Electronically Filed
2/21/2020 2:57 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALIZA COVER,

Petitioner-Respondent-Cross-Appellant,

vs.

IDAHO BOARD OF CORRECTION, IDAHO DEPARTMENT OF CORRECTION, and JEFFREY R. RAY, Public Information Officer,

Respondents-Appellants-Cross-Respondents.

Supreme Court No. 47004-2019

Ada County District Court No. CV01-18-03877

CROSS-APPELLANT'S BRIEF

CROSS-APPEAL FROM THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT

HONORABLE LYNN NORTON, DISTRICT JUDGE PRESIDING

Richard Eppink, ISB No. 7503 AMERICAN CIVIL LIBERTIES UNION OF IDAHO FOUNDATION P.O. Box 1897 Boise, Idaho 83701 Ph: 208-344-9750, ext. 1202 Attorney for Petitioner/Respondent/Cross-Appellant	Mark A. Kubinski, ISB No. 5272 Jessica L. Kuehn, ISB No. 9059 OFFICE OF THE ATTORNEY GENERAL P.O. Box 83720 Boise, Idaho 83720 Ph: 208-334-4103 Attorneys for Respondents/Appellants/Cross-Respondents

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Constitutional Provisions

Statutes

Session Laws and Legislative History

Rules

I. STATEMENT OF THE CASE

A. Nature of the Case

This is a Public Records Act case. It will decide whether Idahoans still have meaningful oversight over executions carried out in their name.

In Idaho, "[a]ll political power is inherent in the people." Idaho Constitution art. I, § 2. Government agencies carry out their duties in the public's name. Idaho's Public Records Act was enacted to guarantee that "[t]he records of governmental activity and officials at all levels should generally be accessible to members of the public to determine whether those entrusted with the affairs of government are honestly, faithfully and competently performing their functions as public servants." Statement of Purpose, 1990 Idaho House Bill no. 860 [Appendix A]. The Legislature meant for disclosing public records to rouse a public response, including criticism and embarrassment of those who do the public's work:

> Those who are elected to public office and those who are employed in government are trustees and servants of the people and it is in the public interest to enable any person to review and commend or criticize the operation and actions of government and governmental officials and employees, even though allowing the people to examine the operations and actions of government may cause inconvenience and additional expense to government and may result in criticism or embarrassment of officials and employees.

Id.; *cf.* 1990 Idaho Session Laws ch. 213, at 480 (reflecting enactment of H.B. 860).

"The death penalty is the gravest sentence our society may impose." *Hall v. Florida*, 572 U.S. 701, 724 (2014). "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). The dignity of our punishments "reflects the Nation we have been, the Nation we are, and the Nation we aspire to be." *Hall*, 572 U.S.

at 708. Recognizing those solemn stakes, the United States Supreme Court has given the public itself a constitutional responsibility in preserving that dignity. To protect it, the constitutionality of execution practices depends on the "evolving standards of decency that mark the progress of a maturing society." *Id.* Courts discern those evolving standards from "the judgment reached by the citizenry and its legislators." *Atkins v. Virginia*, 536 U.S. 304, 313 (2002).

Yet the appellants here ("IDOC" or the "Department" for short) argue that if the public knew how the agency kills Idaho's condemned, the public might have something to say about it. But that is exactly what the Public Records Act expects. That is precisely how standards of decency evolve.

B. Statement of Facts

Death penalty scholar and University of Idaho law professor Aliza Cover, like the public at large, wants to know how her government behaves in her name. Under the Public Records Act, she asked IDOC for records about its use of lethal injection. The Department largely denied her request, in bad faith.

1. Glossary

Shorthand terms for common ideas and documents have evolved in this case. This glossary will bring the Court into the shared parlance:

***Rhoades execution*:** The State of Idaho executed Paul Ezra Rhoades on November 18, 2011. The Idaho Department of Correction bought the chemicals used to execute

Rhoades with more than $10,000 in cash. (R. p. 1825 at ¶¶ 3–4.)*

***Leavitt execution*:** The State executed Richard Leavitt on June 12, 2012, and IDOC bought the chemicals for that execution with more than $10,000 cash as well. (R. p. 1826 at ¶¶ 9–10.) The State has not executed anyone since, though it has been able to get execution drugs after the Leavitt execution. (*Id.* at ¶ 11.)

***Confidential Cash Log*:** A handwritten log, on loose leaf paper, recording cash payments that IDOC made for executions. (R. pp. 1830 at ¶ 35, 1841 n.46, 1849 at ¶ 129, 1881.) The district court ruled that IDOC could completely withhold the Confidential Cash Log from Cover.

***Bates 654*:** A receipt from the compounding pharmacy that provided drugs for the Leavitt execution. (R. pp. 1826 at ¶ 13, 1887.) Bates 654 concerns a commitment from this pharmacy to provide lethal injection drugs after the Leavitt execution. (R. p. 1826 at ¶ 11.) The Department has never promised this supplier that its identity or other information would be kept confidential. (R. pp. 1826 at ¶ 13, 1887.) It identified only "Rule 135" as its basis for redacting this record. (Tr. p. 141 at 220:14–16.) Bates 654, as produced in redacted form, is in trial Exhibit 40. (Exs. p. 778.) The Court has the unredacted version of this page in the unredacted Exhibit 40 binder that IDOC lodged for in camera examination (at page

---

* Record references throughout this brief use this citation format:
- "R." cites the clerk's amended record on appeal ("AmendedClerk-Cover.pdf").
- "Exs." cites the clerk's exhibits on appeal ("Conf.Exhibits-Cover.pdf").
- "Tr." cites to pages in the reporter's transcripts on appeal ("Trans.-Cover.pdf"), beginning with the Bates numbered record page number, followed by the page:line number on that record page.

654). The district court ordered IDOC to disclose this record unredacted. (R. p. 1888.)

***Bates 655*:** A Drug Enforcement Administration (DEA) form, identifying the supplier of drugs used in the Rhoades execution. (R. pp. 1825 at ¶ 5, 21 at ¶ 103, 1888.) The Department has never promised this supplier, either, that its identity or other information would be kept confidential. (R. p. 1825 at ¶ 6.) The Department justified the extensive redactions it made to Bates 655 only under Rule 135.06. (R. p. 1889.) Bates 655, as produced in redacted form, is in trial Exhibit 40. (Exs. p. 779.) The Court has the unredacted version in the unredacted Exhibit 40 binder that IDOC lodged for in camera examination (at page 655). The district court ruled that IDOC did not have to disclose Bates 655 unredacted (R. p. 1890.)

***Rule 135.06*:** Idaho Administrative Code (IDAPA) § 06.01.01.135.06, as it existed in September 2017. The district court referred to Exhibit 39 for the text of this rule. (R. exs. pp. 111–113.) This is the only rule that IDOC timely cited as the basis for withholding or redacting records responsive to Cover's request. The Board of Correction never actually adopted the rule. (R. p. 1839 at ¶ 80.) (In June 2019, the Board of Correction amended IDAPA 06.01.01.135. What used to be 135.06 is now 135.05(b). For brevity, citations to IDAPA 06.01.01.135.06 in this brief refer to the rule in effect in September 2017.)

2. Cover's Public Records Request

Aliza Cover is a law professor at the University of Idaho's College of Law. She teaches and writes about the death penalty. In September 2017, she emailed IDOC asking for records about:

- The most current IDOC protocol for executions.

- The drugs that have been or will be purchased/used in future executions (including identifying information about the drugs; drug labels; expiration dates; purchase orders/receipts; paperwork about how the drugs are to be stored; etc.).

- The use of lethal injection in the Rhoades and Leavitt executions (including paperwork about where IDOC got its drugs from, and communications with drug suppliers or others regarding acquisition of drugs).

(Exs. pp. 7–8.) Though IDOC released its execution protocol to Cover, it withheld and extensively redacted many of the remaining responsive records.

3. IDOC's Bad Faith

The Department, in fact, did almost nothing to fulfill Cover's request for months. The Department selected just 49 pages, replete with redactions, for release to Cover. (R. pp. 1836 at ¶ 61, 14 at ¶ 65.) It withheld obviously responsive records, like an IDOC email with a drug supplier about buying lethal injection chemicals ahead of the Rhoades execution. (R. p. 1836 at ¶ 62.) It issued an "IDOC Notice of Action on Public Records Request" citing only "Board Rule 135.06" to justify the partial denial. (R. pp. 1837–1838 at ¶¶ 71–72; Exs. pp. 115–163.) The response was blatantly incomplete. (R. p. 1838 at ¶ 77.)

Cover filed a petition in court to compel IDOC to disclose records the agency withheld and redacted. The Department produced 603 new, previously undisclosed pages of records on the day its response was due. (R. p. 1840 at ¶ 82.)

Not until nine months after Cover's request, after the district court ordered IDOC to diligently search for responsive records, did the agency begin actually trying to find the records Cover requested. (*See* R. pp. 737–738, 1843–1847 at ¶¶ 97–119.) Once it began looking for responsive records, it found them all over the place. It found them in the offices

of employees who worked on executions, in the IDOC Director's record archive, and in a share drive that IDOC used in 2011 and 2012 (the years of the Rhoades and Leavitt executions)—all places it had, astonishingly, never even looked before. (R. pp. 1843–1845 at ¶¶ 97–111.) Its Deputy Director of Prisons Jeff Zmuda, who oversaw IDOC's response to Cover's request, even "found" responsive records in his own file drawer that he did not produce to Cover until after the district court entered its first peremptory writ of mandate. (R. p. 1845 at ¶ 113.) The district court held that Zmuda was disingenuous in his representations to the court. The court found that IDOC did not begin diligently searching for responsive records until nearly a year after Cover's request. (R. p. 1892.)

Then, just days before trial began, IDOC re-produced all of the records it had previously released, this time with far fewer redactions. (R. p. 1848 at ¶ 125.) Facing trial, IDOC could not justify most of the information it had withheld. And no surprise: even after trial, IDOC continued to find more responsive records. Only after the district court issued its decision after trial, holding that IDOC acted frivolously and in bad faith, did IDOC for the first time run keyword searches on key employees' email and hard drives. (R. pp. 2110–2115.) Those searches turned up still more responsive records. (*Id.*)

On appeal, IDOC does not contest that it acted frivolously and in bad faith.

4. <u>The District Court's Ruling</u>

The district court ruled that Cover was the prevailing party, winning release of the "overwhelming majority" of the redacted and withheld records. (R. p. 1896.) It ordered IDOC to disclose Bates 654: the record identifying the Leavitt execution drug supplier, which IDOC now contests on appeal. (Exs. p. 778; R. pp. 1887–1888.)

The court did not, however, order IDOC to disclose Bates 655: the record identifying the Rhoades execution drug supplier. (Exs. p. 779; R. p. 1890.) The court held that redacting Bates 655 was justified under "Idaho Code § 74-105(4)(a)(i) and Board Rule 135." (R. p. 1890.) The court also allowed IDOC to withhold the Confidential Cash Log in its entirety. (R. p. 1881.) The court held that it was exempt under Board Rule 135 and Idaho Code § 74-105(4)(a)(i). (*Id.*) Cover contests this ruling.

The court also let stand IDOC's redactions to records about other medical supplies used in lethal injections. (R. pp. 1833–1834 at ¶ 51.) It found, erroneously, that Cover's public records request did not encompass this information. (*Id.*) Therefore, the redactions to Exhibit 40, Bates 1593–1594, 1597–98, and 1616–17 (Exs. pp. 1722–1723, 1726–1727, and 1745–1746), which contain information about suppliers of "IV lines, catheters, syringes, and other medical supplies" still stand. (R. p. 1833–1834 at ¶ 51.) Cover contests this ruling as well.

The district court also held that the IDOC official who responded to Cover's request improperly refused the request deliberately and in bad faith. (R. p. 1892.) It fined the official $1,000 under I.C. § 74-117, the maximum penalty it believed the Public Records Act allowed. (R. p. 1893.) The court further held that IDOC frivolously denied Cover records and awarded her fees and costs. (R. p. 1896.)

C. Procedural History

Cover requested these records nearly three years ago, in September 2017. (Exs. 7–8.) She filed her district court petition two years ago in February 2018. (R. pp. 16–27.) It asked for a writ of mandate or, in the alternative, judicial review of agency action under the Idaho

Administrative Procedures Act. (*Id.* at 18, 22.) The court issued an alternative writ of mandate and order to show cause (R. pp. 110–112), and held a show cause hearing in April 2018. (R. p. 728.)

A month later, the District Court issued a peremptory writ of mandate requiring IDOC to diligently search for and disclose all records responsive to Cover's requests both for records about the use of lethal drugs in the Rhoades and Leavitt executions and for records about drugs that have been or will be purchased for future executions. (R. pp. 737, 739.) But the Department moved the district court to reconsider its decision to grant a peremptory writ. (R. pp. 740–741.) The district court granted IDOC's motion and set the case for trial. (R. pp. 1574, 1584.)

After a five-day bench trial, the district court issued findings and conclusions together with a peremptory writ of mandate specifying which parts of the records IDOC could redact and which parts it must disclose. (R. pp. 1824–1900, 1901–1904.) The court ordered IDOC to unredact many of the records, including Bates 654. The Department appealed only as to Bates 654. Cover cross-appeals on several issues.

II. ISSUES PRESENTED ON APPEAL

A. Can IDOC use a motion to reconsider to evade the Public Records Act requirement that agencies promptly search for and produce public records when requested and timely invoke any exemptions for withholding or redacting records?

B. Is an agency rule valid or entitled any deference if the board delegated to make it never actually adopted it?

C. Could the district court base its decision on inadmissible hearsay-within-hearsay from a newspaper article?

D. Does the Public Records Act permit an agency to redact or withhold records because

of protected free speech that might result if the records are disclosed?

E. Can a private contractor's interests prevent public records disclosure, where the Public Records Act provides the exact opposite at I.C. § 74-102(13)?

F. Did the district court err by permitting IDOC to withhold portions of certain public records that Cover requested?

G. Is Cover entitled to attorneys' fees and costs on appeal?

III. ATTORNEY FEES ON APPEAL

Cover and her counsel seek their fees and costs on appeal. The district court held that Cover was the prevailing party and that IDOC frivolously pursued its refusal of the records she requested. *See* I.C. § 74-116(2). The district court first awarded Cover reasonable costs and attorney fees in May 2018. The court held that Cover prevailed and that IDOC frivolously denied her records between March 7, 2018, and the show-cause hearing on April 5, 2018. (R. pp. 728, 729.) The district court again awarded Cover fees in January 2019, this time as discovery sanctions. (R. pp. 1657, 1664.) The district court yet again awarded Cover fees after trial, again holding that IDOC frivolously denied Cover records. (R. p. 1896.)

On appeal, Cover seeks fees and costs under I.C. § 74-116(2) and IAR 40 and 41. The Department does not contest the district court's finding that IDOC frivolously denied Cover records. Therefore, the district court—and this Court—"shall award reasonable costs and attorney fees" to Cover if she prevails. I.C. § 74-116(2).

IV. ARGUMENT

This Court's decision in this case will signal whether agencies can run roughshod over the purposes and plain language of Idaho's Public Records Act. The Act presumes

public access to records. It requires agencies to promptly search for and disclose records, and to timely justify any records they withhold or redact. It requires district courts also to act quickly to resolve petitions to compel disclosure. It must be interpreted broadly in favor of the public's right to records.

But despite finding that IDOC refused records frivolously and in bad faith, the district court granted a motion to reconsider allowing IDOC to invoke new arguments and exemptions long after the Act deemed them waived. Rather than narrowly construing exemptions from disclosure, the court broadly interpreted them and then misapplied them. It denied records based both on hearsay and on speculation about how the public might use the records to engage in protected free speech. It ignored the Public Records Act's express prohibition against invoking a government contractor's private interests to evade public records disclosures.

The Court should reaffirm its clear precedent protecting the Act's public purpose, clarify the Act's procedures, and correct the district court's errors.

A. The Idaho Public Records Act

The Public Records Act's purpose is "to create a very broad scope of government records and information accessible to the public." *Dalton v. Idaho Dairy Products Commission*, 107 Idaho 6, 11, 684 P.2d 983, 988 (1984). This Court must interpret the act to favor public access to records. *Id.*, 107 Idaho at 11, 684 P.2d at 988. Multiple, fundamental principles ensure Idaho courts effect that purpose.

First, the Act requires courts to presume that public records must be disclosed when requested. I.C. § 74-102(1). The only exception to disclosure is when an exemption is

"expressly provided by statute." I.C. § 74-102(1).

Second, courts must "narrowly construe exemptions to the disclosure presumption" under the Act. *Federated Publications v. Boise City*, 128 Idaho 459, 463, 914 P.2d 21, 25 (1996). Unless it is obvious that a record falls within a narrowly construed exemption, the record must be disclosed. *Id.*

Third, to invoke an exemption, an agency must expressly "indicate the statutory authority" for each exemption it claims, at the time that it issues written notice of denial. I.C. § 74-103(4); *cf.* I.C. § 74-103(2).

Fourth, an agency must search all of its records and issue any notice of denial, indicating each claimed exemption, within no more than 10 working days. *See* I.C. § 74-103(1). If an agency fails to issue a proper denial within 10 working days, the request is deemed denied. I.C. § 74-103(2).

Fifth, after timely invoking an exemption, an agency bears the burden to prove that any redacted or withheld record fits within an exemption, narrowly construed. *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002). The burden is a high one, both because the exemption must be narrowly construed and also because the burden requires specific proof. An agency cannot meet its burden unless it makes a "specific demonstration" proving that a claimed exemption applies to the records it redacted or withheld. *Ward v. Portneuf Medical Center*, 150 Idaho 501, 504 n.3, 248 P.3d 1236, 1239 n.3 (2011). Courts cannot accept an agency's "generalization of the types of documents withheld," but instead must thoroughly and objectively review each record itself. *Wade v. Taylor*, 156 Idaho 91, 99–100, 101, 320 P.3d 1250, 1258–59, 1260 (2014). The agency carries the burden to prove

that every single redaction and withheld record falls under a claimed statutory exemption. *See Bolger*, 137 Idaho at 796, 53 P.3d at 1215.

Sixth, for exemptions involving risk of harm, like those here, the agency has the burden to prove "a reasonable probability that disclosure of the requested . . . records would result in one or more of the harms identified by" statute. *Hymas v. Meridian Police Dept.*, 156 Idaho 739, 746, 330 P.3d 1097, 1104 (Ct. App. 2014).

Lastly, "the motivation of the person requesting the public record is irrelevant." *Wade*, 156 Idaho at 101, 320 P.3d at 1260. Courts cannot consider how records might be used once disclosed. *See id.*

B. The Court Should Reinstate the First Peremptory Writ of Mandate.

After a show cause hearing—just as the Public Records Act prescribes—the district court issued a peremptory writ of mandate in April 2018 requiring IDOC to find and disclose all responsive records, unredacted. But the court reconsidered that decision because of what it felt was a technical, procedural misstep.

There was no misstep. This Court should reinstate the first peremptory writ and also make clear what procedural rules apply to Public Records Act proceedings.

1. <u>From Petition, to Peremptory Writ, to Reconsideration.</u>

After Cover filed her petition, the district court issued an alternative writ of mandate and order for IDOC to show cause why it had not disclosed all responsive records. (R. pp. 110–112.) Both sides appeared for the show cause hearing. The district court expressly invited IDOC to "present any evidence or testimony you would also like to consider," but both sides relied only on previously filed affidavits and oral argument at the

hearing. (Tr. p. 43 at 5:15–18; *see generally* Tr. Pp. 41–71.) Based on that hearing, the district court issued a peremptory writ of mandate requiring IDOC to diligently search for and disclose the requested records, including records about lethal injection drug suppliers. (R. pp. 735, 737–738.)

The Department filed a motion to reconsider that decision, invoking IRCP 11.2(b)(1). (R. pp. 740–741, 743.) It acknowledged, however, that because it sought reconsideration from a "final judgment," its motion was more properly brought under IRCP 59 or 60(b)(6). (R. p. 743 n.1.)

The district court decided the motion without identifying which rule it applied. (*See* R. pp. 1574–1584.) It ruled, however, that IRCP 74 governed the show cause proceedings. (R. p. 1577.) Because IRCP 74 provides for trial setting, the court vacated its peremptory writ and set a trial on the merits. (R. p. 1580.) Trial did not begin until January 2019, many months after the Public Records Act's deadline to hold all hearings on a petition to compel disclosure of public records. (R. p. 1824.); *see* I.C. § 74-115(1).

2. <u>This Court Should Clarify Which Procedural Rules Apply to Public Records Act Proceedings.</u>

It is not clear which procedural rules govern Public Records Act proceedings under I.C. §§ 74-115 and 74-116. Though three possibilities stand out, the show cause procedures under IRCP 72 are most consistent with the Act.

In *Dalton*, this Court held that "mandamus is the proper remedy" for a denied public records request. 107 Idaho at 9, 684 P.2d at 986. Mandamus follows the procedures in IRCP 74. The district court followed IRCP 74 hypertechnically here, drawing out the proceedings

over more than a year and violating I.C. § 74-115(1)'s requirement that hearings in Public Records Act cases "in no event" be set beyond 28 days from the date of filing.

Contrary to the mandamus approach, Idaho's First Judicial District held that the procedures for judicial review of agency action at IRCP 84 govern proceedings under I.C. §§ 74-115 and 74-116. *McHenry v. Kootenai County Sheriff's Dept.*, Case No. CV 2016 1127, slip op. at 3–4, 6 (1st Dist. Ct. Idaho March 2, 2016) [Appendix B]. The court interpreted I.C. § 74-116(1) alongside I.R.C.P. 84(a) and held that judicial review in Public Records Act cases relies "upon the record created before the agency" along with any additional evidence and argument the court allows. *Id.*

However, the Public Records Act itself prescribes the procedures for petitions to compel disclosure under the Act. *See* I.C. § 74-116(1). If an agency may be improperly withholding public records, "the court shall order the public official charged with withholding the records to disclose the public record or show cause why he should not do so." I.C. § 74-116(1). Show cause procedures are set out in IRCP 72. They are consistent with I.C. § 74-116(1). Those procedures facilitate the rapid timeline for Public Records Act proceedings and allow both sides to present additional evidence. IRCP 72(a) (requiring just 7 days' notice of a show cause hearing); IRCP 72(b) (permitting testimony, evidence, and cross-examination with 24 hours' notice); *cf.* I.C. § 74-115(1) (requiring hearings to be set no more than 28 days from the date of filing); I.C. § 74-116(1) (permitting additional evidence).

The Public Records Act prescribes a swift process. Agencies must process requests within 10 working days and trial courts must hold hearings on I.C. § 74-115 petitions within 28 days. I.C. §§ 74-103(1) and 74-115(1). The procedure that best comports with that

design is a show cause order and hearing under IRCP 72. Therefore, this Court should clarify that the proper procedural rules for proceedings under I.C. §74-115 and §74-116 are the show cause rules in IRCP 72.

3. If the Court Doesn't Reinstate the Original Peremptory Writ, It Will Reward IDOC's Bad Faith and Publish a Recipe for More Bad Agency Conduct.

a. Standard of Review

When reviewing a motion for reconsideration decision, this Court applies the same standard that the district court employed. *International Real Estate Solutions v. Arave*, 157 Idaho 816, 819, 340 P.3d 465, 468 (2014). Because the district court's original decision involved interpreting the Public Records Act and the Idaho Rules of Civil Procedure, this Court freely reviews those questions of law and interpretations of the Act and Rules. *See Wade*, 156 Idaho at 96, 320 P.3d at 1255.

b. Reconsideration Motions Designed to Skirt the Public Records Act's Requirements and Facilitate Bad Faith Denials Must Be Barred.

The Department of Correction, here, tried an end-run around the Public Records Act's swift timelines, and the district court endorsed that end-run by granting IDOC's reconsideration motion. By doing so, it published a recipe for avoiding the Act's deadlines.

Giving IDOC another bite at the apple by granting the motion to reconsider undermined the Act's purpose and deadlines, and it rewarded IDOC's frivolous, bad faith refusal to search for and release records to Cover. Granting a reconsideration motion following an I.C. § 74-116 show cause hearing—especially in cases where an agency acted frivolously and in bad faith—creates a perverse incentive for agencies to delay or avoid

disclosing public records by not diligently searching for them before the Act's 10-day deadline. Though the agency would risk paying an attorney fees award and a fine for bad faith, those risks clearly did not deter IDOC.

The district court rewarded IDOC even more because it let IDOC assert new, untimely exemptions to justify redacting responsive records. In the motion to reconsider, IDOC argued that its "new claims for exemption raised in reconsideration should apply to records the Respondents were unaware existed as of March 14, 2018 and should be considered by the Court to apply to records discovered after the Court entered its Peremptory Order." (R. p. 1581.) Though the district court recognized that the Act requires agencies "to perform a diligent search for any records which could be responsive to a Public Records Request" (R. p. 729), the court let IDOC untimely invoke new exemptions despite the Act's clear deadlines and deemed-denial provisions in I.C. § 74-103. (R. p. 1582.)

This Court should reject these end-runs around the Act. It should make clear that agencies must promptly and diligently search for records and invoke all claimed exemptions in a written notice by the 10-day deadline. I.C. §§ 74-103(1), (2), (4). Permitting untimely exemptions and reconsideration tactics, based on records withheld in bad faith to skirt the Act's 10-day deadline and swift judicial procedures, vitiates the Act's plain language and purpose. *See also* IRCP (1)(a) ("These rules should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding.")

The Court should reverse the district court's decision reconsidering its original peremptory writ (R. pp. 1574–1584) and its order vacating that writ (R. p. 1586), thereby reinstating the court's original peremptory writ (R. pp. 737–738.)

C. IDOC Failed to Meet Its Burden at Trial.

The district court erred on both law and fact by letting IDOC redact Bates 655, the Confidential Cash Log, and medical supplies records. For the same reasons, the district court properly ordered IDOC to disclose Bates 654 unredacted.

1. Standard of Review.

Public Records Act cases turn on interpreting and applying the Act and its exemptions. This Court freely reviews those questions of law and freely interprets the Act. *Wade*, 156 Idaho at 96, 320 P.3d at 1255. Under free review, this Court is not bound by the district court's findings, but is free to draw its own conclusions from the evidence. *Chapin v. Linden*, 144 Idaho 393, 396, 162 P.3d 772, 775 (2007). When interpreting ambiguity in the Act, the Court looks to the language used and the policy behind the Act—in this case to presume and promote public access to government records. *Ward*, 150 Idaho at 504, 248 P.3d at 1239; *see Dalton*, 107 Idaho at 11, 684 P.2d at 988.

This Court will set aside findings of fact when they are clearly erroneous: that is, when they do not have substantial and competent evidentiary support. *Galli v. Idaho County*, 146 Idaho 155, 158, 191 P.3d 233, 236 (2008).

2. Untangling IDOC's Claimed Exemptions Leaves None Left.

Over the course of more than a year of rolling disclosures, IDOC claimed various exemptions at the different times it released new records. In its initial September 2017 disclosure (Bates 1–49), IDOC cited only "Board Rule 135.06." (Exs. p. 2708.) Indeed, IDOC did not check the boxes on its notice form to indicate that I.C. §§ 74-104 and 74-105 or IDAPA § 06.01.01.108 were grounds for partial denial. (*Id.*)

When IDOC filed its response to Cover's petition in March 2018, the agency newly disclosed over 600 additional pages of records. (R. p. 1840 at ¶ 82; Exs. pp. 164–777.) At that time, it cited I.C. § 74-104 generally, I.C. § 74-105(4)(a) generally, and IDAPA Rule 06.01.01.135 generally. (Exs. pp. 2709–2710.) It then disclosed still more records on May 25 (Bates 654–950), May 29 (Bates 951–1196), June 1 (Bates 1197–1542), June 11 (Bates 1543–1887), and July 10, 2018 (Bates 1888–1951). For those disclosures, IDOC cited I.C. § 74-104 generally, I.C. § 74-105(4)(a) generally, I.C. §§ 74-105(4)(a)(i) and (4)(a)(ii), "Board Rule 135" generally, "Board Rule 108" generally, and "Board Rule 108(4)(b)(i)." (Exs. pp. 2711–2720, 5–6, 9–10; *cf.* R. pp. 1675–1678 at ¶¶ 11–19.) When it produced more newly disclosed records in October 2018 (Bates 1952–2497), it cited no authority at all to support those redactions. (Exs. p. 11; *cf.* R. p. 1679 at ¶ 21.) In summary:

Disclosure Date	**Ex. 40 Bates Range**	**Exs. Pages**	**Exemptions Claimed**
9/27/2017	1–49	115–163	"Board Rule 135.06"
3/14/2018	50–653	164–777	I.C. § 74-104 I.C. § 74-105(4)(a) IDAPA 06.01.01.135
5/25/2018	654–950	778–1074	I.C. § 74-104 I.C. § 74-105(4)(a) I.C. §§ 74-105(4)(a)(i), (ii) "Board Rule 135" "Board Rule 108" "Board Rule 108(4)(b)(i)"
5/29/2018	951–1196	1075–1322	
6/1/2018	1197–1542	1323–1671	
6/11/2018	1543–1887	1672–2017	
7/10/2018	1888–1951	2018–2081	
10/25/2018	1952–2497	2082–2706†	[None]

† The Record page range for the 10/25/2018 disclosure contains more pages than the Bates range in Exhibit 40 because the Clerk's Record numbering counts the blank side of single-sided pages.

a. Untimely Claimed Exemptions Are Waived.

The Public Records Act expressly requires an agency redacting or withholding records in response to a request "indicate the statutory authority for the denial" in a written notice. I.C. § 74-103(4). The agency must issue the notice within 10 working days after it gets the request, or else the request is deemed denied without notice. I.C. §§ 74-103(3), (2).

The requirement to timely specify all claimed exemptions would be meaningless if agencies could later rely on any other exemptions. *See also Hillside Landscape Const. v. City of Lewiston*, 151 Idaho 749, 753, 264 P.3d 388, 392 (2011) (instructing that courts should presume, when interpreting statutes, that no provisions are superfluous). Accordingly, the exemptions IDOC claimed after the 10-day deadline must be deemed waived. The Act calls for this result in I.C. § 74-103(2), which deems a request denied after 10 working days. The Act has no provision allowing agencies to amend claimed exemptions after the 10-day deadline.

To allow agencies to claim new exemptions after the 10-day deadline would perversely incentivize agencies not to diligently search for records before the 10-day deadline and to withhold records in bad faith, as IDOC did here. In this case, permitting IDOC to rely on exemptions it never cited until well after the deadline rewards the agency for the same bad faith that the Act penalizes, I.C. § 74-117, and vitiates the Act's deemed-denial provision at I.C. § 74-103(2).

The only exemption IDOC timely claimed was "Board Rule 135.06." The Court should deem all the other exemptions that IDOC later claimed were waived.

b. General Citations Do Not Invoke an Exemption.

The Court must not read the significance of "indicate" out of the statute, either. The Act requires an agency to "***indicate*** the statutory authority for the denial" in a timely written notice. I.C. § 74-103(4) (emphasis added). The plain meaning of "indicate" is "to point out or point to." "Indicate," Merriam-Webster, https://www.merriam-webster.com/dictionary/indicate.

This Court must decide whether agencies can get away with citing whole swaths of exemptions generally, like IDOC has. For instance, IDOC cited generally to "Idaho Code § 74-104," but that section contains two, very distinct exemptions. (Ex. 6, R. exs. pp. 2708–2709.) Likewise it cited to "Idaho Code § 74-105(4)(a)," a subsection that contains five separate exemptions. (*Id.*) It also cited "Board Rule 135" and "Board Rule 108" generally. Even assuming these refer to Idaho Administrative Code §§ 06.01.01.135 and 06.01.01.108, Rule 135 contains seven subsections on various execution topics and Rule 108 contains 15 separate, distinct exemptions (IDAPA §§ 06.01.01.108(a)(i)–(ix), (b)(i)–(vi). (Exs. 101 and 39, R. exs. 2–4, 111–114.) Sweeping citations do not "point out or point to" a specific exemption.

Agencies can easily identify the specific exemption language they claim justifies redacting or withholding records. General references to lists of exemptions frustrate the Public Records Act's purpose of promoting broad public access to records. They also frustrate judicial economy, as this case's lengthy and cumbersome proceedings demonstrate. This Court should hold clearly that to "indicate" the statutory authority for redacting or withholding records under the Act, I.C. § 74-103(4), an agency must timely cite the specific subsection or paragraph it relies on. Where an agency relies on multiple or all of

the specific exemptions within a statute or subsection, the agency should be required to cite each of the specific exemptions in its notice.

c. What Exemptions Does IDOC Have Left? None.

This Court, just like the district court, must determine "whether the exemption from disclosure was justified at the time of the refusal to disclose rather than at the time of the hearing." *Wade*, 156 Idaho at 96, 320 P.3d at 1255.

The only exemption IDOC claimed before the 10-day deadline and before it refused Cover all but 49 of the thousands of pages of responsive records it had was "Board Rule 135.06." (Exs. p. 2708.) All the remaining exemptions it cited were untimely and should be deemed waived. Most of IDOC's remaining exemption citations were far too general to sufficiently "indicate" any exemption at all. And for the final batch of records that IDOC disclosed in October 2018, the agency did not claim any exemptions at all. (Exs. p. 11.)

The Public Records Act is broad, remedial legislation designed to ensure democratic transparency and protect the public's access to government records. Accordingly, the Act must be construed liberally to promote those purposes. *Page v. McCain Foods*, 141 Idaho 342, 346, 109 P.3d 1084, 1088 (2005) ("It is a well-known canon of statutory construction that remedial legislation is to be liberally construed to give effect to the intent of the legislature."); *McAnally v. Bonjac*, 137 Idaho 488, 491, 50 P.3d 983, 986 (2002); *Arrington v. Arrington Bros. Construction*, 116 Idaho 887, 891, 781 P.2d 224, 228 (1989). The Court cannot reward IDOC for its bad faith and lack of diligence by letting it rely on untimely or nonspecific exemptions. It cannot allow IDOC to rely on any exemptions for the October 2018 disclosures, because it cited no exemptions to justify those redactions at all. And it

cannot allow its lone timely exemption citation, "Board Rule 135.06," to count, either, because the agency did not indicate "***statutory*** authority" for those redactions. I.C. § 74-103(4) (emphasis added). This leaves IDOC without a properly cited exemption to rely on:

Disclosure Date	**Exs. Pages**	**Exemptions Available**	**Reason**
9/27/2017	115–163	~~"Board Rule 135.06"~~	No statutory authority
3/14/2018	164–777	~~I.C. § 74-104~~ ~~I.C. § 74-105(4)(a)~~ ~~IDAPA 06.01.01.135~~	Untimely, too general Untimely, too general Untimely
5/25/2018	778–1074	~~I.C. § 74-104~~ ~~I.C. § 74-105(4)(a)~~ ~~I.C. §§ 74-105(4)(a)(i), (ii)~~ ~~"Board Rule 135"~~ ~~"Board Rule 108"~~ ~~"Board Rule 108(4)(b)(i)"~~	Untimely, too general Untimely, too general Untimely Untimely, too general Untimely, too general Untimely
5/29/2018	1075–1322		
6/1/2018	1323–1671		
6/11/2018	1672–2017		
7/10/2018	2018–2081		
10/25/2018	2082–2706	[None]	No authority indicated

The Court should not reward IDOC for bad faith. The Court must effect the Act's purposes and ensure agencies comply with the Act's timelines. The Court should hold that IDOC must disclose all of the records unredacted.

3. IDOC Failed to Meet Its Burden on All Exemptions, Anyhow.

If this Court does reward IDOC's bad faith, it must still reverse as to several records that IDOC redacted or withheld. This is because:

- Rule 135.06 is invalid and entitled to no deference.
- IDOC did not meet its burden under Rule 135.06 or any of the other exemptions it cited.
- The Public Records Act explicitly prohibits invoking government contractors' interests to evade records disclosure.

a. *Rule 135.06 is Invalid.*

The Department's centerpiece exemption is Rule 135.06. When Cover made her records request, that rule stated:

> **Non-disclosure.** The Department will not disclose (under any circumstance) the identity of staff, contractors, consultants, or volunteers serving on escort or injection teams, nor will the Department disclose any other information wherein the disclosure of such information could jeopardize the Department's ability to carry out an execution.

The Department relies only on the rule's final clause ("nor will the Department disclose any other information wherein the disclosure of such information could jeopardize the Department's ability to carry out an execution") as to the records at issue in this appeal.

The rule is peculiar. It does not appear to be a Public Records Act exemption at all. The Board of Correction's rules, found at IDAPA 06.01.01, include a section dedicated to the Idaho Public Records Act: IDAPA § 06.01.01.108. Within that section the Board delineated a list of "Records Exempt from Disclosure." IDAPA § 06.01.01.108.04. There, the Board describes certain records to be exempt in their entirety and others to be only partly exempt, "subject to redaction." IDAPA §§ 06.01.01.108.04(a), (b). The Board textually tied those exemptions directly to the Act itself, expressly stating that "[i]n order to protect information consistent with the public's interest in confidentiality, public safety, security, and the habilitation of offenders, the Board has identified records of the Department to be exempt from disclosure in whole or in part." IDAPA § 06.01.01.108.04. That language mirrors the Act's provision delegating the Board to identify specific IDOC records for exemption. That provision, I.C. § 74-105(4)(a)(i), exempts from disclosure "Records of which the public

interest in confidentiality, public safety, security and habilitation clearly outweighs the public interest in disclosure as identified pursuant to the authority of the Idaho board of correction under section 20-212, Idaho Code."

By contrast, Rule 135.06 lacks any connection to the Public Records Act whatsoever. The rule is found nowhere within the Board's list of Public Records Act exemptions in IDAPA § 06.01.01.108.04. The notice promulgating the rule does not cite I.C. § 74-105(4)(a)(i) or any other part of the Public Record Act as authority for the rule. (Exs. p. 111.) The rule includes no findings about public interests in confidentiality, public safety, security, habilitation, or public disclosure, as the Act requires. I.C. § 74-105(4)(a)(i). And the rule appears alongside provisions about media coordination, a public information officer, media parking, protest areas, and people allowed to witness an execution. IDAPA § 06.01.01.135 (2017). It sure seems that the Board meant Rule 135.06 to direct IDOC personnel when speaking about executions, not as a Public Records Act exemption.

Rule 135.06 is plainly invalid as a Public Records Act exemption. The Board never even adopted it. Needless to say, it also never identified any specific records to be exempt. It never weighed the public interests the Act required it to, and certainly never determined that the public interest in disclosure is clearly outweighed by competing interests. Even if it had, the rule contravenes the Legislature's clear instructions and is entitled no deference.

i. The Board never adopted the rule.

The Board of Correction never actually adopted Rule 135.06, much less complied with I.C. § 74-105(4)(a)(i)'s explicit requirement to identify exempt records only after weighing public interests. (R. pp. 1839 at ¶ 80, 1869–1870; Exs. pp. 65–110.) But I.C. § 74-

105(4)(a)(i) explicitly required IBOC to "identify" records to be exempt. Narrowly construing that exemption, as this Court must, it requires the Board to identify specific records for exemption, not broad categories. *See Wade*, 156 Idaho at 99, 320 P.3d at 1258 (rejecting a categorical approach to Public Records Act exemption); *Hymas*, 159 Idaho at 602, 364 P.3d at 303 (same). A general description delegating broad discretion to IDOC, not the Board, to determine records that "could jeopardize" an execution falls far short of that requirement—especially because the Legislature very precisely granted only the Board, not the Department, authority to identify exempt records under I.C. § 74-105(4)(a)(i). It was IDOC's burden to prove that the Board in fact adopted the rule, made the "clearly outweighs" determination under the Act, and identified specific records for exemption. It utterly failed to meet that burden. Rule 135.06 is therefore invalid as a Public Records Act exemption.

ii. The rule contravenes the Legislature's instructions.

Rule 135.06 is also invalid because it contravenes the legislature's plain instructions. "[A]dministrative rules are invalid which do not carry into effect the legislature's intent as revealed by existing statutory law, and which are not reasonably related to the purposes of the enabling legislation." *Holly Care Center v. State Dept. of Employment*, 110 Idaho 76, 78, 714 P.2d 45, 47 (1986).

In *Holly Care Center*, this Court considered a Department of Employment rule about payroll tax delinquencies. The statute, I.C. § 72-1319, said that "delinquencies of a minor nature" could be disregarded. *Id.* The agency, though, declared in a rule that only delinquencies under $20 qualified as "minor." *Id.* This Court invalidated the rule. *Id.*, 110 Idaho at 79, 714 P.2d at 48. "Administratively determining that *any* delinquency over

twenty dollars is [a] 'major' delinquency renders virtually meaningless the statutory distinction the legislature intended," the court held. *Id.* Because the rule defined away the statutory distinction "into oblivion," the rule was invalid because it "eras[ed], for all practical purposes, distinctions that were legislatively created and mandated." *Id.*

Rule 135.06 likewise renders the I.C. § 74-105(4)(a)(i) public interest balancing meaningless. The Legislature instructed that IDOC records could be exempt pursuant to a Board rule only if the public interest in four specific areas (confidentiality, public safety, security, and habilitation) "clearly outweighs" the public interest in disclosure. I.C. § 74-105(4)(a)(i). To exempt from disclosure any information that "could jeopardize" the ability to carry out an execution, IDAPA 06.01.01.135.06, ignores that stiff, "clearly outweighs" hurdle and defines the "public interest in disclosure" into oblivion, I.C. § 74-105(4)(a)(i). Under Rule 135.06's "could jeopardize" test, IDOC could withhold records in which the public has an extreme interest in disclosure: records proving the condemned person's innocence, records revealing that executioners are not qualified, or—as in this case—records bearing on whether IDOC uses safe and legally obtained lethal injection drugs. The "could jeopardize" test is so broad and meaningless that it allows IDOC to hide illegal executions from the public. Because that test "eras[es], for all practical purposes" the legislature's "clearly outweighs" statutory balancing test, Rule 135.06 is invalid. *Holly Care Center*, 110 Idaho at 79, 714 P.2d at 48.

iii. *The rule is entitled no deference.*

Even were the rule valid, it would be entitled no deference. It fails all four prongs of this Court's agency deference analysis, originally set out in *J.R. Simplot Co. v. Tax*

Commission, 120 Idaho 849, 863, 820 P.2d 1206, 1220 (1991):

(a) Has the agency been entrusted with the responsibility to administer the statute?

(b) Is the agency construction reasonable?

(c) Does the statutory language expressly treat the precise question at issue?

(d) Are the rationales underlying the rule of deference present?

As to the first prong, though the Legislature empowered the Board to "identif[y]" records for exemption, pursuant to its rulemaking authority, the Board never did so. (R. pp. 1839 at ¶ 80 at 16, 1869–1870.) The Board certainly did not analyze whether the public interest in disclosure was clearly outweighed. *Id.* The Board did not approve Rule 135.06 and therefore the rule fails the first prong.

The rule fails the second prong, as well. Exempting any information that merely "could" jeopardize an execution renders the statutory balancing test meaningless. Suppliers' interests in avoiding public scrutiny protect only those vendors' private, economic interests. The only interest IDOC might have in shielding drug information from the public would be if the information revealed that IDOC uses illegal or dangerous drugs or obtains them corruptly. It is unreasonable to conclude that state officials' and private economic interests in avoiding scrutiny outweigh the public's interest in knowing executions are conducted properly in the public's name. Such a broad exemption is unreasonable.

The rule also fails the third prong. "An agency construction will not be followed if it contradicts the clear expressions of the legislature," and will fail this prong. *Id.*, 120 Idaho at 862, 820 P.2d at 1219. The intent of I.C. § 74-105(4)(a)(i) is clear and the rule contradicts

the statute in three ways. First, as explained above, the rule renders the "clearly outweighs" test meaningless. Second, also explained above, the Board never identified any records for exemption, it gave the Department discretion to identify those records when that the statute gives that authority only to the Board, and it never determined that the public interest in disclosure was clearly outweighed as the statute expressly requires. Third, the Rule allows IDOC to evade the Public Records Act's disclosure requirements by contracting with a private entity. The Public Records Act makes clear that an agency "shall not prevent the examination or copying of a public record by contracting with a nongovernmental body to perform any of its duties or functions." I.C. § 74-102(13). But Rule 135.06 does just that by shielding records about contractors and the drugs they supply.

The rule fails the fourth prong, too. None of the five rationales underlying the rule of agency deference—repose, practical interpretation, legislative acquiescence, contemporaneous formulation, and special expertise—are present. "Repose" protects long-time reliance on a particular agency construction. *J.R. Simplot Co.*, 120 Idaho at 858, 820 P.2d at 1215. There is no evidence of reliance here and the rule was less than six years old when Cover made her request. Repose only applies after a dozen years or more. *Id.*, 120 Idaho at 863, 820 P.2d at 1220 ("The shortest time period in a case directly addressing this rationale was twelve years."). The second rationale is whether the agency rule is a "practical" interpretation. *Id.* For the same reasons that Rule 135.06 is invalid for rendering the public interest balancing meaningless, it is not a "practical" interpretation of that statutorily mandated balancing. The third rationale is legislative acquiescence. This rationale "has not stood the test of time" in the face of mere legislative inaction. *Id.*, 120

Idaho at 859 n.6, 820 P.2d at 1216 n.6. The fourth rationale favors rules formulated contemporaneously with the passage of their authorizing statute. *Id.*, 120 Idaho at 859, 820 P.2d at 1216. This rationale is not present here because the statutory provision currently found at I.C. § 74-105(4)(a)(i) was enacted in 2001 and has not been amended since. 2001 Idaho Session Laws ch. 180, at 607. Rule 135.06 was not announced until a decade later, in 2011. (Exs. pp. 111–114.) The fifth and final rationale is also missing. That rationale favors deference where the agency demonstrably used its special expertise in developing the rule. *J.R. Simplot Co.*, 120 Idaho at 865, 820 P.2d at 1222. The Board did not even discuss or vote on this rule, much less apply its expertise to make the rule. (R. pp. 1839 at ¶ 80 at 16, 1869–1870.)

The rule fails all four prongs of the analysis. It is entitled no deference.

iv. *The Court can address the rule.*

Idaho courts routinely examine the validity of and deference due agency rules regardless of the nature of the underlying suit. *J.R. Simplot Co.*, 120 Idaho at 850, 820 P.2d at 1207 (adopting deference analysis and granting little deference in proceeding to dispute Tax Commission deficiency determination); *Holly Care Center*, 110 Idaho at 78, 714 P.2d at 47 (invalidating agency rule in appeal of Industrial Commission ruling increasing employer's tax rate); *Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001) (applying deference analysis and analyzing validity of agency rule in unemployment insurance proceeding); *Idaho Power Co. v. Idaho Public Utilities Commission*, 102 Idaho 744, 754, 639 P.2d 442, 452 (1981) (invalidating agency rule in Public Utilities Commission

proceedings).

The Department cites no authority holding that Idaho courts cannot decide the validity of and deference due agency rules whenever those rules are at issue. It cites instead only to *J.R. Simplot Co.*, which was a court appeal from an agency's tax deficiency determination. 120 Idaho at 850, 820 P.2d at 1207. This case, likewise, is a court appeal from an agency's action withholding public records. It was brought under the Public Records Act as it had to be. I.C. § 74-115(1) ("The ***sole*** remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings in the district court . . . to compel the public agency . . . to make the information available . . . ." (emphasis added)). If courts must apply and defer to invalid agency rules unless challenged under special procedures, then agencies can abuse invalid and improper rules with impunity. It would also beget needless, duplicative litigation to address issues inseparable from the underlying challenge to agency action. "[I]t is this Court's duty to interpret the law. Within that duty is the responsibility of deciding whether an administrative rule contradicts the wording of a statute." *Holly Care Center*, 110 Idaho at 82, 714 P.2d at 51.

Here, the Department's argument that the district court could only address the validity of or deference due Rule 135.06 in an APA proceeding is frivolous because Cover's petition made clear that she brought her action, in the alternative, under the APA. (R. 16, 22–24.) The Court can obviously decide whether the rule is valid and how much deference to give it. It is entitled no deference and invalid.

b. The Department Did Not Meet Its Burden to Show That Either Rule 135.06 or I.C. § 74-105(a)(i) Applies.

If this Court nevertheless decides that Rule 135.06 is valid and entitled to deference or, as the district court did, apply the I.C. § 74-105(4)(a)(i) balancing test directly, IDOC did not meet its burden under either test. The Department could only meet that burden with a specific demonstration proving the records at issue are obviously exempt under the proper test, narrowly construed. *Ward*, 150 Idaho at n.3, 248 P.3d at 1239 n.3; *Bolger*, 137 Idaho at 796, 53 P.3d at 1215; *Federated Publications*, 128 Idaho at 463, 914 P.2d at 25. As IDOC acknowledges, it had the additional burden to show a reasonable probability that disclosure of each requested document could result in harm, with evidence showing the harm that might result. *Hymas* 159 Idaho at 601–602, 364 P.3d at 302–303. Generalized or categorical evidence of harm is not enough; the evidence must be "individualized". *Hymas*, 159 Idaho at 601, 364 P.3d at 302; (*see also* R. p. 1872). Interpreting a public records act balancing test nearly identical to the one at I.C. § 74-105(4)(a)(i), the California Supreme Court held that "[a] mere assertion of possible endangerment is insufficient to justify nondisclosure." *ACLU of Northern California*, 202 Cal. App. 4th 55, 68, 72 (2011) (applying Cal. Gov't Code § 6255, which allows agencies to withhold records by showing that "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record"). Speculation is not enough. *Id.* at 75. The Department met none of these burdens.

Neither IDOC nor the district court have identified substantial or competent evidence on the non-disclosure side of the balance. The district court's "harm" findings only identified the absence of harm:

- No harm or even any credible threat of harm to any of those participating in any executions. (R. p. 1858 at ¶ 173.)

- No lethal injection drug supplier that will not supply drugs if its identity were revealed. (*Id.* at ¶¶ 174 & 177.)

- No executions that IDOC was unable to conduct because it lacked the necessary drugs. (*Id.* at ¶ 178.)

Despite those findings, the district court identified the following as grounds for allowing IDOC to withhold the confidential cash log and Bates 655:

- Disclosing the Confidential Cash Log (which IDOC withheld in its entirety), would reveal dates of payments, which in turn correlate to training dates. (R. p. 1881.)

- There were protests about a Texas lethal injection drug supplier after its identity became known. (R. p. 1888.)

- A newspaper reported that IDOC's former director Brent Reinke said IDOC adopted a one-drug execution protocol after the 2011 Rhoades execution because of difficulty obtaining three drugs instead of one. (R. pp. 1888, 1827 at ¶ 15.)

In its opening appellate brief, IDOC identifies these grounds for nondisclosure of Bates 654 and 655:

- Anti-death penalty groups have organized protests, in writing or in person, of lethal injection drug suppliers.

- The worst case one could imagine is that an execution might be delayed or cancelled.

- Disclosing government contractors allows the public to make economic decisions about those contractors, including whether to boycott them.

The district court also found (and IDOC argues) that IDOC had "some difficulty" obtaining lethal injection chemicals. But that testimony concerned conversations an IDOC official had ***after*** Cover's records request. So the district court properly concluded that

evidence could not justify redaction. (R. pp. 1858 at ¶ 179, 1889); *Wade*, 156 Idaho at 96, 320 P.3d at 1255 ("[T]he district court's inquiry is whether the exemption from disclosure was justified at the time of the refusal to disclose rather than at the time of the hearing.").

None of these grounds are permissible, substantial, or competent justifications under either the Rule 135.06 or I.C. § 74-105(4)(a)(i) tests.

i. The newspaper article is hearsay.

The district court's reliance on the newspaper report was improper. Besides that the article does not even suggest that revealing drug supplier identity has anything to do with difficulty obtaining lethal injection drugs, the article is inadmissible hearsay. (Exs. pp. 2486–2487; *cf.* R. pp. 1827–1828 at ¶ 15 & n.12.) The article never came up once during trial. Apparently, the district court found it while reviewing Exhibit 40. But the article was never admitted for its truth. Rather, the parties expressly stipulated that the records in Exhibit 40 were "[a]dmitted to identify the records Respondents produced to Cover and the effect of the contents on members of the public" but "not admitted for the truth of any matters asserted in exhibit contents." (R. pp. 1673, 1694.) This newspaper article is textbook hearsay. It's a newspaper reporter's out-of-court statement about a former IDOC director's out-of-court statement. *See* IRE 801(c), 805. Because there is no exception—for any of these multiple levels of hearsay—the article is inadmissible to prove the truth of what it reports. IRE 802.

ii. The "worst case scenario" speculation was flatly contradicted.

The district court's rationale for not disclosing Bates 655 did not even mention another reason that IDOC argues could justify it: speculation that an execution could be

delayed or cancelled if drug supplier identities were revealed. This speculation was hypothetical, about what a "worst case scenario" might be. (Tr. p. 201 at 457:5–9.) The speculation itself was based only on the possibility that the public might write letters or protest a drug supplier. (*Id.* at 457:13–19.)

But that "worst case scenario" is "hard to imagine" in the first place. (Tr. p. 202 at 464:21–465:3.) And it evidences no risk to any public interest. There is zero risk to the public interest if a drug supplier's identity is disclosed. (Tr. p. 203 at 467:6–9.) There is zero risk to safety or security if a supplier's identity is disclosed. (*Id.* at 467:10–12.) There is no concern about disclosing that information: execution drug supplier identities have been published in the past, "[a]nd there just isn't any data or information to suggest that that's created a security concern for any company that's been identified." (Tr. p. 200 at 455:11–20; *cf. id.* at 456:13–457:4.)

The California Department of Corrections already tried the same argument that IDOC tries here for withholding public records about execution drug suppliers. *ACLU of Northern California*, 202 Cal. App. 4th at 70–72. The California Supreme Court had to apply a balancing test nearly identical to that in I.C. § 74-105(4)(a)(i), found at Cal. Gov't Code § 6255, which allows agencies to withhold records by showing that "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." *ACLU of Northern California*, 202 Cal. App. 4th at 67. The court held that "[a] mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records," especially because the Department "offered no documentary or testimonial *evidence* that any pharmaceutical company or intermediary

could or did require its name to be kept confidential," or "of any potential threat to the security of any pharmaceutical company . . . ." *Id.* at 72, 74.

Unsurprisingly, the district court, which heard the testimony, did not credit this worst case scenario speculation as a reason for withholding Bates 655 or any other record.

iii. Protests and boycotts are protected speech.

That Idahoans might use information gleaned from public records to make economic and political decisions is hardly a reason to withhold those records. The Public Records Act's very purpose is to let the public access public records and respond to what it learns from them. The prospect that Idahoans might speak up if they knew the source of IDOC's drugs only emphasizes the enormous public interest in disclosure here. Indeed, the Act would have constitutional problems if the risk of public, protected free speech were grounds for withholding public records.

Public protest and economic pressure, including picketing and boycotting, are protected First Amendment activities. *Thornhill v. State of Alabama*, 310 U.S. 88, 104–105 (1940); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908–910 (1982); *Twin Falls Construction Co. v. Operating Engineers Local No. 370*, 95 Idaho 370, 373, 509 P.2d 788, 792 (1973). "[T]he danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion," the United States Supreme Court held in *Thornhill*. 310 U.S. at 105. This Court has agreed, holding that "[i]n light of the weighty free-speech values inherent in peaceful informational picketing, an unlawful objective should not be ascribed to it unless such a purpose is clearly

apparent." *Twin Falls Const. Co.*, 95 Idaho at 373, 509 P.2d at 792.The Public Records Act cannot curtail protected political and economic pressure.

This Court has emphasized these principles by holding that the purpose for which records are sought is irrelevant to whether they are exempt. *Wade*, 156 Idaho at 101, 320 P.3d at 1260. The public's right to inspect a public record "is conditioned *solely* on whether the document is a public record that is not expressly exempted by statute," not on how the record could be used after disclosure. *Id.*

iv. The Department did not meet its burden under the "could jeopardize" test.

Even under Rule 135.06, IDOC failed to show that disclosing any of the records at issue here "could jeopardize" an execution. It admitted there has been no harm or even any credible threat of harm to anyone involved in any execution. (R. p. 1858 at ¶ 173.) It admitted there is no execution drug supplier that will not supply drugs if its identity were known. (*Id.*at ¶¶ 174 & 177.) It admitted there have been no executions cancelled because it lacked the necessary drugs. (*Id.* at ¶ 178.) Its own records reflect that it has made contingency plans if it cannot find the drugs it needs. (Exs. p. 206.) It can get a stay of execution if it needs more time to find drugs. (Exs. p. 319.) And it could not refute that there is zero evidence of any risk to the public interest, to any execution, or to any drug supplier from revealing supplier identities. (*See* Tr. pp. 200 at 455:11–20, 456:13–457:4; 202–203 at 464:21–465:3, 467:6–12.) The hearsay in the newspaper article is inadmissible, and the possibility of public reaction cannot be grounds for withholding records: both because the requester's motivations are irrelevant and because withholding records to

prevent the public from engaging in protected speech would violate constitutional free speech guarantees and the purposes of the Public Records Act.

The Department did not prove that disclosure could jeopardize an execution. It certainly did not prove a reasonable probability that disclosing Bates 654, Bates 655, or the Confidential Cash Log could result in harm, with evidence showing the harm that might result. *See Hymas* 159 Idaho at 601–602, 364 P.3d at 302–303. Though Rule 135.06 was never adopted, is invalid, and is entitled no deference, IDOC did not meet its burden under the rule even if it applied here.

v. The Department did not meet its burden under the I.C. § 74-105(4)(a)(i) balancing test.

Though recognizing that Rule 135.06 did not comport with I.C. § 74-105(4)(a)(i), the district court instead itself conducted the balancing test set out in I.C. § 74-105(4)(a)(i). The Department failed its burden under that test to show that the public interest in disclosing these records is clearly outweighed.

To start with, the district court erred because it did not conduct the proper weighing in the first place. As to Bates 655 in particular, the court only concluded that "the ***agency's*** interest in confidentiality and security ***outweigh*** the public interest in knowing this lethal injection drug supply source." (R. p. 1890 (emphasis added); *see also* R. p. 1881 (ruling, as to the Confidential Cash Log, that "the ***agency's*** interest in the confidentiality of the information on payments ***outweighs*** any interest in public disclosure" (emphasis added)).)

There are two big errors of law in this conclusion. First, the court considered the "agency's" interest, not the "public" interest in confidentiality and security. (*Id.*) Second, the

court concluded that those agency interests merely "outweigh[ed]" the public interest in disclosure, not that they "clearly outweighed" the public's disclosure interest. Especially if narrowly construed, the "clearly outweighs" test should require clear and convincing evidence. *State ex rel. Nebraska Health Care Association v. Dept. of Health & Human Services*, 255 Neb. 784, 789, 587 N.W.2d 100, 105 (Neb. 1998) (holding that in light of purposes of public records statutes, an agency must show by "clear and conclusive evidence" that records fall within an exemption). "Clear and convincing evidence is generally understood to be evidence indicating that the thing to be proved is highly probable or reasonably certain." *In re Adoption of Doe*, 143 Idaho 188, 191 (2006) (quoting Black's Law Dictionary 577 (7th ed.1999)); *cf. Wade*, 156 Idaho at 100, 320 P.3d at 1259 (holding that "the withholding agency has the burden to demonstrate a reasonable probability that disclosure of the requested records would result in a harm" referenced in the statute). The Department has not even shown by a preponderance of the evidence, much less by clear and convincing evidence, that public interests in confidentiality or security clearly outweigh the public interest in disclosure.

Moreover, though there is no evidence of any public interest in confidentiality, public safety, security, and habilitation for withholding any of these records, there is abundant evidence of an enormous public interest in disclosing them:

- IDOC received at least 16 public records requests, from the press and others, seeking information about execution drugs in recent years. (R. pp. 1830 at ¶ 27, 1833 at ¶ 48.) It gets requests about execution drugs so often it created a packet to respond to them. (R. p. 1830 at ¶ 28.)
- The federal FDA and DEA have recently seized execution drugs from multiple states. (R. p. 1829 at ¶ 20.)

- At least one other state has illegally imported execution drugs from a distributor in India, Harris Pharma, from which IDOC also sought lethal injection drugs. (R. p. 1829 at ¶ 21.) The Department tried to hide records of its contacts with Harris Pharma from both Cover and another public records requester. (*See* R. pp. 1829 at ¶ 23, 1836 at ¶ 62.)

- In each of the last two executions, IDOC spent more than $10,000 of Idaho taxpayers' money to buy execution drugs in cash. (R. pp. 1825 at ¶ 4, 1826 at ¶ 10.) Records unveiled alarming cash payments totaling more than $25,000, paid directly to IDOC officials for execution purchases. (R. pp. 1840–1841 at ¶ 87.)

- IDOC has no proof that any of its execution drugs were tested, and the drugs are not available for testing. (R. p. 1828 at ¶ 16.)

- Disclosing drug supplier identity can encourage safer and more effective executions, as well as lead to information on more sources for the drugs, while withholding supplier identity can increase the likelihood of ineffective drugs and botched executions. (R. p. 1860 at ¶ 193.)

- Most states use compounding pharmacies to get lethal injection drugs. (R. p. 1861 at ¶ 202.) These pharmacies are not required to test their products, and common lethal injection drugs are especially susceptible to problems. (R. pp. 1861–1862 at ¶¶ 206–212.)

- An inspection of 61 compounding pharmacies found that 23 of them—well more than a third—were unacceptable and unable to meet standards. (R. p. 1860 at ¶ 197.)

- Knowing a drug supplier's identity allows the public and policymakers to check the supplier for regulatory violations, investigate the effectiveness of the drugs, and figure out whether the drugs were mixed properly or used after their expiration date. (R. p. 1862 at ¶¶ 215–216.)

- Without a drug supplier's identity, it is difficult or impossible for the public to determine the safety and efficacy of execution drugs, ensure that executions are constitutional and humane, determine whether IDOC is acting ethically and legally in obtaining the drugs, or speak publicly to legislators or in protest about the death penalty. (R. p. 1863 at ¶ 219.)

- IDOC acts in bad faith and has proved itself incompetent, disastrously ill-organized, and frivolous in carrying out its lawful duties. (*See* R. pp. 1843–1847 at ¶¶ 98–119, 18478 at ¶ 124, 1892, 1896.)

In "weighing the competing interests, we must determine the extent to which disclosure of the requested item of information will shed light on the public agency's performance of its duty." *Versaci v. Superior Court*, 127 Cal. App. 4th 805, 813, 820 (2005) (applying nearly identical public records balancing test) (quotation marks omitted). That light is especially important to shed on the State's most solemn act, execution. "Independent public scrutiny . . . plays a significant role in the proper functioning of capital punishment." *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002). The constitutionality of execution methods depends on the "judgment reached by the citizenry and its legislators." *Atkins*, 536 U.S. at 313. To reach that judgment, the public needs to know whether lethal injections are safe, where the drugs come from, and whether they are purchased legally and ethically from reputable suppliers.

Because the district court failed to conclude that any public interest clearly outweighed the public interest in disclosure, this Court must reverse the district court's decision and require IDOC to disclose Bates 655 and the Confidential Cash Log unredacted. For the same reasons, it must affirm the district court's decision requiring IDOC to disclose Bates 654.

vi. Protecting a government contractor's interests directly violates the Public Records Act.

The Public Records Act expressly prohibited the district court from invoking the private interests of a contractor, like IDOC's drug suppliers, to withhold public records. Under the Act, an agency "shall not prevent the examination or copying of a public record by contracting with a nongovernmental body to perform any of its duties or functions." I.C.

§ 74-102(13). An agency "cannot bargain away the public's right to inspect documents," this Court explained. *Ward*, 150 Idaho at 506 n.7, 248 P.3d at 1241 n.7 (2011). The public's right to access public records "cannot be denied by the expediency of having some other entity conduct the public's business at some other location." *Idaho Conservation League v. Idaho State Dept. of Agriculture*, 143 Idaho 366, 369, 146 P.3d 632, 635 (2006).

In other words, the Act treats the records about the drugs as if IDOC had itself manufactured them. The district court here allowed exactly what the legislature prohibited: an agency "delegating its duties to a private entity in an effort to evade the Act . . . ." *Ward*, 150 Idaho at 506, 248 P.3d at 1241. Regardless whether Rule 135.06 is valid, as a matter of law I.C. § 74-102(13) negates any public interest in security or confidentiality due to a private vendor.

For this additional reason, this Court must reverse the district court's decision as to Bates 655 and the Confidential Cash Log unredacted and affirm the decision requiring disclosure of Bates 654.

4. <u>The Medical Supplies Records Are Within the Scope of Cover's Request.</u>

Erroneously concluding that Cover only requested records about lethal injection drugs, the district court ruled that records about medical supplies used in lethal injections were outside the scope of her request. These were clearly within the request's scope.

Cover's public records request sought records about "the use of lethal injection in the Rhoades and Leavitt executions" expressly. (Exs. p. 7.) The district court inexplicably found, however, that Cover "did not request any information about purchases of other items used in the Rhoades or Leavitt executions such as medical supplies…only drugs and drug

suppliers." (R. pp. 1833–1834.) Based on this clearly erroneous finding, the district court let IDOC redact records related to medical supplies that IDOC used in lethal injections: Bates 1593–1594, 1597–1598, and 1616–1617 (Exs. pp. 1722–1723, 1726–1727, and 1745–1746).

At trial, the Department never cited any rule justifying these redactions. It offered no testimony about any public interest in withholding information or any other evidence to support redaction under any exemption. The district court clearly erred in finding that these records were outside the scope of Cover's request. The Department failed to meet its burden to withhold them. This Court should reverse the district court and require IDOC to disclose Bates 1593–1594, 1597–1598, and 1616–1617 (Exs. pp. 1722–1723, 1726–1727, and 1745–1746) unredacted.

V. CONCLUSION

The Court should reverse the District Court's September 17, 2018, reconsideration decision and Order Vacating Peremptory Writ of Mandate (R. pp. 1574–1585, 1586–1587), and therefore reinstate the original, May 14, 2018, Peremptory Writ of Mandate (R. pp. 737–739). In the alternative, the Court should affirm the district court's conclusions of law and final peremptory writ but reverse them only as to Bates 655, the Confidential Cash Log, and the records about medical supplies (Exs. pp. 1722–1723, 1726–1727, and 1745–1746), instructing the district court to amend its peremptory writ to require IDOC to disclose those records to Cover without redactions.

Respectfully submitted,

/s/ Richard Eppink
RICHARD EPPINK
Attorney for Respondent/Cross-Appellant

APPENDICES

A. Statement of Purpose, 1990 Idaho House Bill no. 860

B. *McHenry v. Kootenai County Sheriff's Dept.*, Case No. CV 2016 1127, slip op. (1st Dist. Ct. Idaho March 2, 2016)

1990

APPENDIX A

STATEMENT OF PURPOSE

RS 24228

The fundamental philosophy of our federal and state constitutional form of representative government is that government is the servant of the people and not the master of them. In delegating authority, the people do not give public officials and employees the right to decide what is good for the people to know and what is not good for the people to know. It is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be knowledgeable and advised of the operations of government at all levels, of the performance of public officials, of the decisions that are reached in all governmental activities and of the formulation of public policy.

Those who are elected to public office and those who are employed in government are trustees and servants of the people and it is in the public interest to enable any person to review and commend or criticize the operation and actions of government and governmental officials and employees, even though allowing the people to examine the operations and actions of government may cause inconvenience and additional expense to government and may result in criticism or embarrassment of officials and employees.

Toward this end, this proposed legislation provides that every person has a right to inspect and take a copy of any public record of this state except as may be provided by statute. This legislation provides that all governmental records in Idaho are open at all reasonable times for inspection, unless access is expressly denied by statute, This right of access is premised on the first amendment to the Constitution of the United States, on Article I, Section 9 of the Constitution of the State of Idaho, on the common law and on strong historical and statutory precedent in this state. The records of governmental activity and officials at all levels should generally be accessible to members of the public to determine whether those entrusted with the affairs of government are honestly, faithfully and competently performing their functions as public servants.

This legislation is a result of workings of the Legislative Council Committee on Public Records which met during the legislative interim in 1989. This legislation will provide much needed procedures, dealing with requests for records, copying, expenses, and response to requests for records which have been heretofore

missing, for individuals to gain access to and obtain a copy of records held by state and local government in Idaho. This proposal will also require each state agency (but not local agencies) to do an inventory of what public records their entity of government possesses and make that inventory available to the public. Additionally, the proposed legislation would sunset exemptions to disclosure of public records effective July 1, 1993. Research presented to the interim committee revealed well over 100 sections in the Idaho Code which provide for the confidentiality or closure of public records. It was the feeling of the interim committee that these exemptions should sunset and that the agencies of government should have to rejustify them to the legislature before they expire.

FISCAL IMPACT

It is estimated that the proposed bill might require a one time expenditure of approximately $113,500 from state general account moneys to initially implement the provisions of this act. This would occur as a result of the inventory of public records provided for in the act. The individual impact will probably vary from agency to agency. Some agencies would need to do little to comply with the provisions of the act, while other agencies may have to do a bit more work to put their house in order. After the initial year, there should be no fiscal impact to any state or local unit of government regarding the public records access issue and some may even save some money on the hiring of legal personnel for advice on whether a record is public or not when a request for access is received.

APPENDIX B

STATE OF IDAHO)
County of KOOTENAI)ss
FILED 5/2/16
AT 5:30 O'Clock P. M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

RUSSELL WAYNE MCHENRY,

Petitioner,

vs.

KOOTENAI COUNTY SHERIFF'S DEPARTMENT, ET AL,

Respondents.

Case No. **CV 2016 1127**

MEMORANDUM DECISION AND ORDER DENYING RESPONDENTS' MOTION TO DISMISS, AND DECISION ON PETITIONER'S PETITION FOR RELIEF UNDER IDAHO PUBLIC RECORDS ACT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the "Petition for Relief Under Idaho Public Records Act" filed by Petitioner Russell McHenry (McHenry) on February 4, 2016. McHenry seeks an order from the Court compelling Respondents Kootenai County Sheriff's Department and/or the Kootenai County Sheriff's Office Records Custodian to provide documents requested on August 29, 2015, and on September 3, 2015, pursuant to the Idaho Public Records Act. Petition for Relief Under Idaho Public Records Act, p. 1.

The August 29, 2015, request was made in writing by Frank Davis (Davis); the September 3, 2015, request was made in writing by McHenry. *Id.*, Exhs. A, B. Both Davis and McHenry list the same mailing address on their request forms. Pursuant to Idaho Code § 74-101(14) "requester" is defined as "the person requesting examination and/or copying of public records pursuant to section 74-102, Idaho Code." I.C. § 74-101(14). McHenry is the "requester" regarding his September 3, 2015, request. The

Court has not been cited to any authority, nor has any argument been made, as to why McHenry cannot file a petition based upon Davis' written request.

Specifically, the following records were requested from the Kootenai County Sheriff's Office: "... all financial deposits for Dylan Thomas William, D.O.B. 4-23-1992[.] Please include deposits into Dylan[']s trust, commissary, phone, and any other account that he has while incarcerated from March 13 to 8-7-15" and "for Ryan Patrick Hoffman born in 1977 please provide an electronic copy of his inmate trust account activity including all deposits during April 2015 through July 2015". *Id.*, Exhs. A, B. Both requests were denied. *Id.* The notice of denial in response to the request for William's records provided: "The requested record is exempt from disclosure pursuant to Idaho Code §§ 74-104 thru 74-111 and/or 74-124". *Id.*, Exh. A. The notice of denial in response to the request for Hoffman's records provided: "The requested record is exempt from disclosure pursuant to Idaho Code §§ [sic] 74-113(3)(e)". *Id.*, Exh. B.

On February 4, 2016, McHenry filed the instant Petition for Relief Under Idaho Public Records Act. Pursuant to Idaho Rule of Civil Procedure 5(f), McHenry provided proof of service to the Court on February 5, 2016. Affidavit of Service, p. 1. According to the Affidavit of Service, "[o]n the 5th day of **February 2016**, I [Jonathan Arnold] personally served copies [o]f the Summons and Petition for relief under Idaho public records act to The Kootenai County Sheriff's Records Division on the 5th day of February 2016". Affidavit of Service, p. 1 (emphasis in original).

On February 16, 2016, Darrin L. Murphey filed a Notice of Special Appearance on behalf of the Respondents. It was accompanied by a Motion to Dismiss pursuant to Idaho Rules of Civil Procedure 12(b)(5), 4(d)(5) and 4(i)(2), for lack of proper service of process upon the Respondents. McHenry has not responded to the Motion to Dismiss.

Hearing on this matter was held on March 2, 2016. The time within which this Court must set a hearing is prescribed in a constricted manner by statute. Idaho Code § 74-115(1) mandates: "The time for responsive pleadings and for hearings in such proceedings shall be set by the court at the earliest possible time, or in no event beyond twenty-eight (28) calendar days from the date of filing." Given the February 4, 2016, filing of the "Petition for Relief Under Idaho Public Records Act", the March 2, 2016, hearing was timely.

For the reasons set forth below, the Court denies the Respondents' Motion to Dismiss and pursuant to Idaho Code § 74-116(1), and orders the Respondents to disclose the records sought by Petitioner by 5:00 p.m. on March 4, 2016.

II. STANDARD OF REVIEW.

"The procedures and standards of review applicable to judicial review of state agency and local government actions shall be as provided by statute. When judicial review of an action of a state agency or local government is expressly provided by statute but no stated procedure or standard of review is provided in that statute, then Rule 84 provides the procedure for the district Court's judicial review." I.R.C.P. 84(a). Idaho Rule of Civil Procedure 84(e) provides the method of judicial review of an agency action as follows:

> When judicial review is authorized by statute, and statute or law does not provide the procedure or standard, judicial review of agency action shall be based upon the record created before the agency. When the authorizing statute provides that the district court may take additional evidence itself upon judicial review, the district court may order the taking of additional evidence upon its own motion or motion of any party to the judicial review.

I.R.C.P. 84(e). Idaho Code § 74-116(1) authorizes judicial review of the denial of a public records request by an agency and provides:

> Whenever it appears that certain public records are being improperly withheld from a member of the public, the court shall order the public official charged with withholding the records to disclose the public record or show cause why he should not do so. The court shall decide the case after examining the pleadings filed by the parties and such oral arguments and additional evidence as the court may allow. The court may examine the record in camera in its discretion.

I.C. § 74-116(1).

The Idaho Supreme Court set forth the appellate standard of review in *Wade v. Taylor,* 156 Idaho 91, 320 P.3d 1250 (2014): "When considering an appeal from a public records request, this Court will not set aside the district court's findings of fact unless they are "clearly erroneous, which is to say that findings that are based upon substantial and competent, although conflicting, evidence will not be disturbed on appeal." *Id.* at 96, 320 P.3d at 1255 (*citing Bolger v. Lance,* 137 Idaho 792, 794, 53 P.3d 1211, 1213 (2002)). The Idaho Supreme Court continued: "This Court exercises free review over questions of law, including the interpretation of a statute." *Id.* (*citing, Ward v. Portneuf Med. Ctr., Inc.,* 150 Idaho 501, 504, 248 P.3d 1236, 1239 (2011)).

III. ANALYSIS.

A. The Respondents' Motion to Dismiss is Denied Because Idaho Rule of Civil Procedure 4(d)(5) is Inapplicable to the Petition.

Respondents move to dismiss the Petition for Relief Under Idaho Public Records Act for failure to properly effectuate service of process under Idaho Rules of Civil Procedure 4(d)(5), 4(i)(2) and 12(b)(5). Rule 12(b)(5) of the Idaho Rules of Civil Procedure governs the requirements for raising the defense of lack of insufficiency of service of process and provides: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except . . . insufficiency of service of process," which shall be made by motion. I.R.C.P. 12(b)(5). A motion for

insufficiency of service of process must be made "prior to filing a responsive pleading and prior to filing any other motion, other than a motion for an extension of time to answer or otherwise appear or a motion under Rule 40(d)(1) or (2)" or it is waived. I.R.C.P. 12(g)(1). "It is not waived, however, by being joined with one or more other motions or by filing a special appearance as provided in Rule 4(i)(2)." *Id.* A party generally appears when he or she voluntarily appears or serves any pleading. I.R.C.P. 4(i)(1). When a party generally appears, he or she voluntarily submits him or herself to the personal jurisdiction of the court. *Id.* Filing a motion for insufficiency of service of process under Idaho Rule of Civil Procedure 12(b)(5) does not constitute a general appearance, but rather a special appearance. I.R.C.P. 4(i)(2). "Special appearances" are governed by Rule 4(i)(2) of the Idaho Rules of Civil Procedure, which provides in pertinent part:

> The filing of a document entitled "special appearance," which does not seek any relief but merely provides notice that the party is entering a special appearance to contest personal jurisdiction, does not constitute a voluntary appearance by the party under this rule if the party files a motion under Rule 12(b)(2), (4), or (5) within fourteen (14) days after filing such document, or within such later time as the court permits.

I.R.C.P 4(i)(2).

On February 16, 2016, Respondents filed a Notice of Special Appearance in compliance with Idaho Rule of Civil Procedure 4(i)(2). Moreover, Respondents filed a timely Motion to Dismiss under Rule 12(b)(5), contesting service of process. As such, Respondents' Motion to Dismiss must be considered by the Court prior to considering McHenry's Petition for Relief Under Idaho Public Records Act.

Respondents contest proper service of process alleging McHenry failed to comply with Idaho Rule of Civil Procedure 4(d)(5). Specifically, Respondents contend:

> The Kootenai County Sheriff's Department is not a political subdivision of the State of Idaho, and the Kootenai County Sheriff's Office Records

> Custodian, Idaho, is not a political subdivision or a named individual. Ben Wolfinger is the elected Sheriff of Kootenai County. . . . Ben Wolfinger, the Kootenai County Sheriff, has not been served with process in this action.

Motion to Dismiss, pp. 1-2. Idaho Rule of Civil Procedure 4(d)(5) provides in pertinent part: "Upon any other governmental subdivision, municipal corporation, or quasi-municipal corporation or public board **service shall be made by delivering a copy of the summons and complaint** to the chief executive officer or the secretary or clerk thereof." I.R.C.P. 4(d)(5) (emphasis added).

However, in this case McHenry has filed a petition contesting the denial of access to public records. Idaho Code § 74-115 sets forth the recourse for a person when their request for a public record has been denied. It provides:

> The sole remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings in the district court of the county where the records or some part thereof are located, to compel the public agency or independent public body corporate and politic to make the information available for public inspection in accordance with the provisions of this chapter. **The petition** contesting the public agency's or independent public body corporate and politic's decision shall be filed within one hundred eighty (180) calendar days from the date of mailing of the notice of denial or partial denial by the public agency or independent public body corporate and politic.

I.C. § 74-115(1) (emphasis added). Because Idaho Code § 74-115(1) authorizes judicial review of an agency's action, Idaho Rule of Civil Procedure 84 applies. I.R.C.P. 84(a)(1). Idaho Rule of Civil Procedure 84(b)(1) sets forth the procedure for filing a petition for judicial review. It provides in pertinent part:

> . . . Judicial review is commenced by filing a petition for judicial review with the district court, and the petitioner shall concurrently serve copies of the notice of petition for judicial review upon the agency whose action will be reviewed and all other parties to the proceeding before the agency (if there were parties to the proceeding). Proof of service on the agency and all parties shall be filed with the court in the form required by Rule 5(f).

I.R.C.P. 84(b)(1). This rule does not require the petitioner to file a complaint and summons, as the request is for the review of an agency decision, not a new lawsuit against the agency. Under that rule, the petitioner is required to "serve copies of the notice of petition for judicial review upon the agency whose action will be reviewed". *Id.*

McHenry served a copy of the Petition for Relief Under Idaho Public Records Act to the Kootenai County Sheriff's Records Division, the agency whose action will be reviewed. Affidavit of Service, p. 1. This was confirmed by the Affidavit of Roxie A. Reinking, the Records Specialist for the Kootenai County Sherriff, who attested she was provided with a copy of the Petition in the lobby of the Sheriff's Office. Affidavit of Roxie A. Reinking, p. 2, ¶ 3. Moreover, Petitioner filed proof of service upon the agency with the Court pursuant to Idaho Rule of Civil Procedure 5(f). Affidavit of Service, p. 1. Unlike service of a complaint and summons per Rule 4(d)(5), Rule 84(b)(1) does not provide any specific means for how a petition for judicial review must be served upon the agency. *See* I.R.C.P. 84. As such, this Court finds McHenry complied with the service requirements of Idaho Rule of Civil Procedure 84(b)(1).

While McHenry also served a summons upon the Kootenai County Sheriff's Records Division with the copy of the petition for judicial review, since a summons is not appropriate for a petition for judicial review, improperly including it does not convert the petition for review to a compliant and summons, subject to the service requirements of Idaho Rule of Civil Procedure 4(d)(5).

Accordingly, the Court denies the Respondents' Motion to Dismiss.

B. Petition for Judicial Review.

A "public record" is defined as "any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency

regardless of physical form or characteristics." I.C. § 74-101(13). The Idaho Supreme Court further expanded that broad statutory definition when stating, "... our legislature has broadly defined public records; other records and writings may qualify even if they do not meet this definition." *Cowles Pub. Co. v. Kootenai Cty. Bd. of Cty. Comm'rs*, 144 Idaho 259, 263, 159 P.3d 896, 900 (2007).

In this case, the following records were requested from the Kootenai County Sheriff's Office: "... all financial deposits for Dylan Thomas William, D.O.B. 4-23-1992[.] Please include deposits into Dylan[']s trust, commissary, phone, and any other account that he has while incarcerated from March 13 to 8-7-15" and "for Ryan Patrick Hoffman born in 1977 please provide an electronic copy of his inmate trust account activity including all deposits during April 2015 through July 2015". Petition for Relief Under Idaho Public Records Act, Exhs. A, B.

The requested records meet the first part of the definition of "public record" because they are writings that contain information relating to the conduct or administration of the public's business. The public may have a legitimate interest in these specific records for inmates housed at the county jail because, presumably, the trust and commissary deposits become county money, deposited into a county bank account, for use in a county program. If that is the case, then the Sheriff's Department is accountable for the finances in its bank accounts and is required to keep an accurate accounting. In doing so, the county must keep records of the deposits made by inmates.

Moreover, the request records are similar to, but not included as prisoner records that are exempt from disclosure under Idaho Code § 74-106(16). That exemption excludes "[r]ecords of the financial status of prisoners pursuant to

subsection (2) of section 20-607, Idaho Code" from public disclosure. I.C. 74-106(16). Idaho Code § 20-607(2) provides:

> Before seeking any reimbursement under this section, the sheriff shall develop a form to be used for determining the financial status of prisoners. The form shall provide for obtaining the age and marital status of the prisoner, the number and ages of children of the prisoner, the number and ages of other dependents, type and value of real estate, type and value of real and personal property, type and value of investments, cash, bank accounts, pensions, annuities, salary, wages and any other personal property of significant cash value. The county shall use the form when investigating the financial status of a prisoner and when seeking reimbursement.

I.C. § 20-607(2). By including this exemption in Chapter 1, Title 74 of the Idaho Code, the legislature has found that the information contained in Idaho Code § 20-607(2) is a public record, but such record is exempt from disclosure. The records sought by McHenry from the Respondents is very similar to the type of information contained in Idaho Code § 20-607(2). As such, a strong inference can be made that the records requested satisfy the first portion of the definition of a public record.

Turing to the second portion of the definition, "prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency", the requested records also satisfy this part of the definition. According to Exhibit B attached to the Affidavit of Darrin L. Murphey, the Sheriff is apparently able to produce the "financial trust account records of specific inmates", as Murphy writes: "Regarding your request for the financial trust account records of specific inmates, the Sheriff will produce such records to you upon receipt of a release authorizing such signed and notarized by the individual inmate." Affidavit of Darrin L. Murphey, Exh. B. Moreover, the Kootenai County Sheriff's Office Public Records Request Form has boxes where the party reviewing the request can inform the petitioner that the record is not known to exist or that the Kootenai County Sheriff's Office is not the custodian of the requested

record. Neither box was checked for either request under review by this Court. Therefore, the requested records are public records as defined by Idaho Code § 74-101(13).

Having determined that the records are public records, the Court must next determine whether Respondent has proven these records are exempt from disclosure.

"Every person has a right to examine and take a copy of any public record of this state . . . except as otherwise expressly provided by statute." I.C. § 74-102(1). It is "presume[d] that all public records are open for examination unless expressly exempted by statute." *Cowles*, 144 Idaho at 265, 159 P.3d at 899 (*citing Magic Valley Newsps, Inc. v. Magic Valley Regl. Med. Ctr.,* 138 Idaho 143, 144, 59 P.3d 314, 315 (2002); *Federated Publications, Inc. v. Boise City*, 128 Idaho 459, 463, 915 P.2d 21, 25 (1996)). Such exemptions are to be narrowly construed. *Wade v. Taylor*, 156 Idaho 91, 97, 320 P.3d 1250, 1256 (2014). The burden is on the agency denying the request for a public record to demonstrate that the requested document meets one of the narrowly-construed exemptions. *See, Hymas v. Meridian Police Dept.,* 156 Idaho 739, 745, 330 P.3d 1097, 1103 (Ct. App. 2014) (*citing Bolger v. Lance*, 137 Idaho 792, 797, 53 P.3d 1211, 1216 (2002)). If the requested record meets an exemption, the agency denying the request to examine or copy the public record must notify the petitioner that the request was denied in part or in its entirety and "shall indicate the statutory authority for the denial and indicate clearly the person's right to appeal the denial or partial denial and the time periods for doing so." I.C. § 74-103(4).

Here, the September 3, 2015, request for records about Dylan Thomas William was denied on September 4, 2015. Petition for Relief Under Idaho Public Records Act, Exh. A. The basis for the denial was as follows: "The requested record is exempt from

disclosure pursuant to Idaho Code §§ 74-104 thru 74-111 and/or 74-124". *Id.* The August 29, 2015, request for Ryan Patrick Hoffman's records was denied on September 2, 2015. *Id.*, Exh. B. The request was denied pursuant to Idaho Code § 74-113(3)(e). *Id.*

The notice of denial for Dylan Thomas William's records does not comply with the requirements of Idaho Code § 74-103(4), as it fails to indicate which specific statutory exemption prevents the disclosure of the requested record. Respondents have the burden of demonstrating which narrowly-construed exemption encompasses the requested record. Respondents failed to meet their burden because they listed all possible exceptions contained within Chapter 1, Title 74 of the Idaho Code and did not disclose the specific exemption that applies.

While Respondents did provide a specific statutory exemption, Idaho Code § 74-113(3)(e), in its notice of denial for the records of Ryan Patrick Hoffman, that statute is inapplicable to the requested records. Idaho Code § 74-113(3)(e) is titled "Access to Records About a Person by a Person", and provides:

> (3) The right to inspect and amend records pertaining to oneself does not include the right to review: . . .
>
> > (e) Records of a prisoner maintained by the state or local agency having custody of the prisoner or formerly having custody of the prisoner or by the commission of pardons and parole."

I.C. § 74-113(3)(e). This exemption only precludes disclosure of records about a prisoner to that prisoner, which is not the case here. As this exemption is inapplicable, Respondents have failed to meet their burden of proving that the requested documents fit within one of the narrowly-construed exemptions.

The Court finds the records sought by petitioner are public records, and are not covered by any exemption. Idaho Code § 74-116(1) reads:

> Whenever it appears that certain public records are being improperly withheld from a member of the public, the court shall order the public official charged with withholding the records to disclose the public record or show cause why he should not do so. The court shall decide the case after examining the pleadings filed by the parties and such oral arguments and additional evidence as the court may allow. The court may examine the record in camera in its discretion.

I.C. § 74-116(1). Because the Respondents chose to file their Motion to Dismiss, Respondents have not substantively responded to McHenry's Petition for Relief Under Idaho Public Records Act, other than at oral argument, and those arguments were not persuasive. Pursuant to Idaho Code § 74-116(1), this Court makes its determination that the requested public records were improperly withheld from McHenry. The Court orders the Respondents to either disclose the records sought by Petitioner by 5:00 p.m. on March 4, 2016. I.C. § 74-116(1).

C. The Court's Concerns Over the Privacy Interests of Dylan Thomas William, and Ryan Patrick Hoffman.

Similar to Idaho Code 74-113(e), which, as discussed above, prohibits the disclosure of prisoner records maintained by a state or local agency having or formerly having custody of a prisoner *to the prisoner* which the records are about, Idaho Code § 74-105(14) prohibits the disclosure of prisoner records maintained by a state or local agency having or formerly having custody of a prisoner *to a different prisoner who is still in custody*. Specifically, Idaho Code § 74-105(14) states, "[r]ecords of a prisoner or former prisoner in the custody of any state or local correctional facility, when the request is made by another prisoner in the custody of any state or local correctional facility" are exempt. I.C. § 74-105(14).

Reading those sections together, a prisoner cannot request records from a state or local agency about him/herself, and a prisoner (while currently in custody) cannot request records from a state or local agency about another prisoner. However, the

Court can find no exemption that would prohibit the disclosure of prisoner records maintained by a state or local agency having or formerly having custody of said prisoner to any third party (as long as that third party is not presently in custody).

It is illogical that a prisoner cannot get his or her own records and a prisoner cannot get another prisoner's records (if the requesting prisoner is currently in custody), but any third party can get any prisoner's records. It is illogical that the person requesting the records would be the determining factor and not the *contents* of the records. As written under Idaho Code § 74-101 *et seq.*, the Idaho Public Records Act, any third party, who is not currently a prisoner in the custody of any state or local correctional facility, can request records of a prisoner or former prisoner in the custody of any state or local correctional facility. That leads to an absurd result.

The Court is uncertain if the inmates who records are sought generally have a constitutional right to privacy in the records under the Fourth Amendment. Normally, financial information is sensitive and a general member of the public has a reasonable expectation of privacy. The Court is uncertain if that would extend to the trust, commissary and phone account records for inmates since the inmates are in custody and records sought are about financial information solely pertaining to them being in custody. The Court cannot find any cases about inmates specifically, only the duty banks have to prevent disclosure of such information about members of the general public who bank with them. *See Peterson v. Idaho Fist Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961).

The Court has found case law where the Court discussed an inmate's reasonable expectation of privacy while incarcerated, but in those cases it was the inmate who was asserting the privacy right. *See State v. Brown*, 155 Idaho 423, 313

P.3d 751 (Ct. App. 2013). No one presently before the Court at this time has standing to make that argument.

However, at oral argument, the Court reviewed the requested records *in camera* and has determined that no privacy interest is implicated.

IV. CONCLUSION AND ORDER.

For the reasons stated above, the Court denies Respondents' Motion to Dismiss and, pursuant to Idaho Code § 74-116(1), and orders the Respondents to disclose the records sought be Petitioner.

IT IS HEREBY ORDERED the Respondents' Motion to Dismiss is DENIED.

IT IS FURTHER ORDERED that pursuant to Idaho Code § 74-116(1), the Respondents must disclose the records sought by Petitioner by 5:00 p.m. on March 4, 2016.

Entered this 2nd day of March, 2016.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 3 day of March, 2016, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Russell McHenry, Pro Se	765-9405 Fax	Kootenai County Prosecutor-Legal Services Dept	208-446-1621 ✓

Jeanne Clausen, Deputy Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of February, 2020, a true and correct copy of the foregoing document was filed with the Clerk of the Court using the iCourt E-File system which sent a Notice of Electronic Filing to the following persons:

Jessica L. Kuehn
Jessica.kuehn@ag.idaho.gov
Deputy Attorney General
Special Prosecuting Attorney
P.O. Box 83720
Boise, Idaho 83720-0010

By: /s/ Richard Eppink
RICHARD EPPINK
Attorney for Respondent and
Cross-Appellant