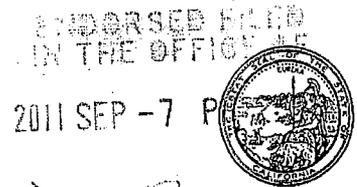


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Debra Bowen
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SECRETARY OF STATE

Date: September 7, 2011

To: Ira Parthemore

From: Chapter Two Compliance Unit

Subject: **2011 OAL DETERMINATION NO. 19 (S)**
(CTU2011-0811-02)
(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 Department of Corrections and Rehabilitation Form 7385, titled "Authorization for Release of Information"

On August 11, 2011, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether California Department of Corrections and Rehabilitation (CDCR) Form 7385, titled "Authorization for Release of Information" constitutes an underground regulation. The challenged rule is attached hereto at 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). Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment.

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... (Emphasis added.)

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.

The form you challenge as an underground regulation, CDCR Form 7385, titled "Authorization for Release of Information" was incorporated by reference into California Code of Regulations, title 15, section 3076.4. "Incorporation by reference" is defined in California Code of Regulations, title 1, section 20 (a) to mean:

...the method whereby a regulation printed in the California Code of Regulations makes provisions of another document part of that regulation by reference to the other document."

Also, California Code of Regulations, title 1, section 20 (e) states:

(e) Where a regulation which incorporates a document by reference is approved by OAL and filed with the Secretary of State, the document so incorporated shall be deemed to be a regulation subject to all provisions of the APA.

Therefore, a document incorporated by reference by a properly adopted regulation has the same force and effect of the properly adopted regulation. California Code of Regulations, title 15, section 3076.4 states:

(c) The C&PR shall review the CDC Form 128-C and the inmate's central file.

....

(2) If the inmate is not sentenced to death or to life without the possibility of parole, medical staff shall explain the recall of commitment process to the inmate within 48 hours of notification and arrange for the inmate to designate a family member or other outside agent on *CDCR Form 7385 (Rev. 09/09), Authorization for Release of Information, which is incorporated by reference*. The inmate's designee shall be informed about the recall of commitment process and the inmate's medical condition. If the inmate is mentally unfit to designate a family member or other outside agent, medical staff shall contact the inmate's emergency contact listed on the CDC Form 127 (Rev. 06/01), Notification in Case of Death, Serious Injury, or Serious Illness, which is incorporated by reference, and advise them of the recall process. (Emphasis added.)

....

California Code of Regulations, title 15, section 3076.4 is a properly adopted regulation and was filed with the Secretary of State on July 7, 2011, pursuant to the APA. It was an emergency adoption pursuant to Penal Code section 5058.3(a)(2). A Certificate of Compliance must be transmitted to OAL by December 14, 2011, or the emergency language will be repealed by operation of law on the following day.

Thus, CDCR Form 7385 is part of a properly adopted regulation and cannot be an underground regulation.²

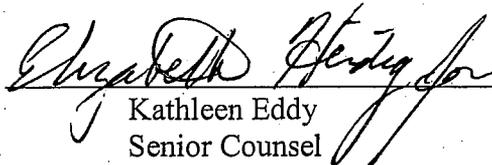
² The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

(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.

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



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Assistant Chief Counsel/
Acting Director



Kathleen Eddy
Senior Counsel

Copy: Matthew Cate
Tim Lockwood

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- (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

AUTHORIZATION FOR RELEASE OF INFORMATION

YOUR INFORMATION			
Last Name:	First Name:	Middle Name:	Date of Birth:
Address:	City/State/Zip:	CDC/YA Number:	

Person/Organization Providing the Information	Person/Organization to Receive the Information
Name: _____	Name: _____
Address: _____	Address: _____
City/State/Zip: _____	City/State/Zip: _____
Phone #: (____) _____	Phone #: (____) _____
Fax Number: (____) _____	Fax Number: (____) _____
[45 C.F.R. § 164.508(c)(1) (iii) & Civ. Code § 56.11(e), (f)]	

Description of the Information to be Released (Provide a detailed description of the specific information to be released) <small>[45 C.F.R. § 164.508(c)(1)(i) & Civ. Code §§ 56.11(d) & (g)]</small>		
<input type="checkbox"/> Medical	<input type="checkbox"/> Mental Health	<input type="checkbox"/> Genetic Testing
<input type="checkbox"/> Dental	<input type="checkbox"/> Substance Abuse/Alcohol	<input type="checkbox"/> Communicable Disease
<input type="checkbox"/> HIV	<input type="checkbox"/> Psychotherapy Notes	<input type="checkbox"/> Other (Please Specify)

For the following period of time: From _____ (date) to _____ (date)		

Description of Each Purpose for the Use or Release of the Information (Indicate how the information will be used) <small>[45 C.F.R. § 164.508(c)(1)(iv)]</small>		
<input type="checkbox"/> Health Care	<input type="checkbox"/> Personal Use	<input type="checkbox"/> Legal
<input type="checkbox"/> Other (please specify) _____		

Will the health care provider receive money for the release of this information?

[45 C.F.R. § 164.524 (c) (4) (i), (ii)]

Reasonable fees may be charged to cover the cost of copying and postage.

This authorization for release of the above information to the above-named persons/organizations will expire on: _____ (date). [45 C.F.R. § 164.508(c)(1)(v) & Civ. Code § 56.11(h)]

I understand:

- I authorize the use or disclosure of my individually identifiable health information as described above for the purpose listed. I understand that this authorization is voluntary. [45 C.F.R. § 164.508(c)(2)(i)]
- I have the right to revoke this authorization by sending a signed notice stopping this authorization to the health Records department at my current institution. The authorization will stop further release of my health information on the date my valid revocation request is received in the Health Records department. [45 C.F.R. § 164.508(c)(2)(i) & Civ. Code § 56.11(h)]
- I am signing this authorization voluntarily and that my treatment will not be affected if I do not sign this authorization. [45 C.F.R. § 164.508(c)(2)(ii)]
- Under California law, the recipient of the protected health information under the authorization is prohibited from re-disclosing the information, except with a written authorization or as specifically required or permitted by law. If the organization or person I have authorized to receive the information is not a health plan or health care provider, the released information may no longer be protected by federal privacy regulations. [45 C.F.R. 164.508(c)(2)(ii)]
- I understand I have the right to receive a copy of this authorization. [Civ. Code § 164.508 (c)(4) and Civ. Code § 56.11(i)]

Signature:	CDC/YA Number:	Date:
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[45 C.F.R. § 164.508(c)(1)(vi) & Civ. Code § 56.11(c)(1)]

Representative:	Relationship:	Date:
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[45 C.F.R. § 164.508(g)(1) & Civ. Code § 56.11(c)(2)]