

OFFICE OF ADMINISTRATIVE LAW

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SUSAN LAPSLEY
Director

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: November 29, 2010

To: Lawrence Bittaker

From: Chapter Two Compliance Unit

Subject: **2010 OAL DETERMINATION NO. 28(S)**
(CTU2010-0930-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation California Code of Regulations, title 15, section 3321(a)(3), titled "Confidential Material"

On September 30, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether California Code of Regulations, title 15, section 3321(a)(3), titled "Confidential Material" constitutes an underground regulation. Section 3321 is attached hereto as Exhibit A.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,¹ which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

The following definitions shall apply to the regulations contained in this chapter:

(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.

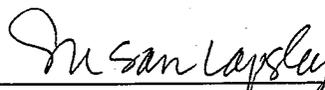
The section you challenge as underground regulations, California Code of Regulations, title 15,

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.

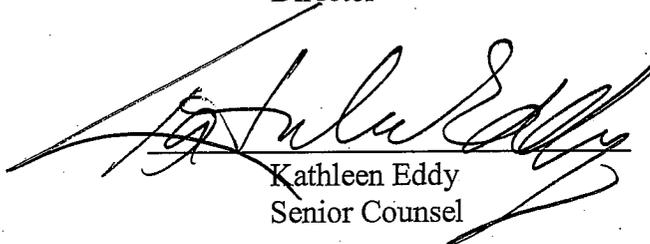
section 3321(a)(3) was duly adopted as regulatory amendments pursuant to the APA and filed with the Secretary of State. Section 3321 was originally filed with the Secretary of State on August 7, 1987, as part of an emergency regulatory action containing several sections in addition to section 3321. The Certification of Compliance for that emergency regulatory action was disapproved for reasons unrelated to the text of section 3321. Another emergency regulatory action containing section 3321(a)(3) and several other sections was filed with the Secretary of State on January 4, 1988, and the Certificate of Compliance was again disapproved for reasons unrelated to the text of section 3321. The emergency regulatory action was filed with the Secretary of State for a third time on June 2, 1988. The Certificate of Compliance for that emergency action was approved by OAL and filed with the Secretary of State on October 26, 1988. The text for section 3321(a)(3) remained the same throughout this process. Section 3321(a)(3) has not been amended since its adoption.

Because the rule you challenge in your petition is a properly adopted regulation, we find that it is not an underground regulation.²

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



SUSAN LAPSLEY
Director



Kathleen Eddy
Senior Counsel

Copy: Matthew Cate
Tim Lockwood

² The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) 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 issued 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.)

Exhibit A

§ 3321. Confidential Material.

(a) The following types of information shall be classified as confidential:

- (1) Information which, if known to the inmate, would endanger the safety of any person.
- (2) Information which would jeopardize the security of the institution.
- (3) Specific medical or psychological information which, if known to the inmate, would be medically or psychologically detrimental to the inmate.
- (4) Information provided and classified confidential by another governmental agency.

(b) Uses of specific confidential material.

(1) No decision shall be based upon information from a confidential source, unless other documentation corroborates information from the source; or unless the circumstances surrounding the event and the documented reliability of the source satisfies the decision maker(s) that the information is true.

(2) Any document containing information from a confidential source shall include an evaluation of the source's reliability, a brief statement of the reason for the conclusion reached, and a statement of reason why the information or source is not disclosed.

(3) The documentation given to the inmate shall include:

(A) The fact that the information came from a confidential source.

(B) As much of the information as can be disclosed without identifying its source including an evaluation of the source's reliability; a brief statement of the reason for the conclusion reached; and, a statement of reason why the information or source is not disclosed.

(c) A confidential source's reliability may be established by one or more of the following criteria:

(1) The confidential source has previously provided information which proved to be true.

(2) Other confidential source have independently provided the same information.

(3) The information provided by the confidential source is self-incriminating.

(4) Part of the information provided is corroborated through investigation or by information provided by non-confidential sources.

(5) The confidential source is the victim.

(d) Filing confidential material.

(1) Only case information meeting the criteria for confidentiality shall be filed in the confidential section of an inmate's/parolee's central file.

(2) Proposed confidential documents shall be reviewed, signed, and dated by a staff person at the correctional counselor III, parole agent III, correctional captain, or higher staff level to indicate approval of the confidential designation and placement in the confidential section of the central file.

(3) Classification committees shall review the material filed in the confidential folder of each case considered. Any material not approved but designated confidential shall be removed from the folder and submitted to the designated staff person for review and determination.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 1798.34, 1798.40, 1798.41 and 1798.42, Civil Code; Section 6255, Government Code; Sections 2081.5, 2600, 2601, 2932, 5054 and 5068, Penal Code; and Illinois v. Gates , 462 U.S. 213 (1983).

HISTORY

1. Repealer and new section filed 8-7-87 as an emergency; operative 8-7-87 (Register 87, No. 34). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 12-7-87.
2. Certificate of Compliance as to 8-7-87 order transmitted to OAL 12-4-87; disapproved by OAL (Register 88, No. 16).
3. Repealer and new section filed 1-4-88 as an emergency; operative 1-4-88 (Register 88, No. 16). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 5-3-88.
4. Certificate of Compliance as to 1-4-88 order transmitted to OAL 5-3-88; disapproved by OAL (Register 88, No. 24).
5. Repealer and new section filed 6-2-88 as an emergency; operative 6-2-88 (Register 88, No. 24). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 9-30-88.
6. Certificate of Compliance transmitted to OAL 9-26-88 and filed 10-26-88 (Register 88, No. 50).
7. Amendment of subsection (c)(4) and Note filed 8-30-99 as an emergency; operative 8-30-99 (Register 99, No. 36). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 2-8-2000 or emergency language will be repealed by operation of law on the following day.
8. Certificate of Compliance as to 8-30-99 order transmitted to OAL 2-7-2000 and filed 3-21-2000 (Register 2000, No. 12).