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SUSAN LAPSLEY
 Director

Jane Bowen
 JANE BOWEN
 SECRETARY OF STATE

Date: August 17, 2007

To: Michael M. Darrow

From: Chapter Two Compliance Unit

Subject: **2007 OAL DETERMINATION NO. 11(S)**
(CTU 07-0709-01)
 (Issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f)(2)(E))

Petition challenging as an underground regulation an Operational Plan #30 entitled "Inmate Visiting" issued by the R.J. Donovan Correctional Facility.

On July 9, 2007, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether the publication you challenge is an underground regulation. The publication is Operational Plan #30 revised in 2007 by the R.J. Donovan Correctional Facility at San Diego (RJD), entitled "Inmate Visiting."

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA). Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

Generally, a rule which meets the definition of a "regulation" in Government Code section 11342.600¹ is required to be adopted pursuant to the APA

In some cases, however, the Legislature has chosen to establish exemptions from the requirements of the APA.

Penal Code section 5058 establishes exemptions expressly for the California Department of Corrections and Rehabilitation (CDCR):

(c) The following are deemed not to be "regulations" as defined in Section 11342.600 of the Government Code:

¹ "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

(1) Rules issued by the director applying solely to a particular prison or other correctional facility...

This exemption is called the “local rule” exemption. It applies only when a rule is established for a single correctional institution. Your petition challenges an Operational Plan #30 issued by RJD. By its own terms, it applies only to inmates and visitors at RJD.

In *In re Garcia* (67 Cal.App.4th 841), the court discussed the nature of a “local rule” dealing with correspondence between inmates at Richard J. Donovan Correctional Facility (Donovan):

The Donovan inter-institutional correspondence policy applies solely to correspondence entering or leaving Donovan. It applies to Donovan inmates in all instances.

...

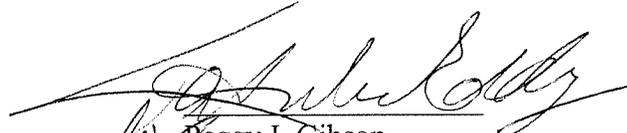
The Donovan policy is not a rule of general application. It applies solely to Donovan and, under Penal Code section 5058, subdivision (c)(1), is not subject to APA requirements.

Similarly, the Operational Plan #30 entitled “Inmate Visiting” issued by RJD applies only to inmates and visitors at RJD. Similar inmates and visitors housed at other institutions are controlled by that institution’s visiting policies. Therefore, the Operational Plan #30 is a “local rule” and is exempt from compliance with the APA.²

Date: August 17, 2007


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² For this reason, pursuant to subdivision (f)(2)(E) of section 270, a rule which is included in a statutory exemption is the proper subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review ... demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be used to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

(A) The challenged rule has been superseded.

(B) The challenged rule is contained in a California statute.

(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

(D) The challenged rule has expired by its own terms.

(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule. (Emphasis added.)