

## *Cover v. Idaho Board of Correction*

Case Summary

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In September 2017, Professor Aliza Plener Cover<sup>1</sup> submitted a records request to the Idaho Department of Correction<sup>2</sup> seeking information regarding the lethal injection drugs used by the state during executions.<sup>3</sup> This records request began a legal battle with IDOC that traveled up through the Idaho Supreme Court<sup>4</sup> and finally concluded early this year.<sup>5</sup>

Professor Cover requested information from IDOC regarding, among other things, the drugs used in Idaho's two most recent executions and "drugs that have been or will be purchased/used in future executions."<sup>6</sup> IDOC refused to disclose any information regarding the drugs that had been used in past executions or any drugs that may be available for use in the future, stating that "the disclosure of such information could jeopardize [IDOC's] ability to carry out an execution."<sup>7</sup>

Under the Idaho Public Records Act, enacted in 2015, "[e]very person has a right to examine . . . any public record of this state."<sup>8</sup> Generally speaking, all public records in Idaho are presumed open for inspection.<sup>9</sup> However, several categories of records are exempt from inspection: IDOC "[r]ecords of which the public interest in confidentiality, public safety, security and habilitation clearly outweighs the public interest in disclosure" is one such category exempt from public disclosure.<sup>10</sup> At the time of the litigation in 2018, the Idaho Administrative Code provided that IDOC would not "disclose any . . . information wherein the disclosure of such information could jeopardize the Department's ability to carry out an execution."<sup>11</sup>

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<sup>1</sup> Professor Aliza Cover is an Associate Professor of Law at the University of Idaho College of Law. *Aliza Cover*, U. OF IDAHO C. OF L., <https://www.uidaho.edu/law/people/faculty/alizac> (last visited Feb. 15, 2021). Her areas of research include criminal law and procedure and capital punishment. *Id.*

<sup>2</sup> The Idaho Department of Correction is hereinafter referred to as IDOC.

<sup>3</sup> Verified Petition for a Writ of Mandate to Compel the Disclosure of Public Records at 4, *Cover v. Idaho Bd. of Corr.*, No. CV01-18-03877 (Idaho 4th Jud. Dist. Feb. 27, 2018), [https://www.acluidaho.org/sites/default/files/field\\_documents/2018-02-27\\_verified\\_petition\\_for\\_a\\_writ\\_of\\_mandate.pdf](https://www.acluidaho.org/sites/default/files/field_documents/2018-02-27_verified_petition_for_a_writ_of_mandate.pdf).

<sup>4</sup> *Cover v. Idaho Bd. of Corr.*, 167 Idaho 721, (2020).

<sup>5</sup> Amended Final Judgment at 1, *Cover v. Idaho Bd. of Corr.*, No. CV01-18-03877 (Idaho 4th Jud. Dist. Mar. 31, 2021).

<sup>6</sup> Verified Petition for a Writ of Mandate to Compel the Disclosure of Public Records, *supra* note 3, at 4.

<sup>7</sup> *Id.* at 5. IDOC provided Professor Cover with "no drug labels, no expiration dates, no purchase orders, no receipts, no information about the storage of the drugs, no information about where IDOC got its drugs from, and no communications with drug suppliers or others about acquiring the drugs." *Id.* at 4–5.

<sup>8</sup> IDAHO CODE § 74-102 (2020). "Every person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute." *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> IDAHO CODE § 74-105(4)(a) (2019).

<sup>11</sup> IDAPA § 06.01.01.135.06 (2018).

Professor Cover, represented by the ACLU of Idaho, initiated court proceedings in early 2018 to compel IDOC to either disclose the records or show cause why they should not.<sup>12</sup> Professor Cover argued that disclosure of the information “would not jeopardize the ability to carry out any lawful execution.”<sup>13</sup> IDOC disputed this, stating that “[d]isclosing this information is likely to subject lethal injection chemical sources to significant harassment and pressure, leading to lethal injection chemicals becoming unavailable from those sources.”<sup>14</sup>

In May of 2018, after a hearing, Fourth District Judge Lynn Norton issued a Peremptory Writ of Mandate compelling IDOC to disclose information regarding the drugs used in Idaho’s two most recent executions.<sup>15</sup> The district court weighed the public interest in confidentiality, public safety, and security against the public interest in disclosure and concluded that “the public interest in public safety and security are not endangered if chemicals become unavailable in the future.”<sup>16</sup>

However, in September of 2018, the district court reconsidered and vacated the Peremptory Writ.<sup>17</sup> The parties proceeded to trial in early 2019.<sup>18</sup> After trial, the court determined that IDOC had frivolously denied part of Professor Cover’s records request and compelled IDOC to disclose some records, while allowing IDOC to withhold other information.<sup>19</sup> Specifically, the court required IDOC to disclose identifying information for the source who supplied the drugs used in the 2012 execution of Richard Leavitt<sup>20</sup> but allowed IDOC to withhold identifying information for the source who supplied the drugs used in the 2011 execution of Paul Ezra Rhoades.<sup>21</sup> The source that provided drugs for the Rhoades execution, unlike the source that provided drugs for the Leavitt execution, is considered a potential future source for execution drugs.<sup>22</sup>

<sup>12</sup> Verified Petition for a Writ of Mandate to Compel the Disclosure of Public Records, *supra* note 3, at 3. Under Idaho Code § 74-115(1), “[t]he sole remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings in the district court . . . compel the public agency . . . to make the information available for public inspection . . . .” IDAHO CODE § 74-115(1) (2019).

<sup>13</sup> Verified Petition for a Writ of Mandate to Compel the Disclosure of Public Records, *supra* note 3, at 7.

<sup>14</sup> Order Granting Peremptory Writ of Mandate Requiring Disclosure of Some Records at 6, (CV01-18-03877), [https://www.acluidaho.org/sites/default/files/field\\_documents/2018-05-14\\_order\\_granting\\_peremptory\\_writ\\_of\\_mandate\\_requiring\\_disclosure\\_of\\_some\\_records.pdf](https://www.acluidaho.org/sites/default/files/field_documents/2018-05-14_order_granting_peremptory_writ_of_mandate_requiring_disclosure_of_some_records.pdf).

<sup>15</sup> *Id.* at 8.

<sup>16</sup> *Id.* at 6. “If [lethal injection] chemicals become unavailable, is it a threat to public safety or security? No. . . . If all lethal injection chemicals are unavailable when an execution is scheduled, then such availability would not cause an inmate’s release from prison. Most states wait for different chemicals to become available while some have adopted alternative forms of execution such as firing squad or electric chair. The Court is not aware of any who just release death row inmates into the community.” *Id.*

<sup>17</sup> Findings of Fact and Conclusions of Law at 20, (CV01-18-03877),

[https://www.acluidaho.org/sites/default/files/field\\_documents/2019-03-21\\_findings\\_of\\_fact\\_conclusions\\_of\\_law.pdf](https://www.acluidaho.org/sites/default/files/field_documents/2019-03-21_findings_of_fact_conclusions_of_law.pdf).

<sup>18</sup> *Id.* at 1.

<sup>19</sup> Findings of Fact and Conclusions of Law at 73–77, *supra* note 16.

<sup>20</sup> *Id.* at 64–64. The court required IDOC to disclose a receipt from the “compounding pharmacy that provided the drugs for the Leavitt execution.” *Id.* at 64. The receipt was not for the drugs actually used in the Leavitt execution but for drugs for a future execution; however, IDOC no longer considers that compounding pharmacy a source for execution drugs because it “cannot comply with current regulations.” *Id.* at 64–65.

<sup>21</sup> *Id.* at 65.

<sup>22</sup> *Id.* at 67.

IDOC appealed, asking the Idaho Supreme Court to reverse the lower court’s ruling that IDOC must disclose the Leavitt source; IDOC stated that the identifying information is listed on a receipt for drugs that were purchased for an execution yet to come.<sup>23</sup> Professor Cover cross-appealed, asking the Idaho Supreme Court to reverse the lower court’s ruling that IDOC could withhold the source used in the Rhoades execution.<sup>24</sup>

In June of 2019, the Idaho Board of Corrections made a change to its departmental policy, which the Idaho Legislature approved in January 2020.<sup>25</sup> This change allows IDOC to refuse to disclose “information that identifies or could lead to the identification of any pharmacy, prescriber, manufacturer, compounder, or other entity that supplies or has supplied any chemicals or substances to [IDOC] or any entity that provides or has provided medical supplies or services to [IDOC].”<sup>26</sup>

The new rule, however, did not affect the appeal: in a unanimous decision filed on November 20, 2020, the Idaho Supreme Court did not consider, nor even cite to, the new rule.<sup>27</sup> It instead looked to the rule IDOC relied on in denying the records request—Rule 135. The Court found that, contrary to IDOC’s characterization, there was “no evidence that the Board promulgated Rule 135 as a public records exemption” and held that IDOC must turn over the records to Professor Cover.<sup>28</sup> The Court then remanded the case back to the district court to continue the litigation: the district court was required to first “determine whether any of these records contain personally-identifying information” and then to order IDOC to “release the records to Cover without redaction, except for any personally-identifying information.”<sup>29</sup>

On March 31, 2021, the district court did just that: IDOC was ordered to release all records responsive to Professor Cover’s September 2017 request for information pertaining to the drugs used in the Rhoades and Leavitt executions, as well as any drugs that will be used in future executions.<sup>30</sup> Though IDOC was permitted to redact information that would identify team members of the executions (which Professor Cover had not requested), it was not permitted to redact identifying information about the drug suppliers.<sup>31</sup>

Since the information has become public, the media has tracked down the suppliers of the drugs used in the Rhoades and Leavitt executions and publicly reported on the process IDOC used to obtain those drugs.<sup>32</sup> Idaho has also scheduled its first execution since the 2012 execution

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<sup>23</sup> Rebecca Boone, *Idaho Appeals Ruling Ordering Release of Execution Records*, ASSOCIATED PRESS (May 3, 2019), <https://apnews.com/8be4fb933ae84987849258a0d0c9fbb6>; *Cover v. Idaho Board of Correction*, ACLU OF IDAHO, <https://www.acluidaho.org/en/cases/cover-v-idaho-board-correction> (last visited Feb. 15, 2021).

<sup>24</sup> *Id.*

<sup>25</sup> IDAPA § 06.01.01.135.05(b)(iii) (proposed 2019); Rebecca Boone, *Idaho lawmakers approve execution-drug secrecy rule*, ASSOCIATED PRESS (Jan. 29, 2020), <https://apnews.com/20f207e46e20971180b22e8c7d7befc7>.

<sup>26</sup> *Id.*

<sup>27</sup> *See Cover*, 167 Idaho 721 (2020).

<sup>28</sup> *Id.* at 725.

<sup>29</sup> *Id.* at 735.

<sup>30</sup> Amended Final Judgment, *supra* note 5, at 1.

<sup>31</sup> *Id.* at 2–6.

<sup>32</sup> Rone Tempest, *Here’s How a Salt Lake City Pharmacy Played a Key Role in the Execution of an Idaho Serial Killer*, SALT LAKE TRIBUNE (Apr. 18, 2021, 8:54 AM),

of Richard Leavitt: Gerald Pizzuto is scheduled to be executed by lethal injection on June 2, 2021.<sup>33</sup>

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[https://www.sltrib.com/news/2021/04/18/heres-how-salt-lake-city/?fbclid=IwAR1P\\_YfcgoOmNyqWzS1JGiyF62n63Tvi9iM2vN1MDYqh\\_yPX1-9gSGT22g](https://www.sltrib.com/news/2021/04/18/heres-how-salt-lake-city/?fbclid=IwAR1P_YfcgoOmNyqWzS1JGiyF62n63Tvi9iM2vN1MDYqh_yPX1-9gSGT22g).

<sup>33</sup> Rebecca Boone, *Idaho Sets June Execution Date for GERALD ROSS PIZZUTO JR.*, ASSOCIATED PRESS (May 7, 2021), <https://apnews.com/article/idaho-executions-8b75a9a39320459de3a523cfaf7f503d>.