

**OFFICE OF ADMINISTRATIVE LAW**

300 Capitol Mall, Suite 1250  
 Sacramento, CA 95814  
 (916) 323-6225 FAX (916) 323-6826  
 E-Mail: staff@oal.ca.gov



2008 MAY 30 AM 8:41

**SUSAN LAPSLEY**  
 Director

Date: May 30, 2008

To: Richard Burgos

From: Chapter Two Compliance Unit

Subject: **2008 OAL DETERMINATION NO. 7(S)**  
**(CTU2008-0422-03)**  
 (Summary Disposition issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a court order issued by Superior Court, County of San Joaquin and Penal Code section 4024.1.

On April 22, 2008, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a court order and a provision in the Penal Code are underground regulations. The court order was issued by the Superior Court, County of San Joaquin, case no. 43450, *In the Matter of Johnnie A. Smith, et al., for Writ of Habeas Corpus* and *In the Matter of Daniel S. Gonzales, et al., for Writ of Habeas Corpus* case no. 44255. You also allege that Penal Code section 4024.1 is an underground regulation.

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).<sup>1</sup> 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 11342.600<sup>2</sup> is required to be adopted pursuant to the APA. In some cases, however, the

<sup>1</sup> Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

<sup>2</sup> "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.

Legislature has chosen to establish exemptions from the requirements of the APA.

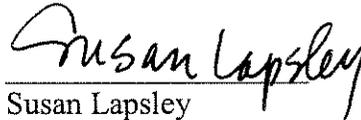
With respect to the court order, pursuant to Government Code section 11340.9 the APA does not apply to “[a]n agency in the judicial or legislative branch of the state government.”<sup>3</sup> A decision issued by a superior court is issued by an agency in the judicial branch of state government<sup>4</sup> and is therefore exempt from compliance with the APA. The court order that you challenge is therefore not an underground regulation.

With respect to Penal Code section 4024.1, “regulation” is defined in Government Code section 11342.600, as “...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....” Penal Code section 4024.1 was adopted by the Legislature, not a state agency, and therefore does not meet the definition of a “regulation.” Therefore, the Penal Code section that you challenge is not an underground regulation.

For the reasons discussed above, we find that the court order and Penal Code section 4024.1 challenged by your petition are not underground regulations.<sup>5</sup>

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

Date: May 30, 2008

  
Susan Lapsley  
Director

  
Peggy J. Gibson  
Staff Counsel

---

<sup>3</sup> “This chapter [APA] does not apply to any of the following: (a) An agency in the judicial or legislative branch of the state government....”

<sup>4</sup> Government Code section 900.3:

A “judicial branch entity” is a public entity and means any superior court, court of appeals, the Supreme Court, the Judicial Council, or the Administrative Office of the Courts.

<sup>5</sup> Pursuant to subdivision (f)(2)(B) and (E) of section 270, OAL issues this 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.)**