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Date: August 3, 2007
 To: Cesar Uribe
 From: Chapter Two Compliance Unit
 Subject: **2007 OAL DETERMINATION NO. 7 (S)**
(CTU 2007-0604-01)
 (Issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f)(2)(B))

Petition challenging as an underground regulation language in Department Operations Manual issued by the Department of Corrections and Rehabilitation section 54100.25, which states: "The appeal inquiry is confidential and shall not be provided to the inmate."

On June 4, 2007, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination whether the rule you challenge is an underground regulation. The rule you challenge as an alleged underground regulation is contained in section 54100.25 in the Department Operations Manual (DOM) issued by the Department of Corrections and Rehabilitation (CDCR) and provides: "The appeal inquiry is confidential and shall not be provided to the inmate."

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.

Your petition states that you asked that various personnel actions be taken against a staff member at Corcoran State Prison. The matter was investigated and you were given the disposition of the investigation, which you appealed and requested the material on which the investigation was based. This information, however, was held to be confidential pursuant to the language quoted above in section 54100.25 of the DOM.

In determining whether a challenged rule is a "regulation" that should be adopted pursuant to the APA, OAL looks to see whether the challenged rule is merely a restatement of existing law. A rule which is contained in a California statute does not meet the definition of a "regulation" in Government Code section 11342.600 and is, therefore, not an underground regulation.¹

¹ Government Code section 11342.600 defines "regulation" to mean "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by

DOM section 54100.25 is a restatement of Penal Code sections 832.5 and 832.7. Penal Code section 832.5 requires:

- (a) (1) Each department or agency in this state that employs peace officers shall establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public.
- (2) Each department or agency that employs custodial officers, as defined in Section 831.5, may establish a procedure to investigate complaints by members of the public against those custodial officers employed by these departments or agencies, provided however, that any procedure so established shall comply with the provisions of this section and with the provisions of Section 832.7.

...

The procedure for investigating complaints required by Penal Code section 832.5 is contained in DOM section 54100.25, and, pursuant to Penal Code section 832.5, must comply with Penal Code section 832.7 which states:

- (a) **Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential** and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

....

- (e) (1) The department or agency shall provide written notification to the complaining party **of the disposition of the complaint** within 30 days of the disposition. (Emphasis added.)

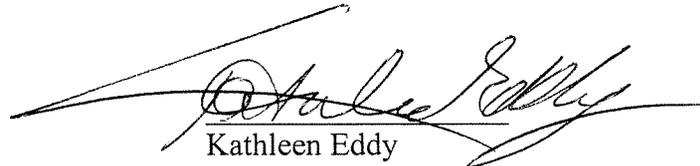
The investigation procedure required by Penal Code section 832.5 is found in DOM section 54100.25, in which it is called an "appeal inquiry." The procedure is the internal investigation of allegations of custodial staff misconduct. It is conducted by CDCR staff, not a grand jury, a district attorney's office, or the Attorney General's office. The information discovered during the investigation of the alleged misconduct would be part of the staff member's personnel records.

The provision challenged in DOM section 54100.25 regarding the confidentiality of personnel records is a restatement of the requirements of the Penal Code sections 832.5 and 832.7. DOM section 54100.25 does not further "implement, interpret, or make specific" these sections. Therefore, the challenged language is not an underground regulation. The facts presented in the

any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

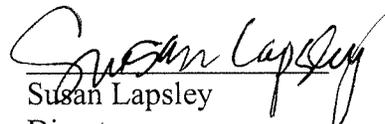
petition demonstrate that the specific language is “contained in a California statute.”² It does not meet the definition of a “regulation” as defined in Government Code section 11342.600, and is not required to be adopted as a regulation pursuant to the APA.

Date: August 3, 2007



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² For this reason, pursuant to subdivision (f)(2)(B) of section 270, it 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.)