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

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**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,  
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- 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  
14 9. On September 25, Atty. Northup responded with another disclosure of documents  
15 [Exhibit F] but made clear that ADC believes the names of manufacturer(s),  
16 distributor(s), lot number(s), and expiration date(s) of the lethal injection drugs to  
17 be used in the October 9 and October 23 executions are confidential under A.R.S. §  
18 13-757(C), stating “the information that has been redacted is confidential pursuant  
19 to A.R.S. § 13-757(C). The attached record, together with the records previously  
20 sent on September 20, 2013, are the complete records in ADC’s possession that are  
21 responsive to your public records request.”

22  
23 10. On September 26, Attorney Flood again requested public records necessary to  
24 satisfy the September 17, 2013 request. [Exhibit G] Specifically, Ms. Flood noted  
25 that ADC’s response to the ACLU of Arizona public records request improperly  
26 redacted information in the following areas:

- 27  
28
- a. The name of the distributors and manufacturers of the lethal injection drugs to be used in the executions of Edward Harold Schad, Jr., #070566, scheduled for execution on October 9, 2013, and to Robert Glen Jones, Jr., #040496, scheduled for execution on October 23, 2013.

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- 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

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

14. Any person has the right to examine or be furnished with copies of any public record. A.R.S. § 39-121.01(D).
15. “The core purpose of the public records law is to allow the public access to official records and other government information so that the public may monitor the performance of government officials and their employees.” *Phoenix News, Inc. v. Keegan*, 201 Ariz. 344, 35135 P.3d 105, 112 (App. 2001) (citations omitted).
16. Pursuant to A.R.S. § 39-121.01(E), access to public record is deemed denied if the custodian fails to promptly respond to a request for production of a public record.
17. The records requested by the ACLU of Arizona in Exhibit B are necessary to ensure the public has accurate knowledge of the official activities of ADC and are not deemed confidential by any statute. *See* A.R.S. § 39-121.01(B); ADC Department Order 201.01, 1.1, (“As a public agency, all Department records are public and subject to disclosure.”) [Exhibit H].
18. ADC’s refusal to provide the ACLU of Arizona with copies of public records violates Arizona law, including, without limitation, A.R.S. § 39-121 and § 39-121.02, and thereby constitutes a failure by a public body and public official to perform a duty required by law for which they have no discretion.
19. The requested documents are not confidential under Arizona law. A.R.S. § 13-757(C) only protects the “identity of executioners and other persons who participate or perform ancillary functions in an execution.” A.R.S. § 13-757(C) does not protect the identity of companies that supply, distribute, or manufacture lethal injection drugs ADC plans to use in the October 9 and October 23 executions. Nor does it protect the lot numbers or expiration dates of the lethal

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;  
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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.

Respectfully submitted this 3rd day of October, 2013.

ACLU FOUNDATION OF ARIZONA

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



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**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

**CERTIFICATE OF SERVICE**

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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