

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Daniel J. Pochoda (SBA 021979)  
Kelly J. Flood (SBA 019772) ——— 773-6014  
Darrell L. Hill (SBA 030424) ——— 773-6024\$  
ACLU FOUNDATION OF ARIZONA  
3707 North 7th Street, Suite 235  
Phoenix, AZ 85014  
Telephone: (602) 650-1854  
dpochoda@acluaz.org  
kflood@acluaz.org  
dhill@acluaz.org

**COPY**

OCT 03 2013



MICHAEL K. JEANES, CLERK  
DAVID GUNN  
DEPUTY CLERK

*Attorneys for Plaintiff*

**ARIZONA SUPERIOR COURT  
MARICOPA COUNTY**

ACLU OF ARIZONA, a non-profit, civil  
rights organization,

Plaintiff,

v.

ARIZONA DEPARTMENT OF  
CORRECTIONS, a state agency,

Defendants.

NO. CV 2013-013531

**PLAINTIFF'S MOTION  
FOR TEMPORARY RESTRAINING  
ORDER  
(With Notice)**

**PRELIMINARY STATEMENT**

Pursuant to A.R.S. § 39-121.02(A) and Ariz. R. P. Spec. Act. 4, Plaintiff American Civil Liberties Union of Arizona ("ACLU-AZ"), by its undersigned attorneys, hereby applies for an Order to Show Cause ordering Defendant Arizona Department of Corrections ("ADC") to show why, pursuant to Arizona Public Records Law, they should not promptly and immediately release: (1) the identities of the distributors, manufacturers, and suppliers of the lethal injection drugs it plans to use in the scheduled executions of

1 Edward Harold Schad Jr. and Robert Glen Jones Jr., and (2) the identifying lot numbers,  
2 expiration dates, and federal regulatory and licensing information for those drugs. ACLU-  
3 AZ seeks a Temporary Restraining Order, compelling ADC to produce the requested  
4 documents. This application is supported by the ACLU's verified complaint, attached  
5 exhibits, and the following Memorandum of Points and Authorities, and Exhibits thereto.  
6

### 7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 ACLU-AZ has filed this Special Action because of ADC's repeated refusal to  
9 release public records concerning the lethal injection drugs it plans to use in the  
10 executions of Edward Harold Schad Jr., scheduled for execution October 9, 2013, and  
11 Robert Glen Jones, Jr., scheduled for execution October 23, 2013. Specifically, ADC has  
12 failed to disclose documents, or improperly redacted materials, that would reveal:

- 13 1. The name of the suppliers, distributors, and manufacturers of the lethal  
14 injection drugs to be used in the executions;
- 15 2. The lot number and expiration dates of the lethal injection drugs;
- 16 3. The National Drug Code (NDC) directly associated with the particular  
17 manufacturer and lot number of the drug;
- 18 4. The DEA classification and reference numbers on the package insert and  
19 invoices;
- 20 5. The DEA Registration information demonstrating each person who will handle  
21 the controlled substances is authorized to do so (we noted that personal,  
22 identifying information could be redacted);
- 23 6. All correspondence, forms, and documents shared between the Arizona  
24 Department of Corrections and any federal agency responsible for regulating  
25 the purchase, handling, or use of the lethal injection drugs;
- 26 7. All correspondence, forms, and documents shared between the Arizona  
27 Department of Corrections and any manufacturer, distributor, or pharmacy  
28

1 responsible for supplying the Arizona Department of Corrections with the  
2 lethal injection drugs;

3 8. All invoice, order, and procuring information concerning the lethal injection  
4 drugs.

5 Arizona Public Records Law is clear that records reflecting expenditures of public  
6 funds and the official duties of public officials and bodies are presumptively open to  
7 public inspection. *See* A.R.S. § 39-121.01(B). ADC is legally bound to observe the  
8 Arizona Public Records Law and its denial of ACLU-AZ's public records request is a  
9 clear violation of its duty to provide prompt access to public records as specified by  
10 Arizona law. A.R.S. § 39-121.01(E).

#### 11 **FACTUAL BASIS FOR CLAIM**

12 On September 17, 2013, the ACLU-AZ, through its representative Attorney Kelly  
13 Flood, sent ADC a public record request seeking documents and information concerning  
14 the lethal injection drugs to be used in the executions of Edward Harold Schad Jr.,  
15 scheduled for execution October 9, 2013, and Robert Glen Jones, Jr., scheduled for  
16 execution October 23, 2013. Under Arizona's Public Records Law, the ACLU of Arizona  
17 is entitled to view, inspect, or be provided with copies of documents concerning the  
18 source and type of lethal injection drugs ADC plans to use in the upcoming executions.  
19 A.R.S. § 39-121 *et. seq.* "All records required to be kept under A.R.S. § 39-121.01(B), are  
20 presumed open to the public for inspection as public records." *Carlson v. Pima County*,  
21 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984).

22 On September 23, ADC responded by sending eleven pages of records, including  
23 six separate pieces of correspondence between ADC and other entities. *See* Exhibit C. The  
24 records included a July 30, 2013 letter stating that ADC intends to "use for these  
25 executions the one drug protocol set forth in Department Order 710," and an August 16,  
26 2013 letter stating "the manufacturer and source of the drug the Arizona Department of  
27 Corrections intends to use for the executions of inmates Robert Jones and Edward  
28

1 Schad... is confidential and not subject to disclosure under A.R.S. § 13-757(C).” *See*  
2 Exhibit C. The position ADC took in its August 16, 2013 correspondence was affirmed in  
3 ADC’s letter to the ACLU, where ADC states “the remaining information you seek, to  
4 the extent ADC has such records, is confidential and not subject to disclosure pursuant to  
5 A.R.S. § 13-757(C).” *See* Exhibit C.

6 On September 24, 2013, Attorney Flood sent a second message to ADC, asking  
7 them again to produce the requested public records. *See Exhibit E.* ACLU-AZ reiterated  
8 that it sought public records “concerning the specific lethal injection drugs to be used in  
9 the executions of Edward Schad, #070566 and Robert Jones, #040496. *See Exhibit E.* Ms  
10 Flood argued that ADC had released substantially similar information in the past in  
11 response to a public records lawsuit, and should produce the requested documents in this  
12 instance as well. *See Exhibit E.* On September 25, ADC responded with another  
13 disclosure of documents, but stated plainly that they did not intend to honor the majority  
14 of the ACLU-AZ’s request, writing “the information that has been redacted is confidential  
15 pursuant to A.R.S. § 13-757(C). The attached report, together with the records previously  
16 sent on September 20, 2013, are the complete records in ADC’s possession that are  
17 responsive to your public records request.” *See Exhibit F.*

18 On September 26, Attorney Flood sent a third request to ADC for the production of  
19 documents, maintaining that the requested records qualified as public records subject to  
20 disclosure under Arizona Public Records Law, and listing the records ADC was  
21 withholding in violation of their duties under Arizona law. *See Exhibit G.* The ACLU-  
22 AZ reiterated it was not seeking the identities of persons associated with the October 9  
23 and October 23 executions, and the names of such persons may properly be redacted. *See*  
24 Exhibit G. To date, ADC still has not provided complete responsive documents to the  
25 ACLU request. Documents reflecting ADC’s expenditures of public money, source of  
26 lethal injection drugs, and procedures and safeguards for their use, are quintessential  
27 public records under the Arizona Public Records Law and must be disclosed.  
28



1 or 2) the presence of serious questions and [that] ‘the balance of  
2 hardships tip[s] sharply’ in favor of the moving party.”

3 *Arizona Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12,  
4 219 P.3d 216, 222 (Ct. App. 2009) (internal citations omitted).

5 **I. ACLU-AZ IS LIKELY TO SUCCEED ON THE MERITS.**

6 **A. ADC IS A PUBLIC BODY AND ITS RECORDS ARE**  
7 **PRESUMPTIVELY OPEN TO PUBLIC INSPECTION UNDER THE**  
8 **ARIZONA PUBLIC RECORDS LAW.**

9 The plain language of the Arizona Public Records Law, A.R.S. § 39-121 *et. seq.*,  
10 and the holdings of the Arizona Supreme Court demonstrate unequivocally that the  
11 records the ACLU-AZ has requested are public record and subject to disclosure under  
12 Arizona law. “Arizona law defines public records broadly and creates a presumption  
13 requiring the disclosure of public documents.” *Griffis v. Pinal County*, 215 Ariz. 1, 4, 156  
14 P.3d 418, 421 (2007). The Arizona Supreme Court defines a public record as:

15 [A] record “made by a public officer in pursuance of a duty, the immediate  
16 purpose of which is to disseminate information to the public, or to serve as  
17 a memorial of official transactions for public reference”; a record that is  
18 “required to be kept, or necessary to be kept in the discharge of a duty  
19 imposed by law or directed by law to serve as a memorial and evidence of  
20 something written, said or done”; or any “written record of transactions of a  
21 public officer in his office, which is a convenient and appropriate method  
22 of discharging his duties, and is kept by him as such, whether required by ...  
23 law or not.”

24 *Griffis v. Pinal Cnty.*, 215 Ariz. at 4, 156 P.3d at 421 (citations omitted).

25 A.R.S. § 39-121.01(B) requires ADC to “maintain all records, including records as  
26 defined in section 41-151.18, reasonably necessary or appropriate to maintain an accurate  
27 knowledge of their official activities and of any of their activities which are supported by  
28 monies from this state or any political subdivision of this state.” A.R.S. 39-121.03(D)

1 grants any person or organization the right to “examine or be furnished copies, printouts  
2 or photographs of any public record.” A public records request “is deemed denied if a  
3 custodian fails to promptly respond to a request for production of a public record or fails  
4 to provide to the requesting person an index of any record or categories of records that are  
5 withheld from production. A.R.S. § 39-121.01(E).

6 The requested records clearly meet the definition of a public record as defined by  
7 Arizona Statute and the Arizona Supreme Court in *Griffs*. ADC has a duty to maintain  
8 extensive records regarding the lethal injections drugs, their source, and the monies spent  
9 in their acquisition. A.R.S. § 39-121.01(B). The ACLU-AZ has a right under Arizona law  
10 to examine or be furnished with copies of such records. A.R.S. 39-121.03(D). ADC’s  
11 failure to produce the requested records violates Arizona’s public records law.

12  
13 **B. A.R.S. § 13-757 (C) DOES NOT PREVENT ADC FROM  
DISCLOSING THE REQUESTED RECORDS.**

14 Defendants’ stance that A.R.S. § 13-757 (C) exempts the requested records from  
15 disclosure has no basis in law or fact. The plain language of A.R.S. § 13-757(C) only  
16 exempts the identity of *persons* from disclosure under the public records law; it does not  
17 shield identifying information regarding the drugs or the drug’s manufacturers or  
18 distributors. A.R.S. § 13-757 (C) states “the identity of executioners and other persons  
19 who participate or perform ancillary functions in an execution and any information  
20 contained in records that would identify those persons is confidential and is not subject to  
21 disclosure pursuant to title 39, chapter 1, article 2.” The statute does not make the  
22 organizations that supply, manufacture, or distribute lethal injection drugs confidential,  
23 and it certainly does not prevent disclosure of information about the drugs such as their lot  
24 number and expiration dates.

25 A federal district court has previously found A.R.S. § 13-757 (C) does not prevent  
26 ADC from disclosing the source of lethal injection drugs, identifying labels, lot numbers,  
27 and expiration dates. *Landrigan v. Brewer*, CV-10-2246-PHX-ROS, 2010 WL 4269559  
28 (D. Ariz. Oct. 25, 2010) *aff’d*, 625 F.3d 1144 (9th Cir. 2010) and *vacated on other*

1 grounds, 131 S. Ct. 445, 178 L. Ed. 2d 346 (U.S. 2010). In *Landrigan*, ADC sought to  
2 withhold from disclosure “any information regarding the drug” it planned to use in the  
3 execution of Timothy Landrigan. *Id.* at 11. The district court rejected the defendants’  
4 argument that A.R.S. § 13-757(C) prevented the disclosure of the requested information  
5 because it would “lead to the identity of individuals participating in an ancillary function  
6 in an execution,” saying that ADC’s interpretation of A.R.S. § 13-757(C) was overbroad  
7 and “not compelling.” *Id.* The district court in *Landrigan* held that “the Arizona statute  
8 cannot be read as protecting the disclosure of any information which might eventually,  
9 somehow, lead to the “identity of executioners and other persons.” *Id.* To do so would  
10 hide from public scrutiny critical information necessary to determining the legality, safety,  
11 and constitutionality of ADC’s execution procedures.

12  
13 Determining the source and distributor of the lethal injection drugs is necessary to  
14 determine the risks associated with their use. Increasingly, states are turning to local  
15 compounding pharmacies to produce lethal injection drugs as large scale pharmaceutical  
16 manufacturers face increased internal and external pressure to not supply pharmaceuticals  
17 for executions. *See, e.g., Lethal Injection Secrecy Post-Blaze*, Deborah W. Denna,  
18 *Georgetown Law Journal*, vol. 102, pp 38-39. Compared to large-scale pharmaceutical  
19 companies who are regulated by the FDA, compounding pharmacies face relatively lax  
20 regulation by state regulators, making “it difficult to ensure that compounded drugs are  
21 held to consistently high standards of quality, safety, and effectiveness.” *Id.* States are  
22 reluctant to reveal the identities of their drug suppliers because they fear disclosure will  
23 lead to public pressure upon suppliers and make acquiring lethal injection drugs more  
24 difficult. *Id.*

25 “The cloak of confidentiality may not be used... to save an officer or public body  
26 from inconvenience or embarrassment,” nor may it be used to hide illegality or  
27 wrongdoing by a public officer or entity. *Arizona Attorney General Agency Handbook*,  
28 Chapter 6, Page 7, <https://www.azag.gov/sites/default/files/sites/all/docs/agency->

1 handbook/ch06.pdf, citing *Dunwell v. Univ. of Ariz.*, 134 Ariz. 504, 508, 657 P.2d 917,  
2 921 (App. 1982); Ariz. Att'y Gen. Op. 76-43; Ariz. Att'y Gen. Op. I89-022. The Arizona  
3 Public Records Law is designed to “open government activity to public scrutiny.” *Lake v.*  
4 *City of Phx*, 222 Ariz. 547, 549 ¶ 7, 218 P.3d 1004, 1006 (2009). ADC has improperly  
5 invoked A.R.S. 13-757(C) to shield from public scrutiny the type of information the  
6 Arizona Public Record’s Law is specifically designed to expose.

7  
8 **C. ADC PREVIOUSLY PROVIDED INFORMATION**  
9 **SUBSTANTIALLY SIMILAR TO THE INFORMATION**  
10 **REQUESTED BY THE ACLU-AZ IN RESPONSE TO A PUBLIC**  
11 **RECORDS LAWSUIT.**

12 On May 19, 2011, the Office of the Federal Public Defender (“FPD”) brought suit  
13 against the Arizona Department of Corrections challenging ADC’s refusal to provide  
14 requested records under Arizona’s Public Record’s Law. *See* Exhibit I, ¶ 3, ¶ 4, ¶ 10 and  
15 ¶ 11. FPD was seeking information substantially similar to the information requested in  
16 the ACLU-AZ’s September 17 records request. *See* Exhibit I, ¶ 3 and ¶ 4. In ADC’s  
17 answer, they submitted over 100 pages of records responsive to FPD’s original record  
18 request, including: invoice and ordering information for lethal injection drugs, the names  
19 of lethal injection drugs supplied to ADC, correspondence between ADC and Federal  
20 regulators (DEA, FDA) about the procurement and legality of the drugs ADC acquired,  
21 and information revealing the identities of distributors, manufacturers, and suppliers of  
22 lethal injection drugs in ADC’s possession. *See* Exhibit J, State’s Exhibits A and B. ADC  
23 implied in their answer that had FPD clarified or requested additional records, ADC  
24 would have provided them without need for a lawsuit. *See* Exhibit J, State’s Answer, FPD  
25 v. ADC ¶ 6. ADC stated “rather than clarifying whether additional records would be  
26 provided, Plaintiff [FPD] filed the instant Complaint for Special Action”. *See* Exhibit J,  
27 State’s Answer, FPD v. ADC ¶ 7 to ¶ 10. However in the present instance, when  
28 presented with a substantially similar request, and after repeated efforts by the ACLU-AZ  
to obtain public records without litigation, ADC still refuses to turn over records clearly  
subject to disclosure.

1           Because the records requested by the ACLU-AZ are clearly subject to disclosure  
2 under Arizona's Public Records Law, are not confidential under A.R.S. 13-757(C), and  
3 have been provided in the past, the ACLU-AZ is likely to succeed on the merits of its  
4 action against ADC.

5  
6           **II. PLAINTIFF WILL SUFFER IRREPARABLE INJURY IF ADC DOES  
7 NOT PROMPTLY PROVIDE THE REQUESTED RECORDS.**

8           Mr. Schad is scheduled for execution on October 9, 2013 and Mr. Jones is  
9 scheduled for execution on October 23, 2013. The ACLU-AZ has requested these public  
10 records to ensure that the procedures and drugs used in the prospective executions  
11 conform to legal standards, meet community expectations and standards for executions,  
12 and will not violate Mr. Schad and Mr. Jones' Eighth Amendment right to be free from  
13 Cruel and Unusual Punishment. Any hopes of adequately addressing any potential  
14 problems or deficiencies with ADC execution procedures would be lost if defendants are  
15 allowed to further delay production of the requested records. "[Unlike] monetary injuries,  
16 constitutional violations cannot be adequately remedied through damages and therefore  
17 generally constitute irreparable harm." *Am. Trucking Associations, Inc. v. City of Los*  
18 *Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009). That is especially true where the  
19 constitutional violation is the Eighth Amendment and the penalty is death. Because the  
20 procedure in question involves the death penalty, any injury would by definition be  
21 irreparable, both to Mr. Schad and Mr. Jones, as well as to the public's understanding of  
22 the execution process and ability to intervene to prevent constitutional abuses.

23           If the Arizona Department of Corrections uses lethal injection drugs that do not  
24 conform to legal standards, there is more than speculation as to the risk of harm.  
25 Administering a drug that does not meet legal standards is an injury in itself. Furthermore,  
26 any action that the ACLU-AZ could take to remedy the issue would be moot if the  
27 executions have already taken place. If the ACLU-AZ is not able to access the requested  
28 information, there is a strong likelihood of irreparable injury.

1  
2 **III. THE BALANCE OF HARDSHIPS STRONGLY FAVORS**  
3 **GRANTING THE PRELIMINARY INJUNCTION.**

4 If the ACLU-AZ is denied access to the requested records, there is no adequate  
5 remedy that may be applied at a later date sufficient to repair the harm. Withholding the  
6 information poses a great potential hardship to the ACLU-AZ's ability to assess the  
7 legality of ADC's execution process prior to the scheduled executions, prevents the public  
8 from accurately understanding ADC's execution procedures in a timely manner, and  
9 potentially subjects Mr. Schad and Mr. Jones to an execution process that will cause  
10 excessive pain and suffering in violation of the Eighth Amendment of the U.S.  
11 Constitution. There are no adequate post-execution remedies if the executions cause  
12 excessive pain because they are carried out with non-conforming drugs or improperly-  
13 trained personnel. *See, e.g., Am. Trucking*, 559 F.3d at 1059.

14 ADC's concern that the disclosure of the requested materials may lead to the  
15 discovery of the identities of executioners and ancillary personnel is insubstantial and  
16 without merit. The ACLU-AZ has acknowledged that, to the extent the names of any  
17 actual human persons would be included in any of the requested information, ADC may  
18 lawfully redact the identities of persons directly involved in the execution, alleviating any  
19 potential hardship to ADC, its employees, or agents who may assist in the October 9 or  
20 October 23 executions. A.R.S. § 13-757(D) prevents the medical licensing board from  
21 suspending or revoking the license of any professional who participates in an execution.  
22 A.R.S. § 13-757(D). Any argument that human persons, whose names would be redacted,  
23 and who are shielded from punishment for participation in an execution, would be  
24 revealed and suffer adverse consequence if ADC provides the requested public records to  
25 the ACLU-AZ is completely speculative.

26 This case clearly presents an important question law regarding the interpretation of  
27 A.R.S. § 13-757 (C), and the balance of hardships tip sharply in favor of plaintiffs,  
28

1 making the grant of a preliminary injunction a proper result. *Arizona Ass'n of Providers*  
2 *for Persons with Disabilities v. State*, 223 Ariz. 6, 12, 219 P.3d 216, 222 ( App. 2009).  
3

4 **IV. PUBLIC POLICY FAVORS THE DISCLOSURE OF RECORDS**  
5 **CONCERNING ADC'S LETHAL INJECTION DRUGS.**

6 Allowing ADC to withhold records concerning the lethal injection drugs it uses in  
7 state executions would deny the ACLUA-AZ and the public the opportunity to determine  
8 whether the lethal injection drugs used by ADC are safe, legal, and meet the standards  
9 required by the Eighth Amendment of the U.S. Constitution. If ADC is allowed to shield  
10 the requested public records from disclosure, the public's right to be informed about the  
11 official duties of public officials in Arizona will be irreparably harmed. "The core purpose  
12 of the public records law is to allow the public access to official records and other  
13 government information so that the public may monitor the performance of government  
14 officials and their employees." *Phoenix News., Inc. v. Keegan*, 201 Airz. 344, 351, 35  
15 P.3d 105, 112 (App. 2001)(citations omitted).

16 The public has a substantial interest in ensuring that ADC performs execution in  
17 accordance with applicable law and "in a manner consistent with the Eighth Amendment."  
18 *Landrigan v. Brewer*, CV-10-2246-PHX-ROS, 2010 WL 4269559 (D. Ariz. Oct. 25,  
19 2010). As the *Landigran* court noted, "The basic concept underlying the Eighth  
20 Amendment is nothing less than the dignity of man. While the State has the power to  
21 punish, the Amendment stands to assure that this power be exercised within the limits of  
22 civilized standards." *Id.* at 11, quoting *Trop v. Dulles*, 356 U.S. 86, 100, 78 S.Ct. 590, 2  
23 L.Ed.2d 630 (1958). The public cannot be certain ADC performs executions in  
24 accordance with the standards of a civilized society if the details about the lethal injection  
25 drugs used in the execution are shielded from public scrutiny.

26 The danger that lethal injection drugs used in an execution may cause unnecessary  
27 pain and suffering are real and substantial. A South Dakota inmate "began choking and  
28 then remained open-eyed as he was executed" after his executioners "obtained its order of

1 pentobarbital from a local compounding pharmacy. Alarminglly, the compounded drug  
2 was contaminated with fungus – a discovery that was only made” after the inmate was  
3 executed. *Lethal Injection Secrecy Post-Blaze*, Deborah Denno, The Georgetown Law  
4 Journal, vol 102, pg 48-49 (September 19, 2013). According to documents provided by  
5 ADC, the exact same drug which caused the extreme suffering of the South Dakota  
6 inmate, pentobarbital, will be used in the scheduled executions of Mr. Schad, and perhaps  
7 Mr. Jones. See Exhibit C July 30, 2013 Letter from Charles Ryan (“the one-drug protocol  
8 using Pentobarbital will be used to carry out the execution scheduled for Wednesday,  
9 October 9, 2013.”) Without adequate information about the suppliers and manufacturers  
10 of lethal injection drugs, the public can never know that the procedures and safeguards in  
11 place are sufficient to prevent undue pain and suffering. The public has a substantial  
12 interest in ensuring that constitutional violations are not carried out and that executions  
13 meet the standards of a civilized society.  
14

15 **V. ACLU-AZ SHOULD BE AWARDED ITS REASONABLE**  
16 **ATTORNEYS’ FEES AND COSTS FOR BEING COMPELLED TO**  
17 **LITIGATE THIS ISSUE.**

18 Section 39-121.02 authorizes the Court to “award attorney fees and other legal  
19 costs that are reasonably incurred in any action under this article if the person seeking  
20 public records has substantially prevailed.” A.R.S. § 39-121.02(B). ADC’s interpretation  
21 of A.R.S. § 757(C) cannot be reasonably construed to prevent disclosure of the  
22 information ADC has refused to turn over. In an action for public records, it is not  
23 necessary for the moving party to prove bad faith or arbitrary and capricious conduct on  
24 the part of the state agency. *Phx. New Times, L.L.C. v. Arpaio*, 217 Ariz. 533, 539, 177  
25 P.3d 275, 281. In awarding attorneys’ fees, a moving party under the Arizona Public  
26 Records Law need only demonstrate that records have not been furnished promptly. *Id.*  
27 “A denial of access to public records is deemed wrongful if the person requesting the  
28 records was, in fact, entitled to them.” *Id.* at 538. The burden is on the public entity to  
prove that records were furnished promptly. *Id.* at 538-39. Arizona courts have defined

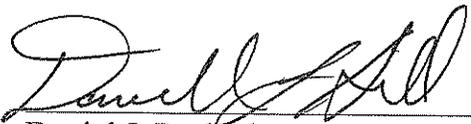
1 the prompt delivery of records as “as being “quick to act” or producing the requested  
2 records “without delay.”” *Id.* at 538 (internal citations omitted). In circumstances where  
3 the request is for a single category of documents that are available for immediate  
4 production, the Arizona Supreme Court holds that the statute requires public bodies to  
5 produce the documents “at once.” *Phx. New Times, L.L.C.* at 538 citing *West Valley View,*  
6 *Inc. v. Maricopa County Sheriff's Office*, 216 Ariz. 225, 230, ¶ 21, 165 P.3d 203, 208  
7 (App.2007). In the present situation, where ADC has outright refused to turn over  
8 relevant records in their possession, the court is warranted in awarding the ACLU-AZ  
9 reasonable attorney fees and costs for having to bring the present action.

### 11 CONCLUSION

12 For the foregoing reasons, the Court should declare that the requested records are  
13 public records subject to disclosure under A.R.S. § 39-121 et. seq., declare that A.R.S §  
14 13-757 (C) does not bar ADC from producing the requested records, enjoin Defendants  
15 from continuing to withhold the requested records from the ACLU-AZ and the public, and  
16 award the ACLU-AZ reasonable costs and attorneys’ fees for being forced to bring this  
17 action.

18  
19 Respectfully submitted this 3rd day of October, 2013.

20  
21  
22 ACLU FOUNDATION OF ARIZONA

23  
24 By   
25 Daniel J. Pochoda  
26 Kelly J. Flood  
27 Darrell L. Hill  
28 *Attorneys for Plaintiff*

CERTIFICATE OF SERVICE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I hereby certify that on October 3, 2013 I caused the foregoing original document to be filed with the Clerk's Office.

COPIES hand delivered this 3<sup>rd</sup> day of October, 2013 to:

Dawn Northup  
General Counsel  
Arizona Department of Corrections  
1601 West Jefferson  
Phoenix, AZ 85007

Charles A. Grube  
Jeffrey Zick  
Office of the Attorney General  
1275 West Washington Street  
Phoenix, AZ 85007

/s/Gloria A. Torres

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Daniel J. Pochoda (SBA 021979)  
Kelly J. Flood (SBA 019772)  
Darrell L. Hill (SBA 030424)  
ACLU FOUNDATION OF ARIZONA  
3707 North 7th Street, Suite 235  
Phoenix, AZ 85014  
Telephone: (602) 650-1854  
dpochoda@acluaz.org  
kflood@acluaz.org  
dhill@acluaz.org

*Attorneys for Plaintiff*

*Darrell Hill  
602-773-6014  
Kelly Flood  
602-773-6014*

**COPY**

OCT 03 2013



MICHAEL K. JEANES, CLERK  
DAVID GUNN  
DEPUTY CLERK

**ARIZONA SUPERIOR COURT  
MARICOPA COUNTY**

ACLU OF ARIZONA, a non-profit, civil  
rights organization,

Plaintiff,

v.

ARIZONA DEPARTMENT OF  
CORRECTIONS, a state agency,

Defendants.

NO. CV2013-013531

**COMPLAINT FOR SPECIAL  
ACTION AND TEMPORARY  
RESTRAINING ORDER WITH  
NOTICE AND ORDER TO SHOW  
CAUSE**

**Parties and Jurisdiction**

1. The ACLU of Arizona is a non-profit, civil rights organization operating within Arizona that performs public education and litigation in defense of civil liberties.
2. The Arizona Department of Corrections (the "ADC") is a state agency and public body as defined in A.R.S. § 39-121.01(A)(2)
3. The ACLU of Arizona brings this action and invokes the jurisdiction of this Court pursuant to A.R.S. § 39-121.02 and Rules 1 and 4 of the Arizona Rules of

1 Procedures for Special Actions.

- 2 4. Venue is proper pursuant to A.R.S. § 12-401 and Rule 4(b), Arizona Rules of  
3 Procedure for Special Actions.

4 **General Factual Allegations**

- 5 5. On September 17, 2013, Kelly Flood, a Staff Attorney for the ACLU of Arizona,  
6 sent a public records request via email and hand delivery to ADC General Counsel  
7 Dawn Northrup and ADC Director Charles Ryan requesting certain records in the  
8 possession of ADC, under Arizona Public Records Law. A.R.S. §§ 39-121-  
9 39.121.03. [Exhibit A] The public records request [Exhibit B] concerned the nature  
10 and source of the lethal injection drugs to be used in the executions of Edward  
11 Harold Schad, Jr., #070566 (scheduled for execution by lethal injection October 9,  
12 2013) and Robert Glen Jones, Jr., #040496, (scheduled for execution by lethal  
13 injection October 23, 2013), including:

- 14 a. the names of the drug(s);  
15 b. the distributor, source, importer, pharmacy, and manufacturer of the drug(s);  
16 c. the lot numbers and expiration dates of the drug(s);  
17 d. whether the drug(s) were approved by the United States Food and Drug  
18 Administration (FDA);  
19 e. the country of origin of the active pharmaceutical ingredients;  
20 f. licensing information for any compounding pharmacy responsible for the  
21 creation of the drugs;  
22 g. for any controlled substances ADC planned to use, the registration  
23 information issued by the Drug Enforcement Administration (DEA) that  
24 permits each person involved in administering the drug the legal right to  
25 possess, handle, and administer controlled substances;  
26 h. any correspondence between a federal agency and ADC concerning the  
27 drugs to be used in the executions; and,  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- i. any correspondence between a manufacturer, distributor, or pharmacy responsible for providing ADC with the drugs.
6. Courts have found such public records relevant to the determination of whether proposed execution procedures violate the Eighth Amendment prohibition against cruel and unusual punishment. *See Lightbourne v. McCollum*, 969 So.2d 326, 332-334 (finding that memoranda relating to lethal injection procedures were non-exempt public records and would be used “in consideration of the Eight Amendment claim.”).
7. On September 23, 2013, ADC General Counsel Dawn Northup responded. [Exhibit C] In ADC’s response, Attorney Northup states “records responsive to your request are attached. The remaining information you seek, to the extent ADC has such records, is confidential and not subject to disclosure pursuant to A.R.S. § 13-757(C).” [Exhibit D] ADC attached five items with their September 20 letter, including:
- a. A September 5, 2013 letter from Director Charles Ryan to Inmate Edward Harold Schad, Jr. explaining some of the execution procedures that would be utilized by the Arizona Department of Corrections and notifying Mr. Schad that “the one-drug protocol using Pentobarbital will be used to carry out the execution scheduled for Wednesday, October 9, 2013.”
  - b. An August 16, 2013 letter from Director Ryan to Dale Biach, Supervisor, Capital Habeas Unit, Office of the Federal Public Defender stating the names of “the manufacturer and source of the drug the Arizona Department of Corrections (“ADC”) intends to use for the executions of inmates Robert Jones (#070566) and Edward Schad (#040496)... is confidential and not subject to disclosure under A.R.S. § 13-757(C).”
  - c. A July 30, 2013 letter from Director Ryan to Dale Biach stating that ADC “intends to use for these executions [Jones, #070566 and Schad #040496]...

1 the one-drug protocol set forth in Department Order 710... The ADC  
2 intends to use unexpired, domestically obtained Pentobarbital for these  
3 executions.”

- 4
- 5 8. On September 24, 2013, Atty. Flood sent an email to Atty. Northup seeking to  
6 clarify any confusion concerning the September 17 public records request. [Exhibit  
7 E] Atty. Flood reiterated that the ACLU of Arizona sought information concerning  
8 the source of the lethal injection drugs to be used in the executions of Edward  
9 Schad and Robert Jones, including information about the drugs: manufacturer(s),  
10 distributor(s), lot number(s) and expiration date(s). Ms. Flood noted that “the  
11 names of manufacturers and the source of these drugs are not protected by A.R.S §  
12 13-757(C).”
- 13 9. On September 25, Atty. Northup responded with another disclosure of documents  
14 [Exhibit F] but made clear that ADC believes the names of manufacturer(s),  
15 distributor(s), lot number(s), and expiration date(s) of the lethal injection drugs to  
16 be used in the October 9 and October 23 executions are confidential under A.R.S. §  
17 13-757(C), stating “the information that has been redacted is confidential pursuant  
18 to A.R.S. § 13-757(C). The attached record, together with the records previously  
19 sent on September 20, 2013, are the complete records in ADC’s possession that are  
20 responsive to your public records request.”
- 21 10. On September 26, Attorney Flood again requested public records necessary to  
22 satisfy the September 17, 2013 request. [Exhibit G] Specifically, Ms. Flood noted  
23 that ADC’s response to the ACLU of Arizona public records request improperly  
24 redacted information in the following areas:
- 25 a. The name of the distributors and manufacturers of the lethal injection drugs  
26 to be used in the executions of Edward Harold Schad, Jr., #070566,  
27 scheduled for execution on October 9, 2013, and to Robert Glen Jones, Jr.,  
28 #040496, scheduled for execution on October 23, 2013.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- i. Requests 1(a)(ii) and 2(a)(ii) of the September 17, 2013 request.
- b. The lot number and expiration dates of the lethal injection drugs.
  - i. Requests 1(a)(iii) and 2(a)(iii) of the September 17, 2013 request.
- c. The National Drug Code (NDC) directly associated with the particular manufacturer and lot number of the drug.
  - i. Requests 1(a)(iv) and 2(a)(iv) of the September 17, 2013 request.
- d. The DEA classification and reference numbers on the package insert and invoices.

11. ADC also failed to disclose relevant public records, in the following areas:

- a. The DEA Registration information demonstrating each person who will handle the controlled substances is authorized to do so. (We noted that personal, identifying information could be redacted).
  - i. Requests 1(d)(iv) and 2(d)(iv) of the September 17, 2013 request.
- b. All correspondence, forms, and documents shared between the Arizona Department of Corrections and any manufacturer, distributor, or pharmacy responsible for supplying the Arizona Department of Corrections with the lethal injection drugs.
  - i. Request 4 of the September 17, 2013 request.
- c. All invoice, order, and procuring information concerning the lethal injection drugs.
  - i. Request 5 of the September 17, 2013 request.

12. As of this filing, ADC has not provided requested documents to satisfy the ACLU of Arizona's September 17, 2013 public records request. ADC maintains the requested documents are confidential pursuant to A.R.S. § 13-757 (C).

**Legal Argument**

13. Arizona's Public Records Law requires public officers and public bodies to maintain all records necessary or appropriate to maintain an accurate account of

1 their official activities and activities supported by public money. A.R.S. § 39-  
2 121.01(B).

3 14. Any person has the right to examine or be furnished with copies of any public  
4 record. A.R.S. § 39-121.01(D).

5 15. “The core purpose of the public records law is to allow the public access to  
6 official records and other government information so that the public may monitor  
7 the performance of government officials and their employees.” *Phoenix News,*  
8 *Inc. v. Keegan*, 201 Ariz. 344, 35135 P.3d 105, 112 (App. 2001) (citations  
9 omitted).

10 16. Pursuant to A.R.S. § 39-121.01(E), access to public record is deemed denied if  
11 the custodian fails to promptly respond to a request for production of a public  
12 record.

13 17. The records requested by the ACLU of Arizona in Exhibit B are necessary to  
14 ensure the public has accurate knowledge of the official activities of ADC and are  
15 not deemed confidential by any statute. *See* A.R.S. § 39-121.01(B); ADC  
16 Department Order 201.01, 1.1, (“As a public agency, all Department records are  
17 public and subject to disclosure.”) [Exhibit H].

18 18. ADC’s refusal to provide the ACLU of Arizona with copies of public records  
19 violates Arizona law, including, without limitation, A.R.S. § 39-121 and § 39-  
20 121.02, and thereby constitutes a failure by a public body and public official to  
21 perform a duty required by law for which they have no discretion.

22 19. The requested documents are not confidential under Arizona law. A.R.S. § 13-  
23 757(C) only protects the “identity of executioners and other persons who  
24 participate or perform ancillary functions in an execution.” A.R.S. § 13-757(C)  
25 does not protect the identity of companies that supply, distribute, or manufacture  
26 lethal injection drugs ADC plans to use in the October 9 and October 23  
27 executions. Nor does it protect the lot numbers or expiration dates of the lethal  
28

1 injection drug(s), the National Drug Code associated with the manufacturer and  
2 lot number of the lethal injection drug(s), the DEA classification and reference  
3 numbers on the packages and invoices for the lethal injection drug(s), the DEA  
4 registration information that demonstrates each person who handles the drug(s) is  
5 authorized to do so, any correspondence between the ADC and any federal  
6 agency responsible for regulating the drug, or any correspondence between ADC  
7 and the companies that manufactured, distributed, or compounded the lethal  
8 injection drug.

9 20. ADC's refusal to produce the requested public records exceeds its jurisdiction  
10 and legal authority to do so, and has been done in an arbitrary and capricious  
11 manner and in bad faith.

12 21. The ACLU of Arizona has no equally plain, speedy, or adequate legal remedy  
13 from the actions taken by the ADOC. The ACLU of Arizona will suffer  
14 irreparable harm and damage from ongoing violations of its rights and the public  
15 breaches of law, unless the relief requested is granted by means of this Special  
16 Action.

17 **APPLICATION FOR ORDER TO SHOW CAUSE**

18 As set forth above, Defendants are plainly prohibited by law from withholding the  
19 requested public records. Accordingly, pursuant to Rule 6(d), Ariz. R. Civ. P., and Rule  
20 4(c), Arizona Rules of Procedure for Special Actions., it is appropriate and proper for this  
21 Court to issue an Order to Show Cause why the requested relief should not be granted.  
22

23 **WHEREFORE**, Plaintiff ACLU of Arizona respectfully requests that this Court  
24 award the following relief:

- 25 1. Issue an order directing ADC to immediately comply with A.R.S. §§ 39-121-  
26 39.121.03. and provide copies of the public records requested by the ACLU of  
27 Arizona;  
28

- 1  
2  
3  
4  
5  
6  
7  
8  
9  
10
2. Issue a preliminary and permanent injunction enjoining ADC from withholding the requested records;
  3. Hold that A.R.S. § 13-757(C) does not prohibit the disclosure of the public records requested by the ACLU of Arizona;
  4. Award the ACLU of Arizona its taxable costs in this action and reasonable attorneys' fees pursuant to A.R.S. § 39-121.02(B) and Rule 4(g) of the Arizona Rules of Procedure for Special Actions; and,
  5. Grant the ACLU of Arizona such other and further relief as may be just and proper in these circumstances.

11 Respectfully submitted this 3rd day of October, 2013.

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

ACLU FOUNDATION OF ARIZONA

By   
Daniel J. Pochoda  
Kelly J. Flood  
Darrell L. Hill  
*Attorneys for Plaintiff*

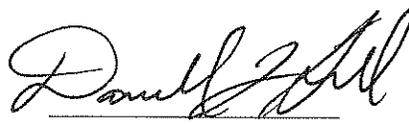
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Verification

Pursuant to Rule 80(i), Ariz. R. Civ. P., Darrell L. Hill verifies under penalty of perjury that the foregoing is true and correct:

1. I am a full-time employee of Plaintiff/Petitioner ACLU of Arizona.
2. I have read the foregoing Complaint and know the contents thereof.
3. The statements and matters alleged are true of my own personal knowledge, except as to those matters stated upon information and belief, and as to such matters, I reasonably believe them to be true.

Dated this 3<sup>rd</sup> day of October, 2013.

  
\_\_\_\_\_  
Darrell L. Hill

