



May 20, 2011

Via facsimile and United States mail

Katherine L. Myrick
Freedom of Information/Privacy Act Unit
FOI/Records Management Section
US Department of Justice
Drug Enforcement Administration
8701 Morrissette Drive
Springfield, VA 22152
FAX: 202-307-8556

Re: Case Number 11-00133-F

Dear Ms. Myrick,

I write in regard to our January 4, 2011 FOIA request with the above-referenced Case Number, and request a response by the close of business today.

It is my understanding based on Page 3-4 of the documents you have produced that two import declarations (Form DEA 236) for sodium thiopental were filed, in connection with state efforts to obtain the drug for use in executions by lethal injection. As you are aware, the requestors in this matter have filed suit against the DEA to enforce the DEA's statutory obligations to produce expeditiously all responsive records. Based on the DEA's statement in the Joint Status Report filed by the parties in this litigation on May 18, 2011, it appears that DEA has refused to provide these import declarations to date based on the assertion that they are not encompassed by the January 4, 2011 FOIA request. The DEA's statement in the Joint Status report further states that if the requestors wish to obtain these declarations "they may supplement their current FOIA request for those records."

For the reasons stated in Plaintiffs' portion of the Joint Status Report, we continue to believe that the two declarations referenced on Page 3 of the documents produced fall within the scope of the original January 4, 2011 FOIA request. The DEA officials who participated in the email chain at Pages 3-4 themselves understood these two import declarations to involve state efforts to import the drug. The first email in the chain notes that "*states* have been importing the lethal drug regimen from England." (Page 4; emphasis added.) As evidenced by the fact that the two imports declarations by Chemique Pharmaceutical and another redacted company were mentioned in a discussion about efforts *by states* to import the drug, the two import declarations are responsive to Plaintiffs' FOIA request 9 for "Records . . . regarding any actual importation of sodium thiopental . . . by state officials. . ." DEA's effort to construe these two import declarations as non-responsive is inconsistent with the email at pages 3-4 and its "duty to

NANCY PEMBERTON, CHAIRPERSON; SUSAN MIZNER, JAHAN SAGAFI, FARAH BAKIMI, ALLEN ASCH, VICE CHAIRPERSONS; DICK GROSBOLL, SECRETARY/TREASURER
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Ms. Myrick
May 20, 2011
Page 2

construe a FOIA request liberally.” *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995).

Moreover, the first page of the January 4, 2011 FOIA request states its scope broadly as a “request for records in the possession of the Drug Enforcement Agency (DEA) pertaining to the acquisition of controlled substances by state officials in California, Arizona, and other states for the purpose of carrying out executions of condemned prisoners by lethal injection.” Where, as here, a request uses broad language and then also asks for what could be construed as a “specific subset thereof,” an agency’s construction of the request as seeking *only* the narrower subset is “implausible” and violates its obligation under FOIA to construe requests liberally. *LaCedra v. Executive Office for U.S. Attorney*, 317 F.3d 345, 348 (D.C. Cir. 2003).

Without prejudice to our position that the import declarations are responsive to the original January 4, 2011 FOIA request, requestors hereby clarify that the Request, particularly paragraph 9, encompasses the declarations referenced in the email at Page 3-4 and any other declarations filed by private entities on behalf of state officials seeking to import the drug for the purpose of execution. “When ... an agency becomes reasonably clear as to the materials desired, FOIA’s text and legislative history make plain the agency’s obligation to bring them forth.” *Truitt v. Department of State*, 897 F.2d 540, 544 (DC Cir. 1990).

Finally, we are concerned that the DEA’s refusal to release these documents is inconsistent with the policy set forth by the President and by the Attorney General. As the Justice Department’s own Office of Information Policy has summarized this policy,

[o]n his first full day in office, January 21, 2009, President Obama issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act (FOIA). The President directed that FOIA should be administered with a clear presumption: In the face of doubt, openness prevails.... Agencies were directed to respond to requests promptly and in a spirit of cooperation. The President also called on agencies to adopt a presumption in favor of disclosure and to apply that presumption to all decisions involving the FOIA. This presumption of disclosure includes taking affirmative steps to make information public.¹

The DEA’s refusal to release these documents, based solely on its crabbed reading of our original request, makes a mockery of the President’s words and what he declared would be a “new era of open Government.”

Because this clarification relates back to our original January 4, 2011 FOIA request, as to which DEA granted expedited processing on January 18, 2011, we request that you produce all Form 236 import declarations relating to the importation of thiopental made by or on behalf of states, including but not limited to the two declarations specifically identified in the records DEA

¹ United States Department of Justice, Office of Information Policy, FOIA Post, available at <http://www.justice.gov/oip/foiapost/2009foiapost8.htm>. See Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act from President Barack Obama, available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.

Ms. Myrick
May 20, 2011
Page 3

has already released during this litigation. We ask that you do this by the close of business today or advise us by that time that you will not do so. As you are aware, requestors will suffer irreparable harm unless these records are provided immediately, as another execution involving imported sodium thiopental is scheduled to occur on May 25, 2011.

Sincerely,

A handwritten signature in black ink, appearing to read 'Natasha Minsker', written over a faint, larger version of the same signature.

Natasha Minsker
Death Penalty Policy Director, ACLU-NC

Also on behalf of Tim Redmond
Executive Editor, *San Francisco Bay Guardian*

cc: Ila Deiss, Assistant United States Attorney (via email)
Linda Lye and Michael Risher, ACLU Foundation of Northern California (via email)

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FAX COVER SHEET

DATE: May 20, 2011

TO: Katherine L. Myrick
 Freedom of Information/Privacy Act Unit
 FOI/Records Management Section
 US Department of Justice
 Drug Enforcement Administration
 3701 Morrisette Drive
 Springfield, VA 22152
 FAX: 202-307-8556

FROM: Natasha Minsker, Death Penalty Policy Director, ACLU-NC
 Telephone: (415) 621-2493
 Fax: (415) 255-8437

PAGES: 4
(including cover)

RE: Case Number 11-00133-F

MESSAGE: Please see the following letter. Original will follow via US Mail.