

DISTRICT COURT, CITY AND COUNTY OF DENVER COLORADO 1437 Bannock Street Denver, Colorado 80202	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><b>Plaintiff:</b>          AMERICAN CIVIL LIBERTIES UNION OF          COLORADO, INC.</p> <p>v.</p> <p><b>Defendants:</b>          COLORADO DEPARTMENT OF CORRECTIONS;          ROGER WERHOLTZ, in his official capacity as Interim          Executive Director of the Department of Corrections</p>	
<p>Attorneys for Plaintiff:</p> <p style="padding-left: 40px;">Lauren E. Schmidt, #37002          Karl L. Schock, #38239          Emily A. Renwick, #45047</p> <p>Address: Brownstein Hyatt Farber Schreck, LLP          410 Seventeenth Street, Suite 2200          Denver, CO 80202-4432</p> <p>Phone: 303.223.1100          FAX: 303.223.1111          E-mails: lschmidt@bhfs.com; kschock@bhfs.com;          erenwick@bhfs.com</p> <p style="padding-left: 40px;">In cooperation with the American Civil Liberties          Union Foundation of Colorado</p> <p style="padding-left: 40px;">Mark Silverstein, #26979          American Civil Liberties Union Foundation of          Colorado          303 E. Seventeenth Avenue          Suite 350          Denver, CO 80203          Tel : (303) 777-5482; Fax (303) 777-1773          Email : msilverstein@aclu-co.org</p>	<p>Case Number:</p> <p>Div:</p>
<b>COMPLAINT AND APPLICATION FOR ORDER TO SHOW CAUSE</b>	

Plaintiff, the American Civil Liberties Union of Colorado, Inc. (“ACLU”), for its  
 Complaint against Defendants, the Colorado Department of Corrections and Roger Werholtz, in

his official capacity as the Interim Executive Director of the Colorado Department of Corrections, alleges as follows:

### **INTRODUCTION**

1. Plaintiff seeks the disclosure of records setting forth the execution protocol of the Colorado Department of Corrections (“CDOC”) as well as communications related to CDOC’s efforts to acquire the chemicals to be used under that protocol. Plaintiff brings this complaint under the provisions of the Colorado Criminal Justice Records Act (“CCJRA”), C.R.S. § 24-72-301, *et seq.*

2. CDOC is the state agency responsible for carrying out executions. Colorado conducted its most recent execution in 1997. For the first time in 16 years, CDOC is planning to execute a Colorado citizen: Nathan Dunlap, a 39-year-old inmate who was sentenced to death after being convicted of first-degree murder. Mr. Dunlap has exhausted his state and federal appeals and his execution date was recently set for the week of August 18, 2013.

3. Plaintiff seeks disclosure of records that will facilitate the public discussion of the death penalty in Colorado. By refusing to disclose records that will allow the public to learn the details of the execution procedure, the efforts to obtain the chemicals that will be used, the drug or drugs that will be used, and information about the companies that may be supplying the chemicals, CDOC infringes, without adequate justification, on the public’s legitimate right to information about how its government operates with regard to one of its most grave and serious undertakings.

4. On May 1, 2013, Plaintiff submitted a records request to CDOC under the CCJRA related to CDOC’s execution protocols (**Exhibit 1**). Plaintiff sought:

- a. Communications between CDOC and any pharmacy or pharmacist, including compounding pharmacies, regarding lethal injection or drugs that might be used in lethal injection. Plaintiff included a specific request to inspect a letter to Colorado compounding pharmacies from the former Executive Director of CDOC, Tom Clements. The public learned of this letter in an article published by The Denver Post on March 12, 2013.<sup>1</sup>
- b. Communications between CDOC and any licensed physician or other individual authorized to write prescriptions in Colorado regarding lethal injection or drugs that might be used in lethal injection.
- c. Communications between CDOC and anyone who claims to be able to provide, obtain, or supply drugs that may be used in lethal injection.

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<sup>1</sup> Tim Hoover, *Colorado Asks Pharmacists for Help in Securing Lethal Injection Drug*, Denver Post, April 12, 2013 (**Exhibit 4**).

- d. Communications to or from CDOC regarding drugs that may be used in lethal injection, including but not limited to sodium thiopental, pentobarbital, pentothal, pancuronium bromide, potassium chloride, or any compounded substance.
- e. The identity of pharmacies, pharmacists, medical professionals, manufacturers, distributors, wholesalers, retailers, or other sources of drugs that might be used in lethal injections.
- f. A copy of CDOC's "RESTRICTED DISTRIBUTION execution protocol document" described in CDOC's Administrative Regulation 300-14, which is titled "Capital Punishment/Execution by Lethal Injection."

5. On May 9, 2013, CDOC responded to Plaintiff and denied the overwhelming majority of Plaintiff's records requests (**Exhibit 2**). CDOC provided the text of the letter from Tom Clements to compounding pharmacies, which is dated March 12, 2013. (**Exhibit 3**). CDOC withheld the names and address information of the recipients. CDOC also provided 13 pages of documents that pre-date Mr. Clements' March 12, 2013 letter. These documents include communications that reflect a nationwide scarcity of sodium thiopental, the drug specified in the Colorado statute that provides for lethal injection as the method of execution. CDOC refused to release any correspondence with pharmacists and other drug providers generated after Mr. Clements sent the March 12, 2013 letter or the identity of these providers. CDOC also refused to release the "RESTRICTED DISTRIBUTION execution protocol" that is referenced in Administrative Regulation 300-14.

6. The records Plaintiff seeks are "criminal justice records" under the CCJRA. Under the CCJRA, the custodian of criminal justice records must make those records available for inspection unless privacy interests or the danger of adverse consequences outweigh the public interest.

7. In denying Plaintiff's request for records, CDOC claimed, without elaboration, that disclosure "could create unnecessary interference with the regular discharge of the Department's duty to carry out the death sentence by lethal injection." CDOC's unsupported and unspecific speculation is not sufficient to justify withholding of the requested records. CDOC also suggested that the companies that responded to CDOC's query have "privacy interests" that support the decision to withhold documents. Vendors offering to sell products to the State of Colorado should have no reasonable expectation of privacy. To the extent they do, which Plaintiff disputes, any such privacy interest is outweighed by the public interest in disclosure.

8. CDOC's decision to withhold these records constitutes an abuse of discretion under the CCJRA. Plaintiff seeks an order from the Court directing Defendants to show cause as to why Plaintiff should not be permitted to inspect and copy the requested records.

## **JURISDICTION AND VENUE**

9. This Court has jurisdiction under Section 24-72-305(7) of the Colorado Criminal Justice Records Act, C.R.S. § 24-72-301, *et seq.*

10. Venue is proper in this Court under C.R.C.P. 98(b)(2) and 98(c)(1). As a State agency, CDOC is deemed to reside in the City and County of Denver.

## **PARTIES**

11. Plaintiff, the American Civil Liberties Union of Colorado, is a Colorado nonprofit corporation in good standing with its headquarters in Denver, Colorado. The ACLU defends and preserves citizens' individual rights and liberties under the laws of Colorado and the United States, including the right to free speech and the right of due process.

12. Defendant Colorado Department of Corrections ("CDOC") is the state agency responsible for carrying out executions by means of lethal injection, including the execution of Nathan Dunlap, which is currently scheduled for the week of August 18, 2013.

13. Defendant Roger Werholtz is the Interim Director of the CDOC and is being sued in his official capacity. Mr. Werholtz is a custodian of criminal justice records as defined by C.R.S. Sections 24-72-302(4) and 24-72-302(5).

## **APPLICABLE LAW**

14. CDOC is a "criminal justice agency" subject to the Colorado Criminal Justice Records Act. *See* C.R.S. § 24-72-302(3); *Johnson v. Colorado Dept. of Corrections*, 972 P.2d 692, 694 (Colo. App. 1998). All records made, maintained, or kept by CDOC in the exercise of official functions are "criminal justice records" as defined by C.R.S. § 24-72-302(4). Unless specifically exempt, all criminal justice records may be made available for public inspection under C.R.S. § 24-72-304(1).

15. The Colorado Supreme Court has determined that the CCJRA "favors making [criminal justice records] available for inspection unless the custodian, in exercising his or her sound discretion, finds disclosure would be contrary to the public interest." *In re Freedom Colorado Information v. El Paso County Sheriff's Dept.*, 196 P.3d 892, 898 (Colo. 2008) (en banc).

16. The custodian's decision to deny access to the requested criminal justice records is reviewable by the district court for abuse of discretion. C.R.S. § 24-72-305(7); *In re Freedom Colorado Information*, 196 P.2d at 899.

17. Any person who is denied access to inspect a criminal justice record may apply to the district court of the district where the record is found for an order directing the custodian of such record to show cause why inspection should not be permitted. Upon application to the district court, the court is to enter an order to show cause "at the earliest practical time," at which time the custodian of records must demonstrate why the denial of inspection was not an abuse of discretion. C.R.S. § 24-72-305(7).

18. If the Court finds that the custodian abused his discretion in refusing to permit access to the records at issue, the Court shall order the custodian to permit access. *Id.*

19. Upon a finding that the custodian's denial of access was arbitrary or capricious (without any legal support), the Court may order the custodian to pay the applicant's court costs and attorneys' fees in an amount to be determined by the Court. *Id.*

### **FACTUAL CONTEXT GIVING RISE TO THE RECORDS REQUESTS**

20. Colorado is preparing to conduct its first execution since 1997. Nathan Dunlap's execution is scheduled for the week of August 18, 2013. CDOC is the state agency tasked with executing Mr. Dunlap.

21. Under C.R.S. § 18-1.3-1202 (the "**Lethal Injection Statute**"), Colorado executions must be conducted by lethal injection. The Lethal Injection Statute specifies the use of a single drug to carry out an execution. "Lethal injection" is defined as "a continuous intravenous injection of a lethal quantity of sodium thiopental or other equally or more effective substance sufficient to cause death." C.R.S. § 18-1.3-1202.

22. With the exception of this one-drug directive, the Lethal Injection Statute provides minimal guidance to CDOC regarding the execution process. CDOC has issued an administrative regulation governing execution by lethal injection, Administrative Regulation 300-14 (the "**Lethal Injection Regulation**"). This Administrative Regulation is available on the CDOC web site.

23. The Lethal Injection Regulation requires the Colorado State Penitentiary (CSP) warden to develop a "RESTRICTED DISTRIBUTION execution protocol document" relative to executions and management of offenders sentenced to death (Section V.B) (the "Execution Protocol"). Upon Plaintiff's information and belief, CDOC has released some or all of this Execution Protocol in the past, but it has refused to release the current version to Plaintiff.

24. Sodium thiopental—the single drug specified in Colorado's Lethal Injection Statute—is no longer manufactured in the United States. Upon Plaintiff's information and belief, the State of Colorado has no known reserves of sodium thiopental and faced a problem determining how to procure it. *See, e.g.,* John Ingold, *Colorado Might Struggle to Locate Drugs If Execution Planned*, Denver Post, March 20, 2012.<sup>2</sup>

25. Due to the unavailability of sodium thiopental, the former Executive Director of CDOC, Tom Clements, sent a letter to 97 compounding pharmacies on March 12, 2013 inquiring about the compounding pharmacies' ability to procure or compound sodium thiopental or, in the words of the Lethal Injection Statute, another "equally or more effective substance to cause death" (**Exhibit 3**). CDOC has not released the responses to Mr. Clements' inquiry to the compounding pharmacies.

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<sup>2</sup> Available online at [http://www.denverpost.com/news/ci\\_20210932/colorado-might-struggle-locate-drugs-if-execution-planned?IADID=Search-www.denverpost.com-www.denverpost.com](http://www.denverpost.com/news/ci_20210932/colorado-might-struggle-locate-drugs-if-execution-planned?IADID=Search-www.denverpost.com-www.denverpost.com).

26. CDOC has also declined to reveal whether it has located a source of sodium thiopental or whether it intends to follow the Lethal Injection Statute's option to substitute another "equally or more effective substance to cause death." On information and belief, the requested records would provide the public with the answer to this question.

27. Mr. Clements' letter to the compounding pharmacies also suggests that CDOC may be planning to deviate from the Lethal Injection Statute's directive to carry out an execution by means of a single drug. The letter suggests, instead, that CDOC is planning to follow some version of the three-drug execution protocol that is followed in a number of other states.

28. That three-drug protocol includes successive injections of sodium thiopental, pancuronium bromide, and potassium chloride. States that have used the three-drug protocol have been plagued by a series of botched executions and serious scientific, medical, and legal questions about whether the procedure has actually functioned to produce what its proponents intend: a swift, painless, and relatively humane execution.

29. In this three-drug protocol, the purpose of sodium thiopental, a barbiturate, is to produce a deep and long-lasting anesthesia. The purpose of the pancuronium bromide is to paralyze the muscles, including the diaphragm, rendering individuals completely unable to move, speak, or breathe. The purpose of potassium chloride is to stop the heart. When administered as the designers of the protocol intend, a sufficient dose of sodium thiopental will anesthetize the condemned inmate so he does not feel the subsequent drugs. If the sodium thiopental is not administered as intended, however, or if a sufficiently strong dose fails to reach the prisoner's bloodstream, the condemned prisoner can experience conscious paralysis (including suffocation) and the pain of potassium chloride and cardiac arrest. Because of the paralysis caused by the pancuronium bromide, the inmate is unable to communicate the fact that he is conscious while suffering excruciating pain.

30. In 2006, a federal district court in California conducted a detailed multi-day evidentiary hearing about California's three-drug execution protocol. The court determined that in more than half of the lethal injection executions that had been carried out, there was evidence that the anesthetic had failed, leaving the prisoner conscious but unable to move because of the second drug, while suffering excruciating pain from the third drug. The court held that California's history and practice with regard to the three-drug protocol posed an intolerable risk of causing unnecessary pain, in violation of the Eighth Amendment prohibition against cruel and unusual punishment.

31. In response to the numerous problems experienced with the three-drug protocol, an increasing number of states are moving to a single-drug execution, as required by Colorado's Lethal Injection Statute. The intention is to cause death by administering a single large dose of a barbiturate. Seven states have used this single-drug method for executions (Arizona, Georgia, Idaho, Ohio, South Dakota, Texas, and Washington). Four other states—Arkansas, Kentucky, Louisiana, and Missouri— have announced the use of single-drug lethal injection protocols, but have not carried out an execution under this protocol.

32. Although Colorado's statute specifies that executions must be carried out with a single drug, Mr. Clements' letter to the compounding pharmacies suggests that CDOC may be

planning a three-drug protocol instead. The letter asks the pharmacies if they can supply not only sodium thiopental, the drug specified in the Colorado statute, but also pentobarbital (a possible substitute for sodium thiopental in the three-drug protocol), and pancuronium bromide and potassium chloride, the second and third drugs in the three-drug protocol.

33. CDOC's Lethal Injection Regulation provides a further hint that CDOC may be planning to deviate from the Lethal Injection Statute's single-drug directive. The regulation defines lethal injection as "[a] continuous intravenous injection of a *series* of legal drugs sufficient to cause death." CDOC Administrative Regulation Number 300-14, Section III.C.

34. The public has a legitimate interest in knowing whether CDOC plans to follow the legislature's directive to use a single drug, or whether CDOC plans, without statutory guidance, to adopt the three-drug protocol that has been the source of botched executions and extended medical and legal controversy in other states.

35. Even if CDOC intends to follow the Colorado statute's directive to use a single drug, the public has a legitimate interest in knowing the identity of that drug. In light of the reports that sodium thiopental may be unavailable, the public has an interest in knowing the identity of the substance that CDOC decided would be "an equally or more effective substance to cause death."

36. The public also has a legitimate interest in knowing how Colorado compounding pharmacies responded to Mr. Clements' inquiry. This is especially true in light of the rules of the Colorado State Board of Pharmacy, 3 Colo. Code Regs. § 719-1. For example, these rules prohibit a pharmacist from knowingly participating in any practice which detrimentally affects the patient. They also prohibit licensed pharmacists from compounding, dispensing, delivering, or distributing any drug to any person where the pharmacist "knows or reasonably should know said drug has no recognized medical utility or application."

37. Pharmacies that are corporations or other non-natural entities have no legally cognizable right of privacy. Furthermore, individual professionals who practice in a field that is subject to extensive government regulation, such as licensed pharmacists, have no objectively reasonable expectation of privacy in how they conduct those regulated professional activities. *See, e.g., Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) ("Certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise.").

38. Notwithstanding—or maybe because of—potential complications and controversies in connection with Mr. Dunlap's upcoming execution, CDOC has refused to release its Execution Protocol or its records of correspondence with pharmacies and other drug providers.

**FIRST CLAIM FOR RELIEF**

**(Order to Show Cause and Award of Reasonable Attorneys' Fees: C.R.S. § 24-72-305)**

39. The Plaintiff incorporates the allegations in Paragraphs 1 through 38 of this Complaint by reference.

40. CDOC is a “criminal justice agency” subject to the Colorado Criminal Justice Records Act, C.R.S. § 24-72-301 *et seq.*

41. On May 1, 2013, Plaintiff submitted a request to Defendants for CDOC’s lethal injection procedures, communications with doctors and pharmacies regarding lethal injection drugs, and records regarding the source of drugs that CDOC may use to perform an execution (**Exhibit 1**). On May 9, 2013, Defendants informed Plaintiff that they refused to produce the overwhelming majority of the requested records (**Exhibit 2**).

42. The records sought by the Plaintiff are “criminal justice records” under the CCJRA.

43. The CCJRA favors making criminal justice records available for public inspection unless disclosure would be contrary to the public interest. The custodian must conduct a balancing test weighing the public interest against the “harm to privacy or dangers of unwarranted adverse consequences.” *In re Freedom Colorado Information*, 196 P.3d at 898. The criminal justice records “must be open for inspection unless the privacy interest or dangers of adverse consequences ‘outweigh’ the public interest.” *Id.*

44. Defendants have not justified their refusal to release the overwhelming majority of these criminal justice records. To the extent Defendants have provided any justification for this decision, Defendants’ explanation does not support their decision to withhold the records from public view.

45. Providing Plaintiff with access to the criminal justice records sought herein would promote the public interest. The public purposes served by disclosure include, among others, the public’s right to know (1) whether CDOC intends to carry out lethal injections in accordance with the one-drug protocol required by C.R.S. § 18-1.3-1202, and, if so, the specific drug that will be used; (2) whether CDOC intends to deviate from the statutory directive and substitute a version of the three-drug protocol that has prompted multiple problems in other states, and, if so, whether CDOC’s execution protocol includes training and safeguards designed effectively to avoid those problems; and (3) whether Colorado compounding pharmacies are supplying drugs to CDOC to be used for lethal injection, raising questions about potential violations of Colorado State Board of Pharmacy rules.

46. Similarly, providing Plaintiff with access to the criminal justice records will neither create unnecessary interference with the regular discharge of CDOC’s duty to carry out executions by lethal injection, nor interfere with any legitimate privacy interests, as Defendants contend.

47. Defendants’ withholding of the requested records constitutes an abuse of discretion, in violation of the CCJRA.



48. Plaintiff is entitled to an Order directing the Defendants to show cause “at the earliest practical time” why Defendants should not permit access to the requested records. *See* C.R.S. § 24-72-305(7).

49. After the Court hears this matter on an Order to Show Cause, Plaintiff is entitled to a further order making the order absolute and directing CDOC’s custodian of records to provide Plaintiff with access to the requested records on the grounds that Defendants’ decision to deny access constitutes an abuse of discretion. *See* C.R.S. § 24-72-305(7).

50. Defendants’ withholding of the requested records is arbitrary and capricious. As such, Plaintiff is also entitled to its reasonable attorneys’ fees under C.R.S. § 24-72-305(7).

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff American Civil Liberties Union of Colorado prays for the following relief under Section 305(7) of the Colorado Criminal Justice Records Act, C.R.S. § 24-72-301 *et seq.*:

(a) An order from the Court directing Defendants to show cause why the Plaintiff should not be permitted to inspect and copy the requested criminal justice records described in this Complaint.

(b) A hearing pursuant to such order “at the earliest practical time” in accordance with C.R.S. § 24-72-305(7), at which time the Court shall make the order to show cause absolute.

(c) An order from the Court directing Defendants to pay Plaintiff’s court costs and reasonable attorneys’ fees, as provided by C.R.S. § 24-72-305(7).

(d) Any other relief the Court deems just and proper.

Respectfully submitted this 21<sup>st</sup> day of May, 2013.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: *s/ Lauren E. Schmidt*

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