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SAN FRANCISCO BAY GUARDIAN

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION
OF NORTHERN CALIFORNIA; SAN
FRANCISCO BAY GUARDIAN,

Plaintiffs,

v.

DRUG ENFORCEMENT
ADMINISTRATION,

Defendant.

CASE NO.: C 11-01997 RS

**EX PARTE APPLICATION TO SHORTEN
TIME ON PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

1 Plaintiffs hereby move *ex parte*, pursuant to Federal Rule of Civil Procedure 6(c)(1)(C),
2 Local Rules 6-3(d) and 7-10, and the Court's inherent power to manage its docket, for an
3 application shortening time on their Motion for Preliminary Injunction, filed herewith.

4 **IMMEDIATE NEED FOR PRELIMINARY INJUNCTION**

5 This is an action under the Freedom of Information Act ("FOIA") for highly time-
6 sensitive records relating to the federal government's conduct in regulating, or failing to regulate,
7 the importation and acquisition of a controlled substance, sodium thiopental, by states that
8 execute inmates by lethal injection. The records contain newsworthy information that bears on
9 the legality of two executions that have just been scheduled. Last week, Arizona scheduled an
10 execution for May 25, 2011 and Nebraska scheduled an execution for June 14, 2011. Defendant
11 DEA has *agreed* that Plaintiffs' requests are entitled to expedited processing, yet it failed for over
12 100 days even to make an initial determination of whether to comply. Prior to filing suit,
13 Plaintiffs repeatedly contacted the DEA to determine when the agency intended to release the
14 requested records. After filing suit, Plaintiffs have continued to contact DEA in an attempt to
15 negotiate a processing schedule. While DEA now indicates it is willing to produce some of the
16 requested records executions in the next few weeks, it declined to commit to complete processing
17 of Plaintiffs' requests in advance of the executions. Defendant has thus denied the expedited
18 processing to which it admits Plaintiffs are statutorily entitled, and Plaintiffs will suffer
19 irreparable harm if DEA does not complete processing of the requested information *before* the
20 executions occur. "Few issues in American society have generated as much impassioned debate
21 as the death penalty." *Morales v. Tilton*, 465 F.Supp.2d 972, 973 (N.D. Cal. 2006). Plaintiffs
22 therefore seek a preliminary injunction on shortened time to require the DEA to comply with the
23 statutory deadlines so that Plaintiffs have an opportunity to report about newsworthy events and
24 of timely access to information vital to an informed debate about the death penalty.

25 **Relief sought in underlying preliminary injunction**

26 As set forth in the papers accompanying Plaintiffs' Motion for Preliminary Injunction,
27 filed herewith, beginning last year, a nationwide shortage of sodium thiopental – the anesthetic in

1 the three-drug protocol commonly used by states that execute inmates by lethal injection and that
2 prevents an inmate from experiencing excruciating, potentially unconstitutional pain – set off a
3 scramble by corrections officials across the country to acquire the drug. Many states resorted to
4 unconventional means, including importing the drug from foreign sources and trading drugs with
5 other states. The legality of that procedure is questionable, as sodium thiopental is a highly
6 regulated controlled substance with tight restrictions on its importation and distribution, and
7 imported drugs are often of inferior quality, raising the specter that their use in an execution will
8 cause an inmate unconstitutional pain in violation of the Eighth Amendment. To date, Defendant
9 DEA has seized the entire supply possessed by at least four states that obtained the drug from a
10 particular source in the United Kingdom.

11 The nationwide shortage and ensuing efforts by states to acquire the drug has been the
12 subject of widespread and exceptional media interest. Plaintiffs submitted requests under FOIA
13 for records from DEA that would shed greater light on the federal government’s role in
14 overseeing state efforts to import sodium thiopental for purposes of execution. Although DEA
15 *granted* Plaintiffs’ request for expedited processing, it has failed to satisfy the timelines for
16 processing FOIA requests applicable to standard, non-expedited requests, and thus presumptively
17 violated FOIA. Under these circumstances, Plaintiffs are entitled to a preliminary injunction
18 ordering immediate release of records. *See Electronic Frontier Found. v. Office of the Dir. of*
19 *Nat’l Intelligence*, 542 F.Supp.2d 1181, 1186 (N.D. Cal. 2008) (“*EFF IP*”) (White, J.); *Electronic*
20 *Frontier Found. v. Office of the Dir. of Nat’l Intelligence*, 2007 WL 4208311, *5 (N.D. Cal. Nov.
21 27, 2007) (“*EFF I*”) (Illston, J.); *Gerstein v. CIA*, 2006 WL 3462659, *4-*5 (N.D. Cal. Nov. 29,
22 2006) (Chesney, J.); *Electronic Privacy Info. Ctr. v. Dep’t of Justice*, 416 F.Supp.2d 30, 42-43 (D.
23 D.C. 2006).

24 **May 25, 2011 execution in Arizona necessitates hearing on shortened time**

25 A hearing on Plaintiffs’ Preliminary Injunction Motion on shortened time is necessary to
26 prevent *imminent* irreparable injury. On April 19, 2011, Arizona set an execution date for May
27 25, 2011, five weeks and one day later. On April 22, 2011, Nebraska set an execution date for

1 June 14, 2011. Plaintiffs initiated this action promptly after the Arizona and Nebraska executions
2 were scheduled. *See* Decl. of Linda Lye ISO *Ex Parte* Application at ¶¶3-5. This Court's
3 ordinary 5-week notice requirement, *see* Local Rule 7-2(a), would not allow Plaintiffs to obtain a
4 hearing before the Arizona execution.

5 Prior to filing suit, Plaintiffs repeatedly inquired as to the status of their expedited FOIA
6 requests, but failed to receive any indication of when DEA intended to make an initial
7 determination. *See* Decl. of Natasha Minsker ISO PI at ¶¶20-28. After filing the Complaint and
8 before filing this motion, Plaintiffs attempted to negotiate with Defendant a processing schedule
9 for production of records *before* the executions. Although it initially appeared Defendant would
10 agree to produce records before the executions, Defendant ultimately indicated that, while it
11 would commit to producing some records, it was unable to commit to completing processing of
12 the requests by any date certain. Plaintiffs remain open to resolving this matter without the need
13 for a hearing, but felt it necessary to file this motion to provide as much advance notice for
14 Defendant and the Court as possible, if the parties are not able to resolve the issue. If any
15 resolution is reached, Plaintiffs will promptly notify the Court to avoid unnecessary expenditure
16 of judicial resources. *See* Lye Decl. at ¶¶6-15.

17 Plaintiffs will suffer irreparable harm if DEA fails to complete processing of records
18 pertaining to Arizona and Nebraska *before* the executions in those states go forward. Both states
19 obtained sodium thiopental from foreign sources. After questions arose surrounding the legality
20 of the drug's importation, the Arizona Supreme Court delayed an execution, albeit temporarily,
21 on one occasion, and the DEA seized the entire sodium thiopental supply of four states that
22 obtained the drug, directly or indirectly, from United Kingdom distributor Dream Pharma. *See*
23 Minsker Decl. at ¶¶9, 31.

24 The records sought here could affect the availability of a stay of the Arizona and/or
25 Nebraska executions. Denial of records that could result in incarceration causes irreparable harm
26 warranting preliminary injunctive relief. *See Aguilera v. FBI*, 941 F.Supp. 144 (D. D.C. 1996)
27 (irreparable harm from FBI's delay in producing records that could have led plaintiff to suffer

1 incarceration for “unwarranted period of time”). The irreparable harm here – execution – is far
2 more acute, and cannot be remedied by any legal remedies.

3 Independent of any role this information may play in legal proceedings, the records sought
4 play a vital part in media coverage of and public debates about the Arizona and Nebraska
5 executions. “[S]tale information is of little value.” *Payne Enterprises, Inc. v. United States*, 837
6 F.2d 486, 494 (D.C. Cir. 1988). The records sought will shed light on highly newsworthy issues
7 such as whether DEA officials have been derelict in their duties permitting Arizona to retain
8 possession of drugs from the identical source that prompted the agency to seize the supplies
9 possessed by four other states, and by allowing importation of a controlled substance from an
10 Indian company that admits it lacks a DEA import license. *See* Decl. of Tim Redmond ISO PI at
11 ¶¶10-11. The media has a right to report on these issues, and the public a right to debate them,
12 *before* the drugs at issue are used in another execution. *See id.* at ¶12; *San Jose Mercury News,*
13 *Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1099 (9th Cir. 1999) (given “perishable nature of news,”
14 delay in access to records requested by the press “can constitute an irreparable injury”). And both
15 Plaintiffs will suffer irreparable harm through the deprivation of records that “may enable the
16 public to participate meaningfully in the debate over” the executions in those two states. *EFF II*,
17 542 F.Supp. 2d at 1187; *EFF I*, 2007 WL 4208311 at *7; *cf. also, e.g., Sammartano v. First*
18 *Judicial District Court*, 303 F.3d 959, 973-74 (9th Cir. 2002) (curtailment of the right to speak on
19 a matter of public concern “for even minimal periods of time, unquestionably constitutes
20 irreparable injury for purposes of the issuance of a preliminary injunction”) (citation omitted).

21 Plaintiffs seek a preliminary injunction requiring DEA to complete processing of all
22 records bearing on the Arizona execution no later than May 16, 2011, the week before the
23 execution is scheduled to occur, and the remaining records on June 7, 2011, a week before the
24 Nebraska execution is scheduled to occur. *See* Pltfs’ Mot. for Prel. Inj & [Proposed] Order, *filed*
25 *herewith*. This will allow Plaintiffs a meaningful opportunity to review and report on the records.

26 Plaintiffs therefore seek a hearing on their preliminary injunction motion the week before
27 May 16, 2011, so that in the event a hearing is necessary and the Court grants Plaintiffs’ motion,

