

CAUSE NO. _____

**MAURIE LEVIN, NAOMI TERR,
HILARY SHEARD, RAMIRO
HERNANDEZ LLANAS and TOMMY
LYNN SELLS**
Plaintiffs

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

v.

**TEXAS DEPARTMENT OF CRIMINAL
JUSTICE,**
Defendant

_____ JUDICIAL DISTRICT

**PLAINTIFFS’ ORIGINAL PETITION, REQUEST FOR EMERGENCY AND
TEMPORARY RELIEF, AND PETITION FOR WRIT OF MANDAMUS**

TO THE HONORABLE COURT:

PLAINTIFFS Levin, Terr, Sheard, Hernandez Llanas and Sells file suit against the Texas Department of Criminal Justice, seeking a writ of mandamus to compel the disclosure of public information under Section 552.321 of the Public Information Act (“The Act”).

DISCOVERY LEVEL

1. Pursuant to Tex. R. Civ. P. 190.1, discovery is expected to be conducted under Level 2.

PARTIES AND SERVICE

2. Plaintiff Maurie Levin is a lawyer domiciled in Philadelphia, PA. She represents Ramiro Hernandez Llanas, a prisoner **facing death by lethal execution on April 9, 2014**. Similarly, Plaintiff Naomi Terr is a lawyer domiciled in Houston, Texas. She represents Ramiro Hernandez Llanas (**facing death by lethal execution April 9, 2014**). Plaintiff Hilary Sheard is a

lawyer domiciled in Austin, TX. She represents Tommy Lynn Sells, a prisoner **facing execution by lethal execution on April 3, 2014.**

3. Defendant Texas Department of Criminal Justice (“TDCJ”) is an agency of the State of Texas and a “governmental body” for purposes of The Act. Defendant may be served by certified mail addressed to its Director, Brad Livingston, Texas Department of Criminal Justice, Office of the General Counsel, P.O. Box 13084, Capitol Station, Austin, TX 78711-3084.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to Section 552.321 of The Act, which allows a requestor of public information to file suit in a district court for a writ of mandamus to compel a governmental body to make information available for public inspection if the governmental body refuses to supply the public information. The information sought by Plaintiffs has been deemed to be public by the Attorney General. Defendants have informed Plaintiffs that they will not be supplying the information requested.

5. A copy of this petition has also been served upon the Attorney General of Texas, Hon. Greg Abbott at his usual address, P.O. Box 12548. Austin, Texas, 78711. A copy of this petition has also been sent to Sharon Howell, General Counsel, Texas Department of Criminal Justice, via facsimile transmission to 512-936-2159 and email transmission to Sharon.howell@tdcj.state.tx.us

6. Venue is proper in Travis County, Texas under § 553.321(b) of The Act, as one of TDCJ’s main offices is in Travis County, as is TDCJ’s General Counsel’s Office.

FACTS REGARDING THE NEED FOR EMERGENCY RELIEF

7. Mr. Sells is scheduled for execution on April 3, 2014; Mr. Hernandez is scheduled for execution April 9, 2014. The information requested – information the Attorney General has repeatedly deemed to be public – is relevant to an accurate assessment of the viability and constitutionality of the impending executions. Departments of Corrections around the country – including TDCJ - have recently turned to compounded pentobarbital to carry out executions. Because compounding pharmacies operate outside of FDA oversight, it is especially important for TDCJ to disclose essential information about the compounded pentobarbital or drugs it uses, including where the compounded pentobarbital comes from, how it was prepared and who has tested it, so that the representations made about the drug can be properly evaluated to ensure the execution will be carried out in a manner that comports with the Constitution. Executions in Oklahoma and South Dakota performed with compounded pentobarbital appeared to have had serious problems, including the January 9th execution of Michael Lee Wilson, whose last words, after being injected with compounded pentobarbital were “I feel my whole body burning.” Jason Hancock, *Execution secrecy draws criticism in Mo.*, Kan City Star, Feb. 7. 2014, available at <http://www.kansascity.com/2014/02/07/4806740/execution-secrecy-draws-criticism.html>, attached hereto as Exhibit G; Mike Ward, *Are Firing Squads, Gas Chambers Heading to Texas*, Austin Amer. Statesman, Feb 9, 2014, available here: <http://www.statesman.com/news/news/are-firing-squads-gas-chambers-heading-to-texas/ndJTk/> attached hereto as Exhibit H. In October 2012, in South Dakota, Eric Robert was executed using compounded pentobarbital. Witnesses reported that he “appeared to clear his throat and gasp heavily, at which point his skin turned a blue-purplish hue. Mr. Robert opened his eyes and they remained open until his death, and his heart continued beating for 10 minutes after he ceased to breathe.” Missouri Execution: pharmacy will not supply compounded pentobarbital, The Guardian, Feb. 17, 2014, available

here: <http://www.theguardian.com/world/2014/feb/18/missouri-execution-pharmacy-will-not-supply-compounded-pentobarbital>, attached hereto as Exhibit I.

8. Counsel for Defendant has informed plaintiffs that TDCJ will not be disclosing the requested information, but will be requesting an opinion from the Attorney General – despite the fact that the Attorney General has repeatedly deemed the information public. The deadline for TDCJ’s submission of that request is April 1, 2014. Even if Defendants expedited the filing of that request – which they have not said they will do – the Attorney General will not be able to write an opinion before Mr. Sells’ April 3rd scheduled execution.

9. The timing of TDCJ’s statement that they will not disclose the requested information reflects an effort to use improper procedural delay to conceal information that Mr. Sells and Mr. Hernandez Llanas have a right to under state law and state and federal constitutional law. As such, plaintiffs have been forced to file this petition and request for emergency relief regarding these truly "life and death issues" with such potentially drastic consequences.

FACTS REGARDING DEFENDANT'S VIOLATIONS OF LAW

10. On or about March 18, 2014, Petitioner requested public information from the Texas Department of Criminal Justice, including:

- (1) The execution protocol by which they intend to carry out the executions of Mr. Sells and Mr. Hernandez;
- (2) The drug or drugs that will be used;
- (3) The source of the drug or drugs that will be used;
- (4) The date such drugs were ordered, and the date received;
- (5) Any testing conducted on said drugs to ensure potency, integrity, and purity.

See Exhibit A (Public Information Act Requests filed by Plaintiffs).¹

11. On March 20 and 21, counsel for Defendant communicated to Plaintiffs via email transmission, stating that Defendant would not be complying with the requests, but would be seeking an opinion from the office of the Attorney General. *See* Exhibit B. The only information disclosed is the July 2012 Execution Protocol, as well as some information purported to represent testing performed on the drugs. *See* Exhibit B. However, the information supplied does not fulfill the request, and Defendant continues to withhold key information the Attorney General has previously determined to be “public information.” *Id.*

12. On November 18, 2010, in a decision relating to four similar Public Information Act requests, the Texas Attorney General ruled that Defendant was required to disclose the information requested by the four requestors – information that is nearly identical to that requested by Plaintiffs. *See* OR2010-17507 (attached as Exhibit C). Specifically, the Attorney General determined that TEX. GOV'T CODE §552.022(a)(3) mandates the release of information dealing with public expenditures unless the information is expressly confidential. The Attorney General determined that the “special exceptions” exemption under §552.101 did not apply because the Defendant failed to show that the requested information was “highly intimate or embarrassing.” Moreover, the Attorney General determined that §552.151 was inapplicable because none of the information that the Defendant sought to withhold pertained to an employee or officer of TDCJ. Finally, the Attorney General ruled that the TDCJ had failed to meet its burden under §552.108(b)(1), the law enforcement exception.

¹ Plaintiffs filed earlier requests, on March 11, 2014, but were both advised to resubmit the requests, and that responses to the March 11 requests were forthcoming, as apparently they do not encompass the new drugs purchased by TDCJ.

13. Nonetheless, TDCJ continued to refuse to supply the requested information. On December 29, 2010, F. Clinton Broden filed a Petition for Writ of Mandamus to compel compliance with the Attorney General's Order. On January 10, 2011, after hearing argument, the 261st Judicial District Court, Travis County, issued an Order granting Broden's Petition, and ordering TDCJ to immediately disclose the requested information. *See Broden v. TDCJ*, No. D-1-GN-10-004493 (Jan. 10, 2011). *See* Exhibit D.

14. The following year TDCJ once again sought an opinion from the Attorney General, asserting that information about the Department's execution protocol and the procurement and use of lethal injection drugs was protected from disclosure. The Attorney General once again rejected that assertion in Open Records Letter No. OR2012-10208. *See* Exhibit E. In OR2012-10208 the Attorney General found that TDCJ could not find shelter in the physical safety exception recognized in *Texas Department of Public Safety v. Cox Newspapers, L.P.*, 343 S.W.3d 112 (Tex. 2011), as it failed to establish that "disclosure of the information at issue would create a substantial threat of physical harm to any individual." That opinion also rejected the assertion that the sought after information was exempted from disclosure under the "law-enforcement" exception, as TDCJ's argument that the disclosure would disrupt the operations of the suppliers or otherwise interfere with law enforcement was "too speculative."

15. In short, every attempt TDCJ has made to assert that the information Plaintiffs' seek is protected has been defeated.

16. Defendant TDCJ has not appealed OR2010-17507, OR2012-10208, or OR2012-14446, and the time for doing so has expired. *See* §552.324(b) Defendant is required to release the requested information. *Thomas v. Cornyn*, 71 S.W.3d 473, 481-482 (Tex. App.—Austin 2002, no pet.).

17. Although it has stated it will do so, Defendant TDCJ has not filed any requests for Attorney General opinions asserting that the information sought by plaintiffs is protected from disclosure. TDCJ must comply with existing law. *Id.*

**THE INFORMATION REQUESTED IS PUBLIC INFORMATION AND NOT
EXCEPTED FROM DISCLOSURE**

18. The information requested by plaintiffs is almost identical to the information sought by the requestors and which resulted in the judgment releasing the information in *Broden v. TDCJ*, No. D-1-GN-10-004493 (Jan. 10, 2011) as well as Attorney General Opinions OR2010-17507, OR2012-10208, and OR2012-14446. For the reasons stated previously by this Court and by the Attorney General in these letters, this Court should likewise hold that the information requested is public and must be disclosed immediately.

19. Plaintiffs are entitled to mandamus relief under the statute. The Attorney General has repeatedly ruled that the requested information is public information and not excepted from disclosure under The Act. TDCJ has failed to provide the information requested. Tex. Gov't Code § 552.321(a) (West 2004).

APPLICATION FOR A TEMPORARY RESTRAINING ORDER

20. Plaintiffs seek a Temporary Restraining Order requiring Defendant to disclose the requested public information.

21. The plaintiffs have notified the defendant regarding their application for a temporary restraining order and the hearing for same in compliance with T.R. Civ. P. 680 and Travis County Local Rule 7.3(a).

22. Plaintiffs' application for a temporary restraining order is authorized by Texas Civil Practice & Remedies Code Section 65.011 (1), (2) and (3).

A. Equitable Principles Under Texas Law are Satisfied.

23. Plaintiffs plead a cause of action against defendants. The first injunction requirement is for the applicant to plead a cause of action against the defendants. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). The plaintiffs' allegations are detailed in this petition.

24. Plaintiffs Have a Probable Right to the Relief Sought. An applicant need not prove that it will prevail on the merits at trial, but is only required to show a probable right to relief on the merits and a probable injury in the interim. *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968).

25. Plaintiffs have alleged in Paragraphs 7-18 that the information requested of Defendant has been determined to be "public information" by the Attorney General on numerous occasions and that, as such, must be disclosed by Defendant upon request. Plaintiffs also have alleged that Defendant refuses to comply with the law by refusing to disclose this public information. Plaintiffs' allegations are supported by evidence attached to this pleading and can be further supported by evidence at a hearing before the Court.

26. Therefore, Plaintiffs have a probable right to obtain the relief they seek.

27. Plaintiffs Will Suffer a Probable, Imminent, and Irreparable Injury. An injury is irreparable if there is no adequate remedy at law as where, for example, a prevailing applicant could not be compensated adequately in damages, or if damages cannot be measured by any certain pecuniary standard. *Benefield v. State*, 266 S.W.3d 25, 30 (Tex. App. - Houston [1 Dist.] 2008, no pet.). This is the case here. If the Plaintiffs' application is not granted, the Plaintiff will suffer immediate and certain injury. Harm is imminent because Defendant is scheduled to carry out the executions on April 3 and April 9 under conditions that may result in constitutional violations. Absent the Court's immediate action, the release of the requested

information (which will reveal whether the execution process can pass constitutional muster), will not occur until much later. The Defendant's failure to disclose the requested public information will visit irreparable damage upon the Plaintiffs. It will cause immediate damage to the prisoners' ability to protect their constitutional right to be free from cruel and unusual punishment. Monetary damages, even if available, would be nearly impossible to determine and could not compensate for this harm. Therefore, the damage to Plaintiff is probable, imminent and irreparable.

28. Although the Court is not required to consider the balance of equities or interests in deciding whether to grant an application for equitable relief, it is important to note that the defendant would not suffer any harm by disclosing the information that it is already legally obligated to provide. The Attorney General has already performed its analysis of this issue and made this determination in a number of Opinions. Therefore, a temporary restraining order will not prejudice Defendant.

29. Plaintiffs are willing and able to post bond. However, Plaintiffs note that under TEX. R. CIV. P. 684, because defendant is a governmental entity, it has no pecuniary interest in the suit and no monetary damages can be shown, therefore the Court has discretion to fix the sum of the bond.

30. Plaintiffs' application for a temporary restraining order is supported by the following exhibits:

- a. A true and correct copy of Plaintiffs' Public Information Act Requests sent to Defendant sent on or about March 18, 2014, attached and incorporated herein as Exhibit A;

- b. True and correct copies of March 20, 21 and 25, 2014, email communications between Plaintiffs and Defendant's counsel, disclosing limited information and stating Defendant would not disclose other information and would seek an Attorney General's opinion, attached and incorporated herein as Exhibit B;
- c. A true and correct copy of Attorney General Open Records Letter Ruling OR2010-17507, dated November 18, 2010, ruling that information nearly identical to that requested by Plaintiffs was "public information" that must be disclosed, attached and incorporated herein as Exhibit C;
- d. A true and correct copy of an Order by the 261st Judicial District Court, Travis County, in *Broden v. TDCJ*, No. D-1-GN-10-004493 (Jan. 10, 2011), granting Plaintiff F. Clinton Broden's Petition and ordering TDCJ to immediately disclose requested information nearly identical to that requested by Plaintiffs herein, attached and incorporated herein as Exhibit D;
- e. A true and correct copy of Attorney General Open Records Letter Ruling OR2012-10208, ruling that information nearly identical to that requested by Plaintiffs was "public information" that must be disclosed, attached and incorporated herein as Exhibit E;
- f. A true and correct copy of Attorney General Open Records Letter Ruling OR2012-14446, ruling that information nearly identical to that requested by Plaintiffs was "public information" that must be disclosed, attached and incorporated herein as Exhibit F; and

- g. True and correct copies of articles in the news media relating to the use of pentobarbital in recent executions, attached and incorporated herein as Exhibits G, H and I.

REQUEST FOR TEMPORARY INJUNCTION

31. Plaintiffs ask the Court to set their application for temporary restraining order/temporary injunction for a hearing, and after the hearing, issue a temporary injunction against the defendant.

32. Plaintiff has joined all indispensable parties under TEX. R. CIV. P. 39.

REQUEST FOR DISCLOSURES

33. Pursuant to TRCivP 194 of the Texas Rules of Civil Procedure, Defendant is requested to disclose, within 50 days of service of this request, the information or material described in TRCivP 194.2. Defendant is further reminded of its obligation to supplement their initial responses in accordance with TRCivP 193. Defendant's initial and supplemental responses should be served upon Plaintiffs' attorneys at the law offices of Deats, Durst, Owen & Levy, P.L.L.C., 1204 San Antonio St., Ste. 203, Austin, Texas 78701.

RELIEF SOUGHT

34. Because Defendant TDCJ has refused to supply public information, Plaintiffs seek appropriate declaratory and/or injunctive relief under Chapter 552, including a writ of mandamus compelling TDCJ to make the requested information immediately available for public inspection. Plaintiffs seek appropriate declaratory relief that the information sought is public under the Texas Public Information Act and also appropriate injunctive relief compelling defendant to disclose the information sought, as set out herein. Plaintiffs further seek a writ of mandamus compelling the disclosure of this information, pursuant to Chapter 552.

35. As the Court can see, time is truly of the essence. Mr. Tommy Sells is scheduled for execution on April 3, 2014. Mr. Hernandez Llanas is scheduled for execution April 9, 2014. Mr. Sells' and Mr. Hernandez Llanas' scheduled executions will be the first to be carried out with drugs newly procured by TDCJ. Without information about where the drugs come from, and the purity, potency, and integrity of those drugs, neither Mr. Hernandez Llanas nor Mr. Sells can evaluate the risk that their executions will subject them to cruel and unusual pain in violation of the Eighth Amendment.

36. Plaintiffs seek an award of costs of litigation and attorney's fees against TDCJ, including an appropriate award of contingent appellate fees and post-judgment interest on such award.

CONDITIONS PRECEDENT

37. Pursuant to Tex. R. Civ. P. 54, all conditions precedent have been performed or have occurred.

PRAYER

38. Upon temporary and/or final hearing, Plaintiffs pray that this Court issue a writ of mandamus requiring Defendant TDCJ to provide immediately to Plaintiffs for their inspection, or copies, if requested, all records that contain information responsive to Plaintiffs' requests for information, dated March 18, 2014; and award Plaintiffs their court costs, costs of litigation, and reasonable attorneys fees. Plaintiffs further pray for such other relief, whether at law or in equity, to which they may show themselves to be justly entitled.

Respectfully submitted,

DEATS, DURST, OWEN & LEVY, P.L.L.C.
1204 San Antonio, Suite 203

Austin, Texas 78701
512/474-6200
512/474-7896 - Fax

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VERIFICATION

STATE OF PENNSYLVANIA '
COUNTY OF PHILADELPHIA '

BEFORE ME, a notary public in and for Travis County, Texas, on this day personally appeared Maurie Levin who being by me duly sworn on her oath deposed and said that she is a plaintiff in the above entitled and numbered cause; that she has read the above and foregoing Petition; and the facts stated in paragraphs 2, and 7-17, therein, are true and correct and within her personal knowledge; and that there is no legal impediment to the making of this verification.

[Handwritten signature of Maurie Levin]

Subscribed and sworn to before me by Maurie Levin as agent of plaintiffs, this 26th day of March 2014, to certify which my hand and seal of office.

[Handwritten signature of Notary Public]
Notary Public in and for Philadelphia County, PA
My Commission expires: 1/7/2017

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Jillian Harig, Notary Public
City of Philadelphia, Philadelphia County
My Commission Expires Jan. 7, 2017
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES
Printed/stamped name of Notary