ARIZONA COURT OF APPEALS

DIVISION ONE

ACLU OF ARIZONA, a non-profit, civil rights organization, Plaintiff/Appellant, v. ARIZONA DEPARTMENT OF CORRECTIONS, a state agency, Defendant/Appellee.	)	**No. 1 CA-CIV 16-0150** **Maricopa County Superior Court** **No. CV2013-013531**

APPELLANT'S OPENING BRIEF

Daniel J. Pochoda (SBN 021979)
Darrell Hill (SBN 019772)
ACLU Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, AZ 85014
(602) 650-1854
dpochoda@acluaz.org
dhill@acluaz.org

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

INTRODUCTION **1**

STATEMENT OF THE CASE **4**

STATEMENT OF FACTS **6**

I. ACLU Record Request and ADC's Response 6

II. The ACLU's Lawsuit and ADC's Public Disclosure of Information. 10

III. ADC's Shifting Interpretation of A.R.S. § 13-757(C). 12

IV. ADC's Narrow Interpretation of Arizona Public Records Law. 13

V. The Trial Court's Ex Parte Hearing 15

VI. The Trial Court's Final Ruling 17

QUESTIONS PRESENTED **19**

LEGAL ARGUMENT **20**

I. Standard of Review 20

II. Arizona Public Records Law Strongly Favors Disclosure of and Access to Records. 20

III. The Drug Packaging Box With the Lone Record of the Expiration Date is a Public Record under Arizona Law.. 22

IV. ADC Failed to Demonstrate It Adequately Searched for Records Responsive to the ACLU's Request. 27

V. A.R.S. § 13-757(C) is Applicable Only to Human Persons 30

VI. The Trial Court and ADC's Ex-Parte Communication Created Actual Prejudice Against the ACLU. 36

REQUEST FOR ATTORNEYS' FEES AND FEES ON APPEAL **42**

CONCLUSION **43**

TABLE OF AUTHORITIES

Page(s)

Cases

Bd. of Regents v. Phoenix Newspapers, Inc.,
167 Ariz. 254, 806 P.2d 348 20

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014) 34

Carlson v. Pima Cnty.,
141 Ariz. 487, 687 P.2d 1242 (1984) 21, 23, 25, 26

Cave Creek Unified School Dist. v. Ducey,
231 Ariz. 342 32

Congress Elementary Sch. Dist. No. 17 of Yavapai Cty. v. Warren,
227 Ariz. 16, 251 P.3d 395 (App. 2011) 1

Cook v. Food & Drug Admin.,
733 F.3d 1 (D.C. Cir. 2013) 2

Cox Ariz. Publ'ns, Inc. v. Collins,
175 Ariz. 11, 852 P.2d 1194 (1993) 20, 21, 27, 43

Crawford v. Washington,
541 U.S. 36 (2014) 37, 38

First Amendment Coal. of Arizona, Inc. v. Ryan,
No. CV-14-01447-PHX-NVW, 2016 WL 2893413 (D. Ariz. May 18, 2016) 1, 2

Fragoso v. Fell,
210 Ariz. 427, 111 P.3d 1027 (App. 2005) 31

Goldgar v. Office of Admin., Exec. Office of the President,
26 F.3d 32 (5th Cir.1994) 27

Grant v. Bd. of Regents of Univ. and State Colls. of Ariz.,
133 Ariz. 527, 652 P.2d 1374 (1982) 32

Griffis v. Pinal Cty.,
215 Ariz. 1, 156 P.3d 418 (2007) ....*passim*

Hodai v. City of Tucson,
239 Ariz. 34, 365 P.3d 959 (App. 2016) 27

Lake v. City of Phoenix,
220 Ariz. 472, 207 P.3d 725 (App. 2009) 24

Lake v. City of Phoenix,
222 Ariz. 547, 218 P.3d 1004 (2009) 23, 25

Landrigan v. Brewer,
CV-10-2246-PHX-ROS, 2010 WL 4269559 (D. Ariz., Oct. 25, 2010)) 32, 33

London v. Broderick,
206 Ariz. 490, 80 P.3d 769 (2003) 20

McElhanon v. Hing,
151 Ariz. 403, 728 P.2d 273 (1986) 37, 40

New Sun Bus. Park, LLC v. Yuma County,
221 Ariz. 43, 209 P.3d 636 (App. 2008) 22

Phoenix New Times, L.L.C. v. Arpaio,
217 Ariz. 533, 177 P.3d 275 (App. 2008) ....*passim*

Phoenix Newspapers, Inc. v. Ellis,
215 Ariz. 268, 159 P.3d 578 (App. 2007) 35, 36

Phoenix Newspapers, Inc. v. Keegan,
201 Ariz. 344, 35 P.3d 105 (App. 2001) 20, 35, 36, 38

Phx. Newspapers, Inc. v. Dept. of Corr.,
188 Ariz. 237, 934 P.2d 801 (App. 1997) 33

Pickard v. Dep't of Justice,
No. 06-CV-00185-CRB (NC), 2015 WL 926183 (N.D. Cal. Feb. 19, 2015) 41

Rugiero v. United States Dep't of Justice,
257 F.3d 534 (6th Cir.2001) 27

Salt River Pima-Maricopa Indian Cmty. v. Rogers,
168 Ariz. 531, 815 P.2d 900 (1991) 22, 23, 24

Schoeneweis v. Hamner,
223 Ariz. 169, 221 P.3d 48 (App. 2009) 25, 26, 40

Scottsdale Unified Sch. Dist v. KPNX Broad. Co.,
191 Ariz. at, 303, 955 P.2d at 540 ....3, 36

State v. Korzep,
165 Ariz. 490, 799 P.2d 831 33

State v. Valencia,
124 Ariz. 139, 602 P.2d 807 37

Weisberg v. U.S. Dep't of Justice,
745 F.2d 1476 (D.C. Cir. 1984)...27

Wiener v. F.B.I.,
943 F.2d 972 (9th Cir. 1991) 41

Statutes

A.R.S. § 12-2101(B) 6

A.R.S. § 13-105(30)..34

A.R.S. § 13-757(A)..1, 24

A.R.S. § 13-757(C) ....*passim*

A.R.S.§ 39–121.02(B) 43

A.R.S. § 39-121...24, 37

A.R.S. §§ 39-121-39.121.03 ....4, 14

A.R.S. §§ 39-121.01-39-121.03...11

A.R.S. § 39-121.01(B) 23, 24

A.R.S. § 39-121.02(B) 42, 43

A.R.S. § 39-121.02(C) 42

A.R.S. §§ 39.121-39.12.03 10

A.R.S. § 39.121.01(B).......... 22

A.R.S. § 41-151.18.......... 22, 23, 24, 25

A.R.S. § 41-161.......... 26

Rules

Arizona Rule of Civil Appellate Procedure 21 43

Arizona Rule of Civil Procedure 30(B)(6) 14

Code of Judicial Conduct, Rule 2.9 40

Other Authorities

ADC Executive Order 710.02.......... 13

First Amendment.......... 10

2010 Arizona Republic article 2

http://kjzz.org/content/325458/lethal-injection-drug-shortage-halts-arizona-executions 24

Kiefer, Michael, *Arizona again tries to illegally import execution drug*, The Arizona Republic, Oct. 23, 2015 3

Kiefer, Michael, *Court: FDA erred in allowing Arizona to import execution drugs,* The Arizona Republic, July 23, 2013.......... 2

Online at http://archive.azcentral.com/news/politics/articles/20130723court-fda-erred-allowing-az-execution-drugs.html 2

Online at http://www.azcentral.com/story/news/arizona/investigations/2015/10/22/arizona-corrections-import-thiopental-illegal-execution-drug/74406580/ 3

INTRODUCTION

¶1 Plaintiff/Appellant the American Civil Liberties Union Foundation of Arizona ("ACLU) brought this special action under Arizona public records law to ensure the public has access to records concerning Defendant/Appellee Arizona Department of Corrections' ("ADC" or the "Department") administration and management of the death penalty.

¶2 The "core purpose of our public records law is to give the public access to official records and other government information so that [the public] may monitor the performance of government officials and their employees. Thus, the statutes broadly define such records and presume that public records will be disclosed." *Congress Elementary Sch. Dist. No. 17 of Yavapai Cty. v. Warren*, 227 Ariz. 16, 18, 251 P.3d 395, 397 (App. 2011) (internal citations/quotations omitted).

¶3 ADC is responsible for the implementation of the death penalty through the use of lethal intravenous injections. A.R.S. § 13-757(A). Unfortunately, ADC has a history of botched executions, a demonstrated willingness to circumvent Federal law to illegally import lethal injection drugs, and a pattern of using secrecy to shield their behavior from public scrutiny.

¶4 ADC has been implicated in the botched executions of Jeffrey Landrigan, Eric King, Robert Towery and Joseph Wood in. *First Amendment Coal. of Arizona, Inc. v. Ryan,* No. CV-14-01447-PHX-NVW, 2016 WL 2893413, at *2-6 (D. Ariz. May 18, 2016). Joseph Wood's execution was particularly horrific: "Wood's execution commenced on July 23, 2014 at 1:52 p.m. Twelve minutes into his execution …Wood 'rose upwards against his restraints and gulped for air.' At the 18 and 24 minute marks, the Department administered second and third doses of the [drug] combination … approximately 100 minutes after the execution began, the Department had injected Wood 12 times with each drug. Finally, after nearly two hours and a total of 15 injections, Wood was pronounced dead." *Id.* at 6.

¶5 A 2010 Arizona Republic article exposed ADC's illegal importation of lethal injections drugs from an unregulated supplier.[1] Subsequently, a U.S Appeals Court affirmed that ADC's importation of thiopental was illegal and the Food and Drug Administration ("FDA") was required to prevent the practice. *Cook v. Food & Drug Admin*., 733 F.3d 1, 12 (D.C. Cir. 2013). Despite the public revelation that ADC's supply of thiopental had been "misbranded" and not subjected to FDA approval, the Department continued to use the drug as part of a three drug combination for lethal injections. *Id., Cook*, 733 F.3d at 12; *First Amendment Coal.*. 2016 WL 2893413, at *2-6.

¶6 In June 2011, Lundbeck, Inc. was publicly revealed as a manufacturer of lethal injection drugs used by a number of states, including Arizona, to perform executions. Lundbeck sent "letters to prison authorities and governors advising that it is not safe to use the drug [pentobarbital] in lethal injections." [Index of Record ("IR") 17, IR 18 Ex. H.]. Despite Lundbeck's warning that pentobarbital was "not safe" for the purpose of lethal injections, the drugs were still used by ADC in the October 2013 executions of Robert Jones and Edward Schad. [IR 5, IR 6].

¶7 In October 2015, ADC was again caught attempting to illegally import execution drugs. ADC "paid nearly $27,000 … to purchase 1,000 vials of the anesthetic sodium thiopental" after receiving an offer to purchase the drug from a foreign distributor. "The DEA notified Customs and the FDA" of ADC's request to purchase drugs from a foreign provider. "When the shipment arrived at the [airport] … it was flagged by the FDA and held by Customs." Despite objections

[1] Kiefer, Michael, *Court: FDA erred in allowing Arizona to import execution drugs,* The Arizona Republic, July 23, 2013. Online at http://archive.azcentral.com/news/politics/articles/20130723court-fda-erred-allowing-az-execution-drugs.html

from ADC Director Charles Ryan, the FDA and DEA refused to lift the ban on the drugs importation.[2]

¶8 Public interest has predictably heightened in light of recent events, and there is widespread concern about execution protocol and drugs used by ADC. Arizona's public records law is the central vehicle for the public to provide meaningful oversight of the practices of government officials. "The purpose of the Public Records Law, like the FOIA, is to open agency action to the light of public scrutiny. The Public Records Law exists to allow citizens to be informed about what their government is up to." *Scottsdale Unified Sch. Dist v. KPNX Broad. Co*., 191 Ariz. at, 303, 955 P.2d at 540 (internal citations/quotations omitted). The language of the public records law broadly defines what constitutes a public records, the case law interpreting the statute require strict compliance by state agencies, and the law mandates strict enforcement by the courts.

¶9 ADC's continued mismanagement of the death penalty led the ACLU to request public records pertaining to the policies, procedures, and methods for the executions of Robert Jones and Edward Schad. In response to the ACLU's request, the Department failed to release important public records, including, but not limited to: (1) records that contained the expiration date of the drugs; (2) records of ADC's compliance with federal law; (3) records of ADC's procurement of the lethal injection drugs; (4) correspondence between ADC and the drug's manufacturer, distributor and supplier; and(5) and dates the drugs were ordered, purchased and delivered.

---

[2] Kiefer, Michael, *Arizona again tries to illegally import execution drug*, The Arizona Republic, Oct. 23, 2015. Online at http://www.azcentral.com/story/news/arizona/investigations/2015/10/22/arizona-corrections-import-thiopental-illegal-execution-drug/74406580/

¶10 ADC cannot escape its responsibility to provide public records because doing so may raise public ire about its administration of the death penalty. "The cloak of confidentiality may not be used… to save an officer or public body from inconvenience." Arizona Attorney General Agency Handbook, 2011 Revision, Chapter 6, pp. 6-7, *citing Dunwell v. Univ. of Ariz,* 134 Ariz. 504, 508, 657 P.2d 917, 921 (App. 1982). The ACLU is entitled to prompt production of all requested records.

STATEMENT OF THE CASE

¶11 The ACLU filed a special action in Maricopa County Superior Court pursuant to A.R.S. §§ 39-121-39-121.03 seeking an order compelling ADC to make public records available for inspection and copying, and requesting an award of reasonable attorneys' fees and costs, for the Department's failure to respond sufficiently and promptly to the ACLU's September 17, 2013 records request. [IR 1, IR 2, IR 37].

¶12 The ACLU's request sought records concerning ADC's administration of the October 2013 executions of Edward Harold Schad Jr., and Robert Glen Jones Jr., including, but not limited to records of: the expiration dates of the lethal injection drugs; ADC's procurement of lethal injection drugs; ADC's federal authorization to procure, possess and administer narcotic(s); and correspondence between ADC, the drug supplier, manufacturer, distributer and any Federal regulatory body concerning the lethal injection drug. [IR 1, IR 37].

¶13 On September 20, 2013, in response to the ACLU's request, the Department provided a series of correspondence between ADC Director Charles Ryan, the Federal Public Defenders Office, and inmate Edward Schad. [IR 1, IR 2, IR 37]. On September 24, ACLU Attorney Kelly Flood contacted ADC General Counsel

Dawn Northup and objected to ADC's initial submission of records because the response failed to comply with Arizona public records law. [IR 1, IR 2, IR 37].

¶14 On September 25, in response to the ACLU's letter, ADC produced three additional records: a heavily redacted invoice; a heavily redacted worksheet; and an almost completely illegible package insert from the drug packaging, with unexplained redactions. [IR 1, IR 2]. The Department claimed that the remaining responsive documents, to the extent they existed, as well as the information redacted from records released to the ACLU-AZ, were confidential pursuant to A.R.S. § 13-757(C). [IR 1, IR 28].

¶15 On September 26, 2013, the ACLU again requested ADC comply with Arizona public records law. [IR 1, IR 38]. The ACLU noted that ADC had improperly redacted materials from the released invoice, worksheet and package insert. [IR 1, IR 38]. In addition, ADC failed to release records responsive to the request, including: (1) the DEA registration information specifying each person who would possess, handle, or administer the pentobarbital is legally authorized to do so; (2) all correspondence, forms, or other documents shared between the ADC and any manufacturer, distributor, or pharmacy responsible for supplying ADC with the pentobarbital; and (3) all invoice, order and procuring information concerning the lethal injection drug. [IR 1, IR 38].

¶16 The ACLU filed suit on October 3, 2013. [IR 1]. At the time the complaint was filed, ADC sole rationale for withholding requested records or from redacting information from released records, was the confidentiality provisions of A.R.S. § 13-757(C). [IR 1, IR 2].

¶17 ADC General Counsel Dawn Northup, the person primarily responsible for responding to the ACLU-AZ's record request, was deposed on June 5, 2014 [IR 34]. During Northup's deposition, ADC admitted for the first time that additional records were withheld from the ACLU because ADC did not believe they met the

definition of a "public record" under Arizona law. [IR 37, IR 38, IR 45]. The parties simultaneously submitted Summary Judgment Motions with accompanying statement of facts. [IR 37-50, 52, 53]. Oral argument on Plaintiff's and Defendant's summary judgment motions was held March 23, 2015. [IR 60].

¶18 On November 9, 2015, outside the presence of ACLU counsel, an ex parte evidentiary hearing was held between the trial court, ADC counsel, and ADC witness Carson Anton McWilliams. [IR 80]. The court heard testimony from Mr. McWilliams concerning whether material redacted from the invoice, worksheet, and drug package insert was confidential. [IR 80]. The ACLU objected to the hearing as an ex-parte communication constituting actual prejudice against the ACLU. [IR 74, 80]. After hearing ADC's witness, outside the presence of ACLU counsel, the Court ruled that ADC's redactions were made "consistent with Arizona law." [IR 80]. A final order was entered on February 3, 2016 [IR 85, 86] and the ACLU timely appealed [IR 87]. This Court has jurisdiction pursuant to A.R.S. § 12-2101(B).

STATEMENT OF FACTS

I. ACLU Record Request and ADC's Response

¶19 On September 17, 2013, ACLU staff attorney Kelly Flood submitted a public records request to ADC seeking records concerning the execution of Edward Harold Schad Jr., scheduled for October 9, 2013, and the execution of Robert Glen Jones Jr., scheduled for October 23, 2013. [IR 1, IR 2, IR 37, IR 38]. Specifically, the ACLU sought all records in the possession of ADC ("including in written, electronic, photographic, audio, video, CD or other format"), identifying: (1) the name of all drugs to be used in the October 2013 executions; (2) the name of the manufacturer and distributor of each drug; (3) the lot number and the expiration date of each drug; (4) documents demonstrating that each person – with

names redacted - involved in administering the lethal injection drug was legally permitted to possess, handle, and administer controlled substances by the Drug Enforcement Agency (DEA); (5) all correspondence, forms, and documents shared between ADC and any federal body, about the execution(s) and lethal injection drugs, including but not limited to the DEA, FDA, and United States Customs; (6) all correspondence, forms and documents shared between ADC and any manufacturer, distributor, or pharmacy responsible for supplying ADC with the lethal injection drugs; and, (7) all invoice, order, and procuring information concerning the lethal execution drugs. [IR 1, IR 2, IR 37, IR 38].

¶20 In response, the Department provided only six pieces of correspondence between the Federal Public Defender's office, the Arizona Department Corrections and inmate Edward Schad. [IR 1, IR 2]. Responding on behalf of ADC, ADC General Counsel Northup wrote the "remaining information you seek, to the extent ADC has such records, is confidential and not subject to the disclosure pursuant to A.R.S. § 13-757(C)." [IR 1, IR 2, IR 37, IR 38].

¶21 ADC's production fell far short of their duties under Arizona public records law. [IR 1, IR 2, IR 37, IR 38]. However, the correspondence did demonstrate that the Federal Public Defender's ("FPD") Office suspected the lethal injection drugs in ADC's possession were expired. [IR 1, IR 2]. According to the released records, ADC planned to execute Edward Schad and Robert Jones utilizing a one drug protocol consisting of an injection of "unexpired, domestically obtained Pentobarbital." [IR 1, IR 2]. On July 9, 2013, FPD wrote to ADC stating ADC's only known supply of pentobarbital "expired in March 2013 … Nembutal (pentobarbital) has not been available to prisons in states that have capitol punishment since July 1, 2011." [IR 1, IR 2]. In a follow up letter, the FPD requested to know the manufacturer and source of ADC's pentobarbital as well as the expiration date of the drug. [IR 1, IR 2]. FPD also requested "the credentials of

each IV Team member with respect to any Drug Enforcement Agency (DEA) registrations that authorize IV Team members to handle controlled substances." [IR 1, IR 2]. On August 16, ADC Director Ryan responded "the name of the manufacturer and source of the drug … [ADC] intends to use for the executions … is confidential and not subject to disclosure under A.R.S. § 13-757(C) … the credentials of the IV team remain the same and are clearly stated in DO 710, Section 1.2.5." [IR 1, IR 2].

¶22 On September 24, 2013, ACLU Attorney Kelly Flood wrote ADC General Counsel Northup that ADC had failed to provide complete records responsive to the ACLU's request. [IR 1, IR 2, IR 37, IR 38]. On September 25, in response to the ACLU's September 24 letter, ADC provided heavily redacted versions of what appeared to be an ADC invoice for the purchase of the pentobarbital, an ADC drug information worksheet, and almost completely illegible Nembutal drug package informational insert. [IR 1, IR 2, IR 37, IR 38]. Northup wrote, "the information that has been redacted is confidential pursuant to A.R.S. § 13-757(C). The attached record, together with the records previously sent … are the complete records in ADC's possession … responsive to your … request." [IR 1, IR 2].

¶23 ADC failed to release the majority of documents responsive to the ACLU's record request. [IR 1, IR 2, IR 37, IR 38]. ADC failed to provide any record of the expiration date of the pentobarbital; the lot number of the drug; records demonstrating that ADC employees were legally authorized by the DEA to procure, handle or administer controlled substances; correspondence between ADC and any manufacturer, supplier or distributor of the lethal injection drug; or, the invoice, order or procuring information concerning the lethal injection drug. [IR 1, IR 2, IR 37, IR 38].

¶24 Aditionally, ADC offered no rationale for as to why it did not provide records it was required to maintain under ADC policy and federal law, of ADC

agents' DEA authorizations to possess, procure and administer pentobarbital. [IR 37, IR 38]. The ACLU was clear that information that would reveal the identity of human persons could be redacted from requested documents. [IR 1, IR 2]. ADC did not enter into the record any admissible evidence or witness, nor subject any such testimony to examination, showing that the Department searched for the requested records, could not locate the requested records or did not have the requested records. [IR 37, IR 38, IR 43, IR 45]. Nor did ADC offer any evidence, or subject any testimony to examination, that revealing records ADC failed to release would result in the release of an identity confidential pursuant to A.R.S. § 13-757(C). [IR 37, IR 38].

¶25 Furthermore, the redactions made to the records released to the ACLU were overbroad and unjustified by a plain reading of the Arizona public records law and A.R.S. § 13-757(C). [IR 1, IR 2, IR 37, IR 38]. ADC claimed to have redacted extensive information from the invoice order form, worksheet, and drug information insert, solely because the confidentiality provisions of A.R.S. § 13-757(C) required them to protect the identity of any party whose identity would be revealed if the information was disclosed. [IR 1, IR 2, IR 37, IR 38]. In fact, ADC redacted information from records released to the ACLU that would not have revealed the identity of a party protected as confidential under A.R.S. § 13-757(C), such as dates the drugs were procured, the date payment was due for the drugs, dates the drugs were ordered, the location where the drugs were sent, the lot number of the drugs, ADC's DEA and FDA registration and reference numbers, and other unidentified information. [IR 37, IR 38]. ADC failed to demonstrate how each redaction from the disclosed records would reveal the name of a supplier, distributor or manufacturer of the pentobarbital. [IR 37, IR 38].

¶26 Many of the records requested by the ACLU and redactions made by ADC fell outside the scope of the confidentiality provisions of A.R.S. § 13-757(C) [IR

37, IR 38]. For example, ADC General Counsel Northup acknowledged that "a date in and of itself wouldn't identify where you obtained" the lethal injection drugs. [IR 37, IR 38]. Information that identifies ADC is licensed to possess and administer lethal injection drugs, and the location where ADC received shipments, also does not identify the supplier of the lethal injection drugs. [IR 37, IR 38] Yet ADC maintains the information is confidential pursuant to A.R.S. § 13-757(C). [IR 37, IR 38].

II. The ACLU's Lawsuit and ADC's Public Disclosure of Information.

¶27 On October 3, 2013, the ACLU brought a special action in Maricopa Superior Court pursuant to A.R.S. §§ 39.121-39.12.03 against the Arizona Department of Corrections seeking an order compelling the Department to release all records responsive to the ACLU's request in its possession and awarding the ACLU reasonable attorneys' fees and costs. [IR 1, IR 2] The ACLU also sought a temporary restraining order and emergency hearing to obtain the immediate release of the requested records due to the pending executions of Edward Schad and Robert Jones. [IR 3]. However, prior to the hearing, a Federal District Court in Arizona held that the prisoners had a First Amendment right to know information about the drugs, including the name of the manufacturer and the expiration date of the drugs. [IR 6].

¶28 On October 4, 2013, ADC was ordered by the Federal District Court in Arizona to release information *to the inmates* scheduled for execution certain information concerning the drugs that would be used in their execution. [IR 6]. In response to that order, ADC publicly disseminated the identity of lethal injection drugs manufacturer, the expiration date of the drug, the lot number, and the national drug code number. [IR 6, IR 38]. ADC did not request a protective order when releasing the information in order to prevent public dissemination. [IR 6, IR

37, IR 38.] After releasing the information in federal court, ADC than voluntarily submitted the information to the lower court and the ACLU. [IR 6]. The information revealed that the manufacturer of the pentobarbital was Lundbeck, Inc., a foreign drug provider. [IR 6]. This contradicted ADC Director Ryan previous statement that ADC's pentobarbital was "obtained domestically." [IR 6, IR 1, IR 2]. The pentobarbital's national drug code was "67386-501-55", the lot number for the pentobarbital was "941853F" and the expiration date of the Pentobarbital was "Nov 2013." [IR 6]. ADC moved to vacate the emergency hearing on the grounds that the information the ACLU sought was publicly revealed in federal court. [IR 5]. Despite the public disclosures, ADC still refused to produce records and information that ADC claimed would reveal Lundbeck, Inc. was the manufacturer or supplier of ADC's lethal injection drugs. [IR 37].

¶29 In fact, Lundbeck, Inc. had been publicly revealed as ADC's pentobarbital provider two years prior to the ACLU's request. On July 1, 2011 Lundbeck, Inc., issued in a press release, lamenting "the distressing misuse of [Lundbeck's] product in capital punishment." [IR 17, IR 18]. Lundbeck, Inc. announced that it "has moved to alter the distribution of its medicine Nembutal® … in order to restrict its application as part of lethal injection in the U.S." [IR 17, IR 18]. Lundbeck, Inc. sent letters to the Governor's Office and the Department of Corrections in each state requesting they cease use of pentobarbital for executions. *Id*.

¶30 The lower court did not vacate the hearing, but ultimately denied the ACLU's request for a temporary restraining order releasing the records. [IR 13]. The court ordered briefing on what issues remained. [IR 13]. The ACLU maintained that it still sought the production of the remaining records, the release of information redacted from material released, and an award of attorneys' fees under A.R.S. §§ 39-121.01-39-121.03. [IR 17, IR 18].

III. ADC's Shifting Interpretation of A.R.S. § 13-757(C).

¶31 According to ADC, A.R.S. § 13-757(C) requires the Department to maintain the confidentiality of non-human "persons" involved in executions. [IR 20, IR 43]. However, ADC's current interpretation of A.R.S. § 13-757(C) differs from its previous interpretations and actions under this law. [IR 37, IR 38]. In their answer to a public records lawsuit brought by the Federal Public Defender ("FPD") in 2011, ADC, through attorneys Kent Cattani and Jeffrey Zick, stated "A.R.S. § 13-757(C) provides that information identifying individuals who participate or perform ancillary functions in an execution is confidential." [IR 37, IR 38]. Defendant did not claim, as they do now, that the law covers corporations. [IR 37, IR 38].

¶32 Consistent with this understanding of the statute, in 2011 ADC voluntarily disclosed records that identified non-human business entities Cardinal Health, Dream Pharma, Physician Sales and Arizona Customs Brokers as participating in the manufacture, procurement and distribution of lethal injection drugs in ADC's possession. [IR 37, IR 38]. Many of these records, such as photos of the exterior of drug bottles, boxes, and packaging, were not produced by ADC in the "ordinary course of business," but were voluntarily provided to FPD. [IR 37, IR 38]. ADC proffered no evidence of harms to Dream Pharma, Cardinal Health, Physician Sales, Arizona Custom Brokers, or the execution process resulting from the public disclosure of their identities. [IR 37, IR 38].

¶33 In reaching the conclusion that A.R.S. § 13-757(C) protects the identity of corporations, ADC did not take any of the steps required when addressing a matter of statutory interpretation. [IR 37, IR 38]. As a result, there is nothing in the record that enabled the lower court to adopt ADC's expansive interpretation of A.R.S. § 13-757(C). [IR 37]. ADC failed to undertake any legislative research to determine the intent of the legislature at the time A.R.S. § 13-757(C) was passed. [IR 37, IR

38]. Northup did not know when the language of A.R.S. § 13-757(C) was adopted, the reason the statute was passed in 1998, nor any concerns that may have preceded the adoption of the bill. [IR 37, IR 38]. Northup when asked whether she had looked into the legislative intent of A.R.S. § 13-757(C) stated, "I did not look into the legislative intent, no." [IR 37, IR 38]. Northup did not rely on any judicial interpretations or court cases in concluding that the term person in A.R.S. § 13-757(C) included corporations and businesses. Northup alone decided that the word "person" in A.R.S. § 13-757(C) included corporations and businesses as well as human beings. [IR 37, IR 38].

¶34 ADC did not introduce into the record any contemporaneous information or legislator statements from the date when the bill was passed indicating that A.R.S. § 13-757(C) was meant to cover non-human entities, nor any information demonstrating the need to protect the identity of the manufacturer, distributor or supplier of the drug in or before 1998. [IR 37, IR 38]. The legislative Fact Sheet from 1998 for A.R.S. 13-757(C), which describes what the bill covers, stated that the law "conceals the identity of those who participate in executions." [IR 37, IR 38]. Northup agreed that a contemporaneous Fact Sheet is intended to describe a recently passed law to the public. [IR 37, IR 38].

¶35 ADC Executive Order 710.02, titled "Execution Team Members" lists over 50 human beings who are involved in the execution process, divided into 11 teams. [IR 37, IR 38]. The persons described in ADC Executive Order 710.02 are the persons contemplated and protected by A.R.S. § 13-757(C). [IR 37, IR 38].

IV. ADC's Narrow Interpretation of Arizona Public Records Law.

¶36 ADC's failure to disclose records was not solely related to the Department's interpretation of the scope A.R.S. § 13- 757(C), but also because ADC's believed

that some documents in its possession did not constitute "public records" under A.R.S. § 39-121.01. [IR 37, IR 38, IR 43, IR 45].

¶37 ADC General Counsel Northup was proffered as ADC's designated Arizona Rule of Civil Procedure 30(B)(6) witness in response to the ACLU's public records lawsuit. [IR 38]. Northup is the person who responds "when outside entities need information from the department." [IR 38] Northup reviewed and directed ADC's response to the ACLU's record request. [IR 38]

¶38 Northup's deposition revealed that ADC's failure to release records and relevant information as requested was due in part to its own interpretation of the scope of the Arizona public records laws, A.R.S. §§ 39-121-39.121.03. [IR 37, IR 38, IR 43, IR 45]. ADC concluded that the Arizona public records law only required production of records that are made and used by ADC in the "ordinary course of business." [IR 37, IR 38]. ADC did not base its conclusions about the scope and meaning of the public records law on any case law or precedent. [IR 37, IR 38].

¶39 ADC did not release records containing the expiration date of the drug, which can be found on the exterior of the box containing the drug, because Northup claimed the record was not a record produced in the ordinary course of business and was on the "side of the box." [IR 37, IR 38]. Northup testified that the box the pentobarbital came in was the *only record of the expiration date* of the drugs in ADC's possession. [IR 37, IR 38 Ex. A p. 41:23- 42:3]. ADC relied on the box to determine the expiration date of the pentobarbital ADC maintained. [IR 37, IR 38]. ADC recognizes there is a public interest in learning if and when execution drugs have expired. [IR 38]. Northup agreed if the expiration date was on a "record" it should be disclosed. [IR 38]. Northup also agreed that a date, in of itself, would not reveal the identity of an entity confidential pursuant to A.R.S. § 13-757(C). [IR 38].

¶40 As a result of ADC's own interpretation, ADC failed to provide the ACLU with the requested expiration date of the drugs because the information was attached to the outside of the box the drug was contained in, and, therefore, in ADC's opinion, not a public record. [IR 37, IR 38, IR 43, IR 45]. In contrast to their response to the ACLU, in answer to a public records lawsuit concerning lethal injection drugs filed by the Federal Public Defender's Office in 2011, ADC provided clear images of the box the drugs were contained and the expiration dates of the drugs. [IR 37, IR 38]. Additionally, in response to the ACLU's request, ADC provided a drug information insert concerning the pentobarbital purchased from Lundbeck Inc., despite the fact that the material had not been produced by ADC in the ordinary course of business. [IR 1, IR 2, IR 17, IR 18]. ADC did not provide any rationale for treating the drug information insert differently from the box which contained ADC's only record of the expiration date, despite the fact that neither were produced by ADC in the ordinary course of business. [IR 37, IR 38]. Additional records may have been withheld by ADC because they did not meet the Department's narrow definition of a public record. [IR 38].

V. The Trial Court's Ex Parte Hearing

¶ 41 On June 8, 2015, after receiving extensive summary judgment briefing by both Plaintiff and Defendant, the trial court ordered ADC to supply the court *in camera* un-redacted and redacted versions of all records responsive to the ACLU's request. [IR 63, IR 64, IR 68]. After examining the un-redacted records, the court could not determine whether the redactions would lead to discovery of an entity confidential pursuant to A.R.S. § 13-757(C). [IR 70]. As previously discussed, on October 4, 2013, pursuant to court order, ADC revealed the name of the manufacturer of the pentobarbital in ADC's possession was Lundbeck, Inc. [IR 6].

Thus, the lower court and ADC were protecting information that would lead to the discovery of an already publicly known entity, Lundbeck, Inc. [IR 37, IR 38].

¶42 The lower court requested ADC "provide the Court with a reference key identifying the redacted information and the reason for the redaction." [IR 70]. As ordered, ADC filed a reference key with the court on July 24, 2015. [IR 71]. The ACLU was not provided a copy of the reference key. [IR 71]. Despite obtaining the key, the court could not determine how information redacted from the records revealed the identity of the manufacturer of the lethal injection drug. [IR 72]. The trial court requested ADC "identify an individual most familiar with the index to provide the Court with further details on a number of redacted items." [IR 72].

¶43 Plaintiff objected to the proposed hearing on the grounds that a communication between an undisclosed ADC witness and the court would constitute an inappropriate ex parte communication that created actual prejudice against the ACLU's position. [IR 74]. The ACLU argued that because the identity of the manufacturer was already publicly available, the court should employ less prejudicial means to determine whether publicly releasing redacted records would have resulted in the discovery of Lundbeck, Inc.'s identity. [IR 74]. For example, the ACLU advised the lower court to let ACLU counsel be present at the hearing, and after ACLU had a chance to cross-examine ADC's witness and present evidence rebutting his testimony, if necessary, the court could than determine whether to seal the record. [IR 74, IR 78]. The court did not offer any rationale for why it could not employ less prejudicial means to hear ADC's witness. [IR 78, IR 80].

¶44 On September 18, 2015, the Court found "it is necessary to meet with an ADC witness to assist the Court in translating the index provided." [IR 78]. On November 9, 2015, outside the presence of ACLU counsel and against the ACLU's objection, the court allowed Mr. Carson Anton McWilliams to testify to material

facts concerning the confidentiality of records at issue. [IR 80]. Mr. McWilliams role with ADC, qualifications to testify, and testimony itself have never been revealed to the ACLU. [IR 80]. At the conclusion of the hearing, and outside the presence of ACLU counsel, the court held:

> The Court has conducted an "in-camera" review of the six pages of material... The review included questioning of DOC witness Carson Anton McWilliams. The purpose of the examination was to clarify how certain redacted information 'when used with other documents and information' would lead to the identity of the distributor or manufacturer of the execution drugs. Plaintiff, ACLU, object to the redactions and the "in-camera" questioning process because it does not include counsel. Having considered the … clarification provided during the "in-camera" session, **THE COURT FINDS** that the D.O.C. appropriately redacted information from the submitted pages consistent with Arizona law. [IR 80]

Mr. McWilliams testimony was sealed and the ACLU has been unable to access the transcript.

VI. The Trial Court's Final Ruling

¶45 Eight days after the court's ex parte hearing with ADC's counsel and witness, the trial court denied all relief sought by ACLU and adopted the Department's conclusions of law. [IR 81]. In doing so, the court below ignored the plain language of Arizona public records law and the cases interpreting that law, committing several errors that form the basis of this appeal. [IR 81].

¶46 The trial court erred by failing to follow the statutory language of Arizona public records law, and established precedent, that hold any record made or received by a state agency in the transaction of public business, no matter the form or characteristics, is a public record that must be disclosed. [IR 81]. The court found that the packaging of the lethal injection drug was not a public record, even though Northup testified that the packaging was the only record of the expiration

date the Department maintained and ADC relied on the packaging in the normal course of operations to accurately determine when the lethal injection drug had expired. [IR 37, IR 38, IR 81].

¶47 In addition, the trial court failed to require the Department to meet their basic obligations under the Arizona public records law to demonstrate ADC searched for records it was legally required to maintain. [IR 81]. The lower court ignored the relevant case law that ADC had the burden to demonstrate it adequately searched for records or prove the non-existence of records, the ACLU demonstrated ADC was required to maintain. [IR 37, IR 38, IR 81].The lower court made this ruling despite receiving no testimony that ADC searched for the records at issue. [IR 81].

¶48 The lower court committed reversible error when it ignored the legislative history and language of A.R.S. § 13-757(C) and found that the names of businesses and corporations that manufacture, distribute, or supply lethal injection drugs, and any information or record that may subsequently reveal their identity, no matter how remote the likelihood, are confidential. [IR 37, IR 38, IR 81].The plain language of the statue protects only the identity of "persons." [IR 37, IR 38]. No evidence in the record suggests that the legislative intent at the time the legislature crafted A.R.S. § 13-757(C) was to protect the identity of corporations who distribute, manufacture or supply ADC with lethal injection drugs. [IR 37]. Absent such support in the record, the lower court could not conclude A.R.S. § 13-757(C) protects information that would reveal the identity of the drug's corporate supplier or manufacturer. [IR 37].

¶49 The lower court also erred when it conducted an ex parte evidentiary hearing, outside the presence of ACLU counsel, on matters central to the determination of whether information redacted from records released to ACLU would lead to the discovery of an identity confidential pursuant to A.R.S. § 13-

757(C). [IR 78, IR 80]. The procedures utilized by the lower court prevented the ACLU from contesting, rebutting, or examining crucial testimony concerning a central issue in the case and thus resulted in actual prejudice against the ACLU. [IR 80].

¶50 Lastly, the Superior Court denied ACLU's request for attorneys' fees despite clear evidence ADC failed to promptly produce records responsive to the ACLU's request. [IR 81]. A final order was entered on February 3, 2016 [IR 85, IR 86] of which the ACLU timely appealed. [IR 87]. Appellate intervention is now required to ensure the public retains access to records concerning our government's most deliberative and sensitive processes – the death penalty.

QUESTIONS PRESENTED

(1) Did the lower court err when it found that a box that contained the only documented evidence of the lethal injection drug's expiration date was not a public record?

(2) Did the lower court err in holding that ADC did not have to demonstrate that it adequately searched for records of federal licensing that allows ADC to legally possess, procure and administer pentobarbital, even though under Federal law and the Department's own regulations, ADC was required to maintain such records?

(3) Did the lower court err in holding that the identity of corporations or businesses that manufacture lethal injection drugs is confidential under Arizona Public Records Law, including when the identity of the manufacturer has already been publicly revealed?

(4) Did the lower court err by conducting an ex-parte evidentiary hearing, allowing an ADC witness to testify to material matters in dispute, outside the presence of ACLU counsel?

LEGAL ARGUMENT

I. Standard of Review

¶51 "Whether a document is a public record under Arizona's public records law presents a question of law," which appellate courts review de novo. *Griffis v. Pinal Cty.*, 215 Ariz. 1, 3, 156 P.3d 418, 420 (2007); *Cox Ariz. Publ'ns, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993). Whether the denial of access to public records is lawful also presents a question of law, and is reviewed *de novo. Phoenix New Times, L.L.C. v. Arpaio*, 217 Ariz. 533, 538, ¶ 11, 177 P.3d 275, 280 (App. 2008).

¶52 "In reviewing findings of fact and conclusions of law, [this Court] must recognize a trial court's finding of fact unless they are clearly erroneous." *Arizona Bd. of Regents v. Phoenix Newspapers, Inc.,* 167 Ariz. 254, 257, 806 P.2d 348, 351 (1991) (citations omitted). However, the "clearly erroneous" standard does not apply to "findings of fact that are induced by an erroneous view of the law nor to findings that combine both fact and law when there is an error as to law." *Id.* Consequently, where "the ultimate determination involves a mixed question of fact and law, review of a denial of access to public records is *de novo.*" *London v. Broderick*, 206 Ariz. 490, 493 n.3, 80 P.3d 769, 772 n.3 (2003).

II. Arizona Public Records Law Strongly Favors Disclosure of and Access to Records.

¶53 The purpose of Arizona's public records law is to allow the public to monitor the performance of elected officials and government agencies. *Griffis*, 215 Ariz. at 4 ¶ 11; *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351, ¶¶ 33, 35 P.3d 105, 112 (App. 2001). "Arizona law defines 'public records' broadly," *Griffis*, 215 Ariz. at 4, ¶ 8, there is a "clear policy favoring disclosure," and records "are presumed open to the public." *Carlson v. Pima Cnty.,* 141 Ariz. 487, 490-91, 687 P.2d 1242, 1245-46 (1984). "Unlike public information statutes in other

jurisdictions, Arizona's statute specifies that when records are subject to disclosure the required response is the prompt and actual production of the documents." *Phoenix New Times, L.L.C. v. Arpaio*, 217 Ariz. 533, 538, 177 P.3d 275, 280 (App. 2008).

¶54 "When the facts of a particular case raise a substantial question as to the threshold determination of whether the document is subject to the [public records] statute, the court must first determine whether that document is a public record. If a document falls within the scope of the public records statute, then the presumption favoring disclosure applies." *Griffis v. Pinal Cty.*, 215 Ariz. 1, 5, 156 P.3d 418, 422 (2007). The burden falls solely on the state official to overcome the presumption favoring disclosure. *Cox Ariz. Publ'ns., Inc. v. Collins,* 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993).

¶55 ADC has the burden to justify each redaction of information and each denial of a requested document. ADC proffered two reasons for their refusal to release responsive records: (1) that some records the ACLU sought do not meet the definition of a public record under Arizona law, and (2) the confidentiality provisions of A.R.S. § 13-757(C) prevent disclosure of records and information that may lead to the discovery of a confidential entity. As demonstrated below, ADC did not meet their burden to demonstrate records in ADC possession were not subject to disclosure, ignoring the plain language of Arizona public records law and the cases interpreting that law. Absent support in the record, the lower court was "not at liberty to rewrite statutes under the guise of judicial interpretation." *New Sun Bus. Park, LLC v. Yuma County*, 221 Ariz. 43, 47, ¶ 16, 209 P.3d 636, 643 (App. 2008) (internal quotations/citations omitted).

III. The Drug Packaging Box With the Lone Record of the Expiration Date is a Public Record under Arizona Law.

¶56 ADC refused to provide the ACLU with a copy of a box that contained the only record of the expiration date of the pentobarbital used in the October 2013 executions because ADC believed that a box was not a public record under Arizona law. [IR 37]. ADC's narrow definition of a public record is contrary to the plain language of the statute and Arizona case law, which hold that a public records is a record "made **or received** by a government agency … regardless of physical form or characteristics," that is "reasonably necessary or appropriate to maintain an accurate knowledge of their official activities" whether required to be kept by law or not. A.R.S. § 39.121.01(B); A.R.S. § 41-151.18; *Salt River Pima-Maricopa Indian* Cmty. *v. Rogers*, 168 Ariz. 531, 539, 815 P.2d 900, 908 (1991). ADC witness Dawn Northup testified that the Department relied on the box as the only memorial of the drug's expiration date. [IR 37, IR 38]. As such, the box served both as a memorial of government business and as an ongoing record used by ADC in furtherance of its official duties, making the box a public record ADC must disclose.

¶57 ADC argues that the packaging box is not a public record because "(1) [i]t was not made by any public officer, since the date was stamped on the box apparently by the manufacturer or distributor; (2) [n]o law required the ADC to keep this box as any sort of memorial or evidence; and (3)… [it is not] any sort of written record of any transactions of a public official." [IR 43, IR 45]. Each of ADC's arguments is without merit.

¶58 Arizona's statutory scheme broadly defines public records and presumes that they will be disclosed. A.R.S. § 39.121.01(B) requires all public officers and agencies to "maintain all records, including records as defined in section 41-151.18, reasonably necessary or appropriate to maintain an accurate knowledge of

their official activities and of any of their activities which are supported by monies from this state or any political subdivision of this state." Thus, records requiring production upon request include "all … documentary materials, regardless of physical form or characteristics … made or received by any government agency in pursuance of law or in connection with the transaction of public business … regardless of the physical form or characteristics." A.R.S. § 41- 151.18. "[A]ll records required to be kept under A.R.S. § 39-121.01(B), are presumed open to the public for inspection as public records." *Carlson*, 141 Ariz. at 491; *Lake v. City of Phoenix*, 222 Ariz. 547, 550 ¶ 11, 218 P.3d 1004, 1007 (2009).

¶59 In addition to public records, A.R.S. 39-121 requires officials to disclose "other matters" including "documents which are not required by law to be filed as public records." *Salt River Pima-Maricopa Indian Cmty. v. Rogers,* 168 Ariz. "The definition of other matters is so broad, the [Arizona Supreme] Court has abandoned any 'technical distinction' between public records and other matters." *Griffis v. Pinal County*, 215 Ariz. 1, 4 n.5, ¶8, 156 P.3d 418, 421 n.5 (2007) (quoting *Carlson v. Pima Cnty.*, 141 Ariz. 487, 490, 687 P.2d 1242, 1245 (1984)).

¶60 The Arizona Supreme Court in *Lake v. City of Phoenix* defined a public record as a record that has a "substantial nexus" to government activities. 222 Ariz. 547, 549, 218 P.3d 1004, 1006 (Ariz. 2009). Under Arizona law, a public record includes any record "required to be kept, or *necessary* to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done." *Id.* The term "public record" includes any "written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by ... law or not...." *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 539, 815 P.2d 900, 908 (1991).

¶61 The box containing the only recorded expiration date for the lethal injection drug meets the definition of "public records" for at least three reasons. First, the box is a public record because it is necessary for the Department to maintain the expiration date of the lethal injection drugs to carry out its execution duties. Arizona courts have long recognized that "a record … necessary to kept in the discharge of a duty imposed by law or directed by law,'" is a public record. *Lake v. City of Phoenix*, 220 Ariz. 472, 477, ¶ 12, 207 P.3d 725, 730 (App. 2009) ("*Lake II*"), *vacated in part on other grounds*, 222 Ariz. 547 (2009). ADC General Counsel Northup testified that the box contained the only record of the expiration date. [IR 38 Ex A. 41:23-42:3]. Northup noted that it would be a public concern if lethal injection drugs were used beyond the expiration date. [IR 38]. The expiration date is clearly a concern for ADC, as the Department recently announced it was halting executions because its present batch of lethal injection drugs have expired.[3] Without the expiration date, ADC could not safely carry out its legislative mandate to perform executions by lethal injection. A.R.S. § 13-757(A). As such, the box with the only record of the drug's expiration date is a record kept by ADC in the performance of a "transaction of public business" that must be disclosed. A.R.S. § 41-151.18; A.R.S. § 39.121.

¶62 Second, the box with the only expiration date for the drugs constitutes a public record because it is a record "reasonably necessary or appropriate to maintain [as] an accurate knowledge of [ADC's] activities . . . ." A.R.S. § 39-121.01(B); "Section 39-121.01(B) creates a statutory mandate which, in effect, requires all officers to maintain records reasonably necessary to provide knowledge of all activities they undertake in the furtherance of their duties." *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245. There is considerable interest among

[3] http://kjzz.org/content/325458/lethal-injection-drug-shortage-halts-arizona-executions

the public, the courts and those sentenced to death as to whether or not lethal injection drugs in ADC custody have expired. The expiration date of the drugs are "reasonably necessary" to maintain an accurate knowledge of ADC's activities, and as such, ADC is required by law to maintain a record of the expiration date of the drug, and provide that record on request.

¶63 Third, the box containing the lethal injection drugs expiration date is a record that has "a 'substantial nexus' with a government agency's activities." *Griffis*, 215 Ariz. at 4, ¶ 10, 156 P.3d at 421. ADC acquired the box when obtaining the lethal injection drugs used in the October 2013 executions and kept a record of the box to ascertain when the lethal injection drugs were expired. Absent a specific exception, any record possessed by ADC and utilized in carrying out the execution process, whether made by ADC or another entity and no matter the physical characteristics, must be disclosed. The box sought by ACLU had "a substantial nexus" to government activity and could not be withheld. *Lake v. City of Phoenix*, 222 Ariz. 547, 549, 218 P.3d 1004, 1006 (Ariz. 2009).

¶64 ADC was required to produce any material or document in its possession that ADC utilized as a memorial of the expiration date of the drugs. The fact that ADC chose to maintain the record in the form of a box, as opposed to a sheet of paper, makes absolutely no difference with regards to their duty to provide records under Arizona law. Arizona public records law makes no distinction as to the form of documentary materials. A.R.S. § 41-151.18. Instead, "central to the determination of whether a document is a public record is the nature and purpose of the document.'" *Schoeneweis v. Hamner*, 223 Ariz. 169, 172, 221 P.3d 48, 51 (App. 2009) (internal citations/quotations omitted). Public records include all "documentary materials, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public

business by a state or local government entity" A.R.S. § 41-161. The Department was required to furnish the box as it would any other public record.

¶65 In addition, ADC's prior actions are inconsistent with its current argument that the drug packaging box is not a public record. Northup testified that only records made or kept by ADC "in the ordinary course of business" constituted public records. [IR 37, IR 38, IR 43, IR 45]. However ADC released the drug package insert in response to the ACLU's request. The drug package insert was not created by ADC, ADC was not specifically required by law to maintain the drug packaging insert (indeed, ADC has less reason to maintain a generic drug package insert than the specific date when ADC's pentobarbital will expire), nor was the drug package sheet a written record of a transaction of public business. Yet ADC still released the record to the ACLU. Furthermore, in its answer to FPD's public records lawsuit, ADC released photographic images of drug packages, drug labels, drug bottles and drug boxes. [IR 37, IR 38]. ADC has offered no rationale for its inconsistent interpretation of what constitutes a public record under Arizona law.

¶66 The trial court erred by focusing on the form of the record, and not the purpose of the record. *Schoeneweis*, 223 Ariz. at 172. ADC General Counsel Northup testified that ADC maintained the box as the only recorded testament of the date ADC's pentobarbital expired. [IR 37, IR 38] The box acted as both a memorial of a government transaction and a reference material for the purpose of fulfilling ADC's statutory obligation to perform executions. As such, the box with the expiration date is a public record ADC must disclose. Requiring disclosure is consistent with the unequivocal legislative intent reflected in the Arizona public records statutes favoring access to public records and supporting transparency in government. *See, e.g., Carlson v. Pima County*, 141 Ariz. 487, 490, 687 P.2d 1242, 1245 (1984) (The public records disclosure statutes "evince a clear policy favoring

disclosure"); *Cox Ariz. Publ'ns., Inc. v. Collins,* 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1983)(noting "the strong policy favoring open disclosure and access").

IV. ADC Failed to Demonstrate It Adequately Searched for Records Responsive to the ACLU's Request.

¶67 ADC "has the initial burden to show it adequately searched for responsive records." *Phx. New Times, L.L.C. v. Arpaio,* 217 Ariz. 533, ¶ 16, 177 P.3d 275, 281 (App. 2008); *Hodai v. City of Tucson*, 239 Ariz. 34, 365 P.3d 959, 969 (App. 2016). An agency's search for records must be "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1486 (D.C. Cir. 1984); *Phoenix NewTimes*, L.L.C., 217 Ariz. at 539, n. 3. "At all times the burden is on the agency to establish the adequacy of its search." *Rugiero v. United States Dep't of Justice*, 257 F.3d 534, 547 (6th Cir.2001) (citations omitted). In Arizona, an agency may demonstrate it adequately searched for records by providing "affidavits or declarations that provide reasonable detail of the scope of the search.' " *Hodai v. City of Tucson*, 239 Ariz. 34, 365 P.3d 959, 969 (Ct. App. 2016)*, quoting Rugiero v. U.S. Dep't of Justice,* 257 F.3d 534, 547 (6th Cir.2001). "It is the agency's burden to prove the non-existence of the records sought."*Goldgar v. Office of Admin., Exec. Office of the President*, 26 F.3d 32, 34 (5th Cir.1994)).

¶68 To meet its burden, ADC was required to demonstrate that the Department's search for records was reasonably sufficient to locate records responsive to the ACLU's request. ADC failed to meet this burden and the trial court wrongly permitted this insufficient showing.

¶69 Under Federal law, the Department is required to maintain records that authorize ADC to acquire, possess and administer controlled substances. In Northup's deposition, she acknowledged that ADC was a DEA registrant that has imported drugs in the past. [IR 38, Ex. A. p. 31:21-23, p. 33:22-35:7].

Pentobarbital, the narcotic used in the October 2013 executions, is a schedule III drug regulated by the DEA. Code of Federal Regulations (C.F.R.) 1308.13(c)(1)(iii). ADC admitted that the manufacturer of ADC's pentobarbital was Lundbeck, Inc., a foreign supplier. [IR 6]. DEA regulation C.F.R. 1301.11(a) states "every person who manufactures, distributes, **dispenses, imports**, or exports any controlled substance … shall obtain a registration unless exempted by law." ADC does not qualify for any relevant exemption. C.F.R. §§ 1301.22–1301.26.

¶70 As a DEA registrant, ADC is required to maintain registration information for ADC agents responsible for procuring and dispensing controlled substance, as well as an inventory of all controlled substances in ADC's possession. C.F.R. § 1304.03. "Each inventory shall contain a complete and accurate record of all controlled substances on hand on the date the inventory is taken … Controlled substances shall be deemed to be 'on hand' if they are in the possession of or under the control of the registrant." C.F.R. § 1304.11. Every registrant must "maintain on a current basis a complete and accurate record of each substance manufactured, imported, received, sold, delivered, exported, or otherwise disposed of by him/her." C.F.R. § 1304.21.

¶71 In addition to the applicable federal regulations, ADC's policies and procedures require the maintenance of the exact documents the ACLU has requested. In an August 6, 2013 letter from the Federal Public Defender Office to ADC Director Ryan, obtained via the ACLU's record request, FPD requested "the credentials of each IV Team member with respect to any … [DEA] registrations that authorize IV Team members to handle controlled substances." [IR 18]. In response, Director Ryan states "the credentials of the IV team remain the same and are clearly stated in DO 710, Section 1.2.5." [IR 18]. ADC Department Order 710, Section 1.2.5.6 states "documentation of IV team members qualifications, including, training of the team members, shall be maintained by the Department

Director or his designee." [IR 18 – Exhibit E]. As previously noted, federal regulations require "every person who … dispenses, imports, or exports any controlled substance … [to] obtain a registration." C.F,R. § 1301.11(a).

¶72 Regulation 1.2 of the ADC Health Services Technical Manual states "every authorized Primary Care Provider in the Arizona Department of Corrections will have a personal identification number (DEA number) for the purpose of legally prescribing Controlled Substances." [IR 48]. Regulation 7.2 mandates ADC maintain records of: official order forms (DEA Form 222); receipts and invoices for schedule C-II thru V drugs; all inventory records of controlled substances, including the initial and biennial inventories; records of controlled substances distributed or dispensed; reports of theft or loss (DEA Form 106); inventory of drugs surrendered for disposal (DEA form 41); records of transfers of controlled substances between pharmacies; and, DEA registration certification. [IR 48]. Regulation 7.3 states "when issued a DEA registration, a registrant must take an initial inventory which is an actual physical count of all controlled substances in their possession." [IR 48]. According to ADC policy, ADC was required to maintain the DEA registrations and information requested by the ACLU. Without explanation, ADC failed to produce any of the responsive records it is obligated by policy to maintain.

¶73 ADC alone has the burden of demonstrating that it adequately searched for records. *Phx. New Times, L.L.C. v. Arpaio,* 217 Ariz. 533, ¶ 16, 177 P.3d 275, 281 (App.2008). ADC provided the lower court no testimony or evidence that ADC had searched for the requested records, could not locate the requested records, or did not have the requested records. Indeed, ADC attempted to explain their failure to search for records by claiming that the ACLU narrowed its request.

¶74 ADC General Counsel Northup submitted a declaration in support of Defendant's summary judgment motion stating "I had two telephone conversations

with attorney Flood to narrow and clarify the ACLU public records requests. Based upon those conversations, I believe that the copies of the documents that I sent to Attorney Flood on September 20 and 25, 2013, consisted of all the ADC public records that were responsive to the ACLU request, as it was narrowed and clarified by my discussions with attorney Flood." [IR 45]. Northup's statement does not bear weight. Northup failed to offer this statement during her deposition when it could have been subject to cross-examination. [IR 38; Ex. A]. More importantly, after Northup's supposed conversations with Atty. Flood, on September 26, 2013 Attorney Flood wrote in a letter to Northup that the ACLU believed ADC had failed to comply with the ACLU's record request. [IR 1, IR 2, IR 38]. Specifically, Ms. Flood cited ADC's improper and unexplained redactions from the materials released, and ADC's failure to release many records responsive to the ACLU's request, including "DEA Registration information demonstrating each person who will handle the controlled substances is authorized to do so" and "all invoice, order, and procuring information concerning the lethal injection drugs." [IR 1, IR 2, IR 37, IR 38].

¶75 ADC has failed to produce records of federal authorization to procure, possess and administer the lethal injection drug. Without testimony or support in the record that ADC conducted a search for records reasonably calculated to locate all responsive documents, the lower court could not reasonably conclude that ADC did not possess the records ACLU sought, and should have ordered ADC to either produce the records or show cause for why the records, could not be produced.

V. A.R.S. § 13-757(C) is Applicable Only to Human Persons.

¶76 A limited number of ACLU requests involved the identity of the manufacturer or supplier of the execution drugs. ADC refused to provide this information based on their interpretation of A.R.S. § 13-757(C). ADC claimed that

this provision, which protects the identity of "persons" involved in carrying out or assisting with executions in Arizona, also protects the identity of corporations and businesses. In making this determination, ADC ignored the basic requirements of statutory interpretation, failing to look into the legislative history or the intent at the time of the statutes passage.

¶77 The meaning of the term "person" in A.R.S. § 13-757(C) must be interpreted in accordance with the intent of the drafters, starting with examination of the statutory language itself. See, e.g., *Fragoso v. Fell*, 210 Ariz. 427, 430, ¶ 7, 111 P.3d 1027, 1030 (App. 2005) ("we look to the plain language of the statute…as the best indicator of that intent") (citing *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1027, 1030 (1996)). The fact that A.R.S. § 13-757(C) covers human beings is not in dispute. In determining whether the word "persons" in this provision also refers to corporations, the first step is to review A.R.S. 13-105(30), a definitional provision of general applicability to all other Title 13 provisions. The language of A.R.S. 13-105(30) makes clear that throughout Title 13, the use of the word "person" refers to human beings and, depending on the context, may also include businesses and corporations.

¶78 A.R.S. § 13-757(C) is found under chapter A.R.S. § 13-757 "Method of infliction of sentence of death; identity of executioners; license suspension." A.R.S. § 13-757(C) states "the identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure pursuant to title 39, chapter 1, article 2." The plain language of A.R.S. § 13-757(C) protects the "identity of persons" who perform or participate in an execution.

¶79 At the time of the enactment of § 13-757(C) in 1998, the Arizona legislature also enacted the companion § 13-757(D), which prohibits any state licensing board

from suspending or revoking the license of a person for participating in an execution. The meaning of a statute is considered "in light of its place in the statutory scheme." *Grant v. Bd. of Regents of Univ. and State Colls. of Ariz.*, 133 Ariz. 527, 529, 652 P.2d 1374, 1376 (1982) (citing Romero v. Stines, 18 Ariz. App. 455, 503 P.2d 413 (1972)). "Person" in section (D) of A.R.S. 757 refers to human beings, as a reading subsection (D) as corporation is not consistent with the statutory language.

¶80 Also instructive is the Fact Sheet provided by the legislature to the public to explain the scope and impact of § 13-757(C) weeks after its passage. This official publication stated that the law "(c)onceals the identity of those who participate in executions;" there is no mention of concealing the identity of businesses which would be an important and expected fact to bring to the public's attention if accurate. Arizona courts regularly utilize a contemporaneous Fact Sheet as evidence of the intent of the legislature in passing the statute. See, e.g., *Metzler v. BCI Coca-Cola Bottling Co. of Los Angeles*, Inc., 233 Ariz, 133, 139, ¶ 17, 310 P.3d 9, 15, (App. 2013); *Cave Creek Unified School Dist. v. Ducey*, 231 Ariz. 342, 346 n.3, ¶4, 295 P.3d 440, 444 n.3 (App. 2013). When the language of the §§ 13-757(C) and of 757(D) are read together, and considered with the 1998 Fact Sheet, the only reasonable conclusion is that the purpose of these two sections was to protect the identity of human beings who are involved in executions, not corporations.

¶81 The only case involving interpretation of A.R.S. § 13-757(C) introduced into the record was *Landrigan v. Brewer.* CV-10-2246-PHX-ROS, 2010 WL 4269559 (D. Ariz., Oct. 25, 2010); aff'd, 625 F.3d 1144, vacated on other grounds, 131 S. Ct. 445, 178 L. Ed. 2d 346 (2010). In *Landrigan*, ADC sought to withhold from disclosure "any information regarding the drug" it planned to use in the execution and related records as done in the instant case. ADC maintained that A.R.S. § 13-

757(C) prevented the disclosure because it would lead to the identity of individuals participating in an ancillary function in an execution, including a supplier of the drugs. *Id.* at 3-4. The Court rejected this interpretation of the language of A.R.S. § 13-757(C) as being overbroad and found that the statute cannot be read as protecting the disclosure of information on grounds that it could possibly lead to the supplier of the drugs. *Id*. at 12.

¶82 Corroboration that this is the proper interpretation of this statute comes from ADC's own actions. Prior to a planned execution in 2011, ADC voluntarily supplied the names of the suppliers and manufacturers of the execution drugs, the expiration dates, the lot numbers, the routes for the transport of the drugs from other countries, and the notice of FDA action concerning the drugs. [IR 37, IR 38]. As stated in the Answer, attorneys for ADC, Kent Cattani and Jeffrey Zick, acknowledged that: "A.R.S. 13-757(C) provides that information identifying individuals who participate or perform ancillary functions in an execution is confidential." [IR 37; IR 38]. Voluntarily providing information about the various businesses was consistent with ADC's position in 2011 that the statute referred only to human individuals.

¶83 If questions remain about the intent of the legislature in passing a statute after examining the plain language, Arizona courts direct us look to the historical background and the purpose of the statute at the time of passage. See, e.g., *Phx. Newspapers, Inc. v. Dept. of Corr*., 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997). In ascertaining the meaning of a law, courts must consider "the policy behind the statute and the evil it was designed to remedy." *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 ((1990). ADC did not attempt to research the relevant historical background and had no idea of the purpose of the statute at passage. As a result, ADC failed to provide the lower court any valid basis to adopt ADC's expansive self-serving definition of the word "person."

¶84 The lower court rewrites the language of A.R.S. § 13-757(C) under the guise of judicial interpretation, ignoring the statutory scheme under which the statute is written. The lower court quotes *Hobby Lobby*, a case published sixteen years after the language of A.R.S. § 13-757(C) was enacted, writing "'[a] corporation is simply a form of organization used by human beings to achieve desired ends …' Including corporations within the definition of 'persons' is a legal fiction that 'provide[s] protections for human beings.'" [IR 81]; *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

¶85 Evidence there was a problem for corporations who supplied lethal injection drugs at the time the statute was enacted is a pre-requisite to concluding that the statute was aimed to protect the identities of corporations that manufacture or distribute lethal injection drugs. The court notes that A.R.S. § 13-105(30) defines person primarily as a human being but opines, without support or citation, that "clearly the context requires" the court include corporation in the definition of person in A.R.S. § 13-757(C) "to protect from reprisal the shareholders, officers and employees associated with the manufacturers and distributors of the lethal injection drugs at issue." [IR 81]. There is nothing in the record indicating any problem for the suppliers of execution drugs prior to passage of A.R.S. § 13-757(C) in 1998. Developments occurring long after passage of A.R.S. § 13-757(C) have no relevance as to the intent of the legislature when the statute was drafted and passed. If prior to 1998 there had never been a concern from any supplier about their role in executions being publically revealed, the trial court could not conclude a legislator would have *intended* to include language to protect the privacy of the supplier when drafting the provision. A present inability to obtain lethal injection drugs is not relevant to the meaning of the law at the time of passage.

a. Assuming Arguendo A.R.S. § 13-757(C) Protects the Identity of Corporations, the Confidentiality Provisions Should Not Shield Information that would Reveal the Name of Lundbeck, Inc.

¶86 Revealing the names of the suppliers in response to the ACLU's request could not have resulted in any of the alleged harms raised before the lower court. It is undisputed that prior to the ACLU's record request, the manufacturer Lundbeck, Inc., had publicly revealed its role in the execution process. [IR 17, IR 18]. Lundbeck strongly condemned the use of pentobarbital for executions and sought to have distribution to Corrections departments in the United States discontinued. [IR 17, IR 18]. Nor is it disputed that ADC voluntarily released Lundbeck, Inc. name to the ACLU. [IR 6]. These voluntary acts by Lundbeck, Inc. and ADC effectively mooted the need to invoke any right of privacy. ADC cannot meet the burden to demonstrate that production of records would have caused any harm as this cannot be done when the information sought is already known. See, e.g., *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 273 ¶ 25, 159 P.3d 578, 583 (App. 2007) ("Given that the basic facts of the assault are already known through press reports … we fail to see what privacy interests weigh against disclosing").

¶87 The government must specifically demonstrate how a countervailing interest overcomes the strong presumption in favor of disclosure. *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 273, ¶ 22, 159 P.3d 578, 583 (App. 2007). When balancing the strong public interest in favor of disclosure with any countervailing interest argued by the state, the court "must evaluate carefully the public interest that the plaintiff seeks to vindicate in requesting" the documents. *Keegan*, 201 Ariz. at 351, ¶ 30, 35 P.3d at 112. "The public interest increases when there is no other available way to obtain the information" than through the public records being requested. *Scottsdale Unified Sch. Dist. No. 48*, 191 Ariz. at 303, ¶¶ 21 & 24, 955 P.2d at 540.

¶88 It is nonsensical to deny access to critical public records on the grounds that it would reveal the name of an entity that is already publicly known. In reference to a previous disclosure of the names of non-human entities that procured, manufactured and distributed lethal injection drugs in *FPD v. Arizona Department of Corrections*, ADC General Counsel Northup stated that "it didn't make sense to redact out the source of the drugs when it had already been disclosed." [IR 37, IR 38]. As a result of the disclosures by ADC and Lundbeck, Inc., Lundbeck's role in providing lethal injection drugs to ADC was placed into the public domain and the confidentiality provisions of A.R.S. § 13-757(C) are moot. Because Lundbeck's role had previously been revealed, no harm could have resulted from releasing records and information that state Lundbeck's identity. The public interest in the documents outweighs any claimed privacy concerns.

VI. The Trial Court and ADC's Ex-Parte Communication Created Actual Prejudice Against the ACLU.

¶89 Even if the lower court found A.R.S. § 13-757(C) protects the identity of the manufacturer, and any information that may reasonably lead to the discovery of the identity of the manufacturer, ADC still retained the burden of proving how each redaction would reveal the name of a party confidential pursuant to A.R.S. § 13-757(C). *Griffis*, 156 P.3d at 422. ADC had the burden of specifically proving how a countervailing interest outweighed the public right to disclosure. *Phoenix Newspapers, Inc. v. Keegan*, 35 P.3d 105 (App. 2001).The burden of overcoming the presumption favoring disclosure and showing that material harm will result from the disclosure of public records is on the party that seeks non-disclosure. *Phoenix Newspapers, Inc. v. Ellis,* 159 P.3d 578, 580 (App. 2007).

¶90 ADC justified each redaction to the released documents by invoking the confidentiality provisions of A.R.S. § 13-757(C). The ACLU maintained at the time, and still maintains, that information redacted from the invoice, drug

information sheet, and Nembutal package insert, including order dates, delivery dates, billing information, order number, and numerous other unexplained redactions, were improperly redacted in violation of A.R.S. § 39-121. Information such as dates and ADC's own DEA registration information could not possibly reveal the identity of the manufacturer of ADC's lethal injection drugs. ADC General Counsel Northup admitted that "a date in and of itself wouldn't identify where you obtained" the drugs. [IR 38].

¶91 To meet its burden that the redacted records were confidential under A.R.S. § 13-757(C), ADC offered testimony from a witness outside the presence of the ACLU. The ACLU objected on two grounds. First, communication between an ADC witness and the court outside the presence of ACLU counsel would be highly prejudicial, as the ACLU would not have opportunity to cross-examine or rebut testimony proffered by ADC. Secondly, because the hearing was closed to the public and ACLU counsel, and the transcript filed under seal, ADC's explanation for why the material is confidential cannot be examined, contested or appealed.

¶92 An ex parte communication that provides the court with new, un-rebutted factual information on an issue to be decided results in actual prejudice to the party not privy to the communication. *McElhanon v. Hing*, 151 Ariz. 403, 412, 728 P.2d 273, 282 (1986); *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979). "By definition, ex parte contacts are rarely on the record and, therefore, are usually unreviewable. Thus, such contacts cast doubt upon the adversary system." *McElhanon*, 151 Ariz. at 411. In *Crawford v. Washington*, the United States Supreme Court condemned ex parte communications, holding no party should "be prejudiced by evidence which he had not the liberty to cross examine." *Crawford v. Washington*, 541 U.S. 36, 49 (2014). The Arizona Supreme Court holds:

> the purpose of the prohibition against ex parte communications is to prevent the communicating side from gaining an unfair advantage in the

> litigation. The advantage is created … because the communication may influence the judge on an important decision without the absent party being able to rebut or qualify the communication as it is being made and with knowledge of the exact form in which it is made. Such contacts violate the right of every party to a fair hearing, a corollary of which is the right to hear all evidence and argument offered by an adversary. The violation is particularly acute because the calculated secretiveness of such communications strongly suggests their inaccuracy. *In re Evans*, 162 Ariz. 197 (1989).

¶93 On November 9, 2015, the lower court held an evidentiary hearing outside the presence of the ACLU concerning whether information redacted from records released to the ACLU should have been disclosed. [IR 78, IR 80]. ADC witness CarsonAnthony McWilliams testified to material facts concerning the confidentiality of records at issue. [IR 80]. Mr. McWilliams role with ADC, qualifications to testify, and actual testimony remain under seal. [IR 80]. In the two years prior to Mr. McWilliams testimony, ADC failed to provide any testimony or evidence that the redactions made to the invoice, worksheet and package insert were necessary to protect the identity of an entity confidential pursuant to A.R.S. § 13-757(C). ADC's blanket pronouncements that all public records and public information ADC failed to release would reveal the name of the manufacturer fell far short of the required showing under Arizona public records law of a specific, material harm for each record requested. *Phoenix Newspapers, Inc. v. Keegan*, 35 P.3d 105 (App. 2001).

¶94 As previously discussed, the supplier of the pentobarbital, Lundbeck, Inc., was publicly known at the time the lower court decided to conduct its ex parte hearing. [IR 74]. Throughout the litigation, the identity of the manufacturer was the sole basis put forward by the Department to justify the redactions. An ex-parte communication so the court could hear evidence concerning whether the material

redacted information could lead to the discovery of a public known entity cannot be justified on substantive or procedural grounds.

¶95 The ACLU's exclusion from the proceedings allowed ADC to offer un-rebutted factual testimony to the court concerning the merits of ADC's failure to release requested information. [IR 80]. Immediately following the hearing, and outside the presence of ACLU counsel, the court ruled in favor of ADC, citing the testimony of ADC witness McWilliams. [IR 80]. Had the lower court utilized proper procedure, the ACLU would have been able to point out discrepancies between the testimony of ADC's two witnesses, Ms. Northup and Mr. McWilliams. For example, ADC General Counsel Northup testified that "a date" would not reveal the identity of any party confidential pursuant to A.R.S. § 13-757(C). [IR 38]. However, Mr. McWilliams was presumably allowed to enter testimony that a date could lead to the discovery of an entity protected by A.R.S. § 13-757(C), as dates were redacted from documents released to the ACLU. Thus even though Mr. McWilliams' testimony contradicted Northup's, the court accepted Mr. McWilliams' statement as true. [IR 80]. Indeed, the lower court, without the benefit of adversarial cross-examination, accepted all of Mr. McWilliams uncontested testimony as true and accurate, even where it conflicted with previous ADC testimony. It is hard to imagine a more prejudicial proceeding. The ACLU's informed participation was necessary to demonstrate to the court why most, if not all, of the undisclosed information should be released under Arizona public records law.

¶96 The Arizona Code of Judicial Conduct states "a judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter." *Arizona Code of Judicial Conduct, Rule 2.9 Ex-Parte Communications*. The rule is unaltered by a judge's good faith belief in the

process undertaken. *McElhanon*, 151 Ariz. at 409. In this instance, the proposed process did not allow for a reviewable record, meaningful input from the Plaintiff, or the ability to rebut factual testimony offered by ADC concerning a matter central to the case. The level of secrecy in these proceedings creates doubt that the judicial process was conducted in a fair manner.

¶97 ADC argues that the *in camera* testimony provided by Mr. McWilliams to the lower court was done in accordance with Arizona law. [IR 77]. However previous *in camera* hearings authorized by Arizona courts in public records case allowed only a review of relevant documents outside the presence of each side's counsel after briefing and evidentiary showings by both parties. For example in *Schoeneweis v. Hamner*, the Appellate court found the lower court abused its discretion by not conducting an *in camera* review of **documents** "merely incidental to an otherwise private matter." *Schoeneweis v. Hamner*, 223 Ariz. 169, 175, 221 P.3d 48, 54 (App. 2009). In *Griffis v. Pinal County*, the Arizona Supreme Court held "in camera review of **disputed documents** … reinforces this Court's previous holding that the courts, rather than government officials, are the final arbiter of what qualifies as a public record." *Griffis v. Pinal Cty.*, 215 Ariz. 1, 5, 156 P.3d 418, 422 (2007). In contrast, in the present instance, the lower court received testimony from an ADC official outside the presence of a party, the ACLU, seeking access to public records. No Arizona appeals court has authorized an *in camera* proceeding where a government witness is allowed to offer testimony and argument to the court without the possibility of cross-examination or rebuttal.

¶98 The ACLU could not meaningfully present arguments and testimony to the lower court when excluded from ADC witness testimony concerning matters central to the dispute. Resorting to *in camera* review is appropriate only after 'the government has submitted as detailed public affidavits and testimony as possible'" in support of withholding the document. *Wiener v. F.B.I.,* 943 F.2d 972, 979 (9th

Cir. 1991). Full possible disclosure of all matters prior to the utilization of an *in camera* hearing is important because “only the party opposing disclosure will have access to all the facts. This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system.” *Pickard v. Dep't of Justice*, No. 06-CV-00185-CRB (NC), 2015 WL 926183, at *1 (N.D. Cal. Feb. 19, 2015) quoting *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir.Cal.1991) (citations omitted). “By forcing the requesting party to rely on his opponent's representations as to the undisclosed material, the ‘court is deprived of the benefit of informed advocacy to draw its attention to the weaknesses in the withholding agency's arguments.’” *Pickard v. Dep't of Justice*, No. 06-CV-00185-CRB (NC), 2015 WL 926183, at *2 (N.D. Cal. Feb. 19, 2015), (internal citations/quotations omitted). In light of this distortion of the adversarial process, “[g]overnment agencies seeking to withhold documents requested” must disclose as much information as conceivably possible. *Id*. at *1-2.

¶99 In the present instance, before hearing ADC’s witness ex parte, the lower court required no showing that the information ADC redacted from records would reveal the identity of a confidential entity in nearly two years of litigation. The lower court offered no rationale for the necessity of an ex parte evidentiary hearing. Thus, there is no explanation as to why Mr. McWilliams testimony concerning how dates on the invoice and worksheet would lead to the discovery of a confidential party could not be made on the record. So not only are the order dates, delivery dates, and payment due dates from the documents confidential, but the reasons why those dates should remain confidential are secret as well.

¶100 There were less prejudicial means available to the lower court to determine whether information redacted from records released to the ACLU would have revealed the name of a manufacturer or distributor of the pentobarbital. ACLU counsel indicated they would abide by any protective order required by the court to

protect the identity of the witness and/or the information disclosed to the court in camera. [IR 74]. The court rejected the ACLU's offer without explanation. [IR 78, IR 80]. It is important to remember, the identity of the party ADC was attempting to keep secret, Lundbeck, Inc., had already been voluntarily publicly revealed by ADC and Lunbeck, Inc. [IR 6, IR 80]. The non-existent risk to ADC's confidentiality interests were in stark contrast to the real prejudice experienced by the ACLU due to the lower court's ex parte hearing. The ACLU was denied the opportunity to rebut, contest, examine and disprove key evidence supplied to the court concerning the confidentiality of information that ADC's claims would reveal the identity of a publicly known entity, Lundbeck, Inc. In the interest of justice, such a biased proceeding cannot be allowed to stand.

REQUEST FOR ATTORNEYS' FEES AND FEES ON APPEAL

¶101 For the reasons explained above, the trial court abused its discretion in failing to award attorneys' fees under A.R.S. § 39-121.02(B) and (C). Under A.R.S. § 39-121.02(B), "[t]he court may award attorney fees and other legal costs that are reasonably incurred in any action … if the person seeking public records has substantially prevailed." A.R.S. § 39-121.02(C) states that "[a]ny person who is wrongfully denied access to public records . . . has a cause of action . . . for any damages resulting from the denial." Here, ADC wrongfully denied ACLU records they were entitled to under Arizona public records law. ACLU's damages resulting from the denial are the fees and costs it incurred in bringing this action.

¶102 In the context of Arizona public records law, "'wrongful' … simply that the person denied the records was, in fact, entitled to them." *Cox Ariz. Publ'ns*, 175 Ariz. at 14. "The failure to 'promptly furnish' documents constitutes a wrongful denial as a matter of law." *Phoenix New Times*, 217 Ariz. at 538 ¶ 11. Following the amendment of A.R.S. § 39-121.02(B), "[i]t is no longer necessary to

demonstrate bad faith or arbitrary or capricious conduct on the part of the agency." *Id*. at 548 n.1. Defendants have "the burden of establishing that its responses to the [Plaintiff's] requests were prompt given the circumstances surrounding each request." Id. at 538 ¶ 15. Accordingly, Arizona courts have held delays of 141 days and 49 days cannot establish a prompt reply as a matter of law. Id. at 539, 545 ¶¶27, 45. The ACLU has been waiting for nearly three years to receive documents and information responsive to the ACLU's September 17, 2013 records request. ADC's wrongful denial of the ACLU's requests warrants an award of attorneys' fees and costs.

¶103 In addition, pursuant to Arizona Rule of Civil Appellate Procedure 21 and A.R.S.§ 39–121.02(B), the ACLU requests its fees and costs incurred on appeal.

CONCLUSION

¶104 The ACLU respectfully requests that the judgment entered by the trial court be reversed and vacated, that ADC be ordered to produce all public records responsive to ACLU's public record request, that the trial court be directed to enter judgment in favor of Plaintiff, that ACLU be awarded its attorneys' fees and costs incurred in connection with this appeal pursuant to Rule of Civil Appellate Procedure 21 and A.R.S. 39-121.02, and that ACLU be awarded its attorneys' fees and costs incurred below in an amount to be determined by the trial court on remand.

RESPECTFULLY SUBMITTED this 14th day of July, 2016.

By: /s/ *Darrell L. Hill*

Daniel J. Pochoda
Darrell L. Hill
ACLU Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, AZ 85014

Attorneys for Plaintiff-Appellant