

August 8, 2019

By Facsimile: (202) 514-1009

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, D.C. 20530-0001

Re: Freedom of Information Act Request

Dear Mr. Hibbard:

Citizens for Responsibility and Ethics in Washington (“CREW”) makes this request for records pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and U.S. Department of Justice (“DOJ”) regulations.

CREW requests all records from February 14, 2019 to the present related to the procurement of pentobarbital, pentobarbital sodium, or Nembutal to be used in federal executions, including without limitation any notifications to or communications with vendors, solicitation information, requests for information, subcontracting leads, and contract awards. Our request includes, but is not limited to, the Office of the Attorney General, the Office of the Deputy Attorney General and the Office of the Associate Attorney General.

Please search for responsive records regardless of format, medium, or physical characteristics. We seek records of any kind, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical material. Our request includes without limitation all correspondence, letters, emails, text messages, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request also includes any attachments to emails and other records.

If it is your position any portion of the requested records is exempt from disclosure, CREW requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. *See* 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. *See Mead Data Central v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A) and DOJ regulations, CREW requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures likely will contribute to a better understanding of relevant government procedures by CREW and the general public in a significant way. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Moreover, the request primarily and fundamentally is for non-commercial purposes. *See, e.g., McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

On July 25, 2019, DOJ filed an addendum to the Federal Bureau of Prisons' execution protocol allowing the use of pentobarbital sodium as the lethal agent in federal executions.¹ The same day, DOJ published a press release confirming that Attorney General William Barr had directed the Federal Bureau of Prisons to adopt the addendum and resume capital punishment after a nearly two decade lapse. The press release states the addendum "closely mirrors protocols used by several states, including currently Georgia, Missouri, and Texas"²

States that use pentobarbital in executions, including Texas, have had an increasingly difficult time obtaining the drug. The manufacturer of pentobarbital requires distributors to sign agreements saying they will not sell the drugs to death penalty states.³ States have subsequently used "compounding pharmacies" as an alternative to licensed manufacturers.⁴ This practice poses an acute risk. The FDA has found that many compounders do not register as outsourcing facilities, which are subject to more regulation,⁵ yet "were engaged in large-scale, non-patient specific compounding like a conventional manufacturer, without complying with premarket approval, labeling, and current good manufacturing practice (GCMP) requirements for their drugs, or compounders that prepared, packed, or held drugs under insanitary conditions."⁶ Attorneys have also "warned that compounded pentobarbital could expire or degrade over time, putting their clients at risk of a painful death that would amount to torture"⁷

The requested records are likely to contribute to public understanding of the process DOJ intends to use to procure an especially difficult to obtain drug, including the extent to which DOJ

¹ *Roane Jr. v. William Barr*, Notice of Adoption of Revised Protocol. Civil Action No. 05-2337. Filed July 25, 2019, available at <https://www.politico.com/f/?id=0000016c-29bc-d88f-a9ec-2dbd798f0000>

² Press Release, Attorney General William P. Barr Directs the Federal Bureau of Prisons to Adopt an Addendum to the Federal Execution Protocol and Schedule the Executions of Five Death-Row Inmates Convicted of Murdering Children, June 25, 2019, available at <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>

³ Chris McDaniel, *Inmates Said The Drug Burned As They Died. This Is How Texas Gets Its Execution Drugs.*, *Buzzfeed*, November 28, 2018, available at https://www.buzzfeednews.com/article/chrismcDaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas?bftwnews&utm_term=4ldqpgc#4ldqpgc

⁴ Chip Brownlee, *The Federal Government Plans to Revive the Death Penalty After 16 Years*, *Slate*, July 25, 2019, available at <https://slate.com/news-and-politics/2019/07/justice-department-bill-barr-orders-revival-federal-executions-lethal-injection.html>

⁵ FDA, *Compounding Laws and Policies*, July 13, 2018, available at <https://www.fda.gov/drugs/human-drug-compounding/compounding-laws-and-policies>

⁶ FDA, *Compounding Oversight*, June 21, 2018, available at <https://www.fda.gov/drugs/human-drug-compounding/compounding-oversight>

⁷ Chris McDaniel, *Inmates Said The Drug Burned As They Died. This Is How Texas Gets Its Execution Drugs.*, *Buzzfeed*, November 28, 2018, available at https://www.buzzfeednews.com/article/chrismcDaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas?bftwnews&utm_term=4ldqpgc#4ldqpgc

considered the risks listed above and how they intend to address those risks. The public has a great interest in ensuring the federal government conducts executions in compliance with all constitutional requirements.

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the public's right to be aware of the activities of government officials, to ensuring the integrity of those officials, and to highlighting and working to reduce the influence of money on politics. CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW intends to analyze the information responsive to this request and to share its analysis with the public through reports, press releases, or other means. In addition, CREW will disseminate any documents it acquires from this request to the public through its website, www.citizensforethics.org. The release of information obtained through this request is not in CREW's financial interest.

CREW further requests that it not be charged search or review fees for this request pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) because CREW qualifies as a member of the news media. See *Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (holding non-profit a "representative of the news media" and broadly interpreting the term to include "any person or organization which regularly publishes or disseminates information to the public").

CREW routinely and systematically disseminates information to the public in several ways. CREW's website receives tens of thousands of page views every month. The website includes blogposts that report on and analyze newsworthy developments regarding government ethics, corruption, and money in politics, as well as numerous reports CREW has published to educate the public about these issues. In addition, CREW posts the documents it receives under the FOIA on its website.

Under these circumstances, CREW satisfies fully the criteria for a fee waiver.

Conclusion

If you have any questions about this request or foresee any problems in fully releasing the requested records, please contact me at [REDACTED] or [REDACTED]. Also, if CREW's request for a fee waiver is not granted in full, please contact our office immediately upon making such a determination.

Where possible, please produce records in electronic format. Please send the requested records to either the email listed above or Lauren White, Citizens for Responsibility and Ethics



in Washington, 1101 K Street, N.W., Suite 201 Washington, D.C. 20005. Thank you for your assistance in this matter.

Sincerely,

Lauren White
Press Associate