super. Ct.* (2002) 28 Cal. 4th 419, 426-27; *Wilder v. Super. Ct.* (1998) 66
14 Cal. App. 4th 77, 84 (1998) ("the *timeliness* of disclosure often is of crucial importance"). The public
15 is entitled to know about the misuse of government power when it happens, not months later after
16 other news has pushed the story from the front page and from the public.

17 Petitioner ACLU-NC requested these records on October 7, well over one month ago. The
18 request is focused and calls for only a limited number of documents. Where, as here, the law
19 prescribes a legal duty to act, mandate lies to compel the performance "within a reasonable time."
20 *Bank of Italy v. Johnson* (1926) 200 Cal. 1, 15. The obligation of timely performance is heightened in
21 the statutory context of the PRA, "[t]he express 'object' of [which] is to ensure that review of an
22 agency decision to withhold documents from a 'member of the public' be secured 'at the earliest
23 possible time.'" *Wilder*, 66 Cal. App. 4th at 82 (citations omitted). Moreover, under Article I § 3 of
24 the California Constitution, these PRA must be construed to further the public's right of access to
25 records. Timeliness is an essential element of access.

26 In order to respond to Petitioner's PRA request and conclude that it would be "partially
27 denied," CDCR has necessarily already identified responsive, disclosable records. CDCR's assertion
28 of statutory exemptions as to some of the records necessarily implies that CDCR conducted a review

1 of all responsive documents, which in turn implies that all of the documents have already been
2 gathered in a central location where the review occurred. All that remains is to copy or make available
3 for inspection the documents CDCR has admitted to be disclosable. Any further delay would be
4 unreasonable.

5 The unreasonableness of CDCR's actions to date is underscored by its failure even to state an
6 estimated release date for the admittedly disclosable records, contrary to statutory mandate. The PRA
7 provides that where, as here "the agency determines that the request seeks disclosable public records,
8 the agency *shall* state the estimated date and time when the records will be made available." 6253(c)
9 (emphasis added). The Court should issue a peremptory writ require CDCR immediately to produce
10 all admittedly disclosable documents.⁸

11 **C. This Court should issue a peremptory writ ordering the CDCR to Produce An**
12 **Index Of All Remaining Responsive Documents**

13 As to the remaining records which CDCR asserts to be exempt from disclosure, this Court
14 should issue a peremptory writ ordering CDCR to produce an index of the documents. Given CDCR's
15 cursory statement that Petitioner's request was "partially denied," Petitioner lacks any information as
16 to the nature and number of responsive documents that CDCR contends to be exempt or the validity of
17 CDCR's asserted exemptions. Unless the CDCR changes its position and releases all documents that
18 are responsive to the ACLU-NC's request, this Court should issue a peremptory writ ordering the
19 CDCR to create an index of the responsive documents it contends to be exempt, specifying the
20 exemption that the CDCR believes applicable to each document. The Court has the authority to order
21 the CDCR to create a list of the documents it is withholding and its authority for doing so, and
22 requiring it to "provid[e] such a list is consistent with the language and spirit of the Public Records
23 Act." *State Bd. of Equalization v. Super. Ct.* (1992) 10 Cal. App. 4th 1177, 1193 (affirming trial
24 court's order requiring responding agency to "prepar[e] a list of the documents which are sought"); *see*
25 *also Haynie v. Super. Ct.* (2001) 26 Cal. 4th 1061, 1073 (discussing *State Bd. of Equalization*). Such

26 ⁸ To the extent CDCR asserts some insurmountable logistical hurdle to immediate disclosure of some
27 limited number of documents, the Court should issue a peremptory writ requiring CDCR to state an
28 estimated date when such records will be made available. CDCR's duty to state an estimated release
date does not negate, however, its duty to disclose promptly all admittedly disclosable records as to
which there are no logistical barriers to production.

1 an index would streamline further litigation in this matter by allowing Petitioner to make an informed
2 decision about whether to later ask this Court to review specific documents in camera to see whether
3 they must be disclosed, as provided in § 6259(a). Without such a list, Petitioner would have to ask
4 this Court to review *all* undisclosed documents, even those that are clearly exempt from disclosure, to
5 see whether they fall within an exemption. Moreover, Petitioners and would be unable to provide the
6 Court with briefing on the applicability of specific exemptions to specific documents. Just as
7 privilege logs streamline the resolution of disputes over whether particular documents must be
8 disclosed in discovery, an index of the documents that the CDCR is withholding would streamline the
9 resolution of this matter by “permit[ing] a judicial evaluation of the claim” of exemption. *See Best*
10 *Products, Inc. v. Super. Ct.* (2004) 119 Cal. App. 4th 1181, 1188 (discussing privilege log). The Court
11 should therefore issue a peremptory writ requiring CDCR to provide an index of all responsive
12 documents which it contends are exempt from disclosure, as well as the asserted grounds for refusing
13 to disclose each document.

14 IV. CONCLUSION

15 For the reasons discussed above, the Court should issue the following orders:

- 16 1. A peremptory writ of mandate directing Respondent CDCR to provide Petitioner ACLU-NC with
17 all records the CDCR agrees are subject to disclosure, immediately and without further delay;
- 18 2. A peremptory writ of mandate directing Respondent CDCR to provide Petitioner ACLU-NC with a
19 list of any responsive records that it has not released to petitioners, specifying the exceptions that the
20 CDCR believes allow it to withhold each document.

21
22 Dated: 11/16/2010

Respectfully submitted,

23
24 By: Michael T. Risher

25
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27 LINDA LYE
28 American Civil Liberties Union
Foundation of Northern California

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