SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA , Petitioner, v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondent	Case No.: CIV 1504195 **DECISION**

Further hearing on the Verified Petition for Peremptory Writ of Mandate came on for hearing on February 10, 2016, Paul M. Haakenson presiding. Achyut Phadke, David Fry and Linda Lye appeared for Petitioner. Lowell Finley and Mark Beckington appeared for Respondent.

After consideration of the pleadings, declarations, logs, sealed documents, and oral argument, the court rules as follows:

INTRODUCTION

In response to a Public Records Request generated by the American Civil Liberties Union (hereafter Petitioner or ACLU), the California Department of Corrections and Rehabilitation (hereafter Respondent or CDCR) disclosed fewer than 100 documents, and withheld thousands more, asserting various exemptions to the Public Records Act disclosure requirement.

Pursuant to this court's order, CDCR submitted a 190-page privilege log, identifying 1,652 documents withheld from disclosure. Respondent asserts that a great majority of these withheld documents are exempt from disclosure pursuant to the attorney client and/or work product privileges.

Respondent further claims a variety of other exemptions, including "draft," "privacy," "threatened harm," "Governor's Office correspondence," and "Rule 26(b)(4)(D)." In its Supplemental Points and Authorities, Respondent addresses the attorney client and/or work product privileges/exemptions as well as the threatened harm exemption. Respondent does not provide authorities or argument on the other exemptions cited in the log.

After Petitioner filed its response, Respondent submitted an augmented log, further identifying the basis for the claimed exemptions as to many of the documents.

The court has closely examined the pleadings and declarations filed by the parties, Respondent's augmented privilege log, and the 1,652 documents lodged with the court under seal and identified in the log. Insofar as the attorney-client and absolute work product privileges are asserted, the contents of the documents reviewed *in camera* have been largely redacted. However, many documents, even where the attorney-client or work product privileges are asserted, are not redacted or are only partially redacted. Respondent has evidently opted to allow the court to review those documents without redaction, notwithstanding the asserted privileges. The log is divided into 5 categories. The documents responsive to each category are included in the applicable portion of the log. Thus, many documents appear multiple times in the log. The court has examined each of the documents, and has made a decision based on the information provided.

Respondent provided the court with a digital version of the log. The digital log includes hyperlinks, which allowed the court to view the documents by simply "clicking" each document title in the electronic privilege log. (The actual .pdf documents were included in a separate file folder. The hyperlinks eliminated the need to navigate the separate file folder to access each document.) Using the log and the hyperlinks, the court was able to view each document, in turn, by first reviewing the log information, then clicking on the document title.

After reviewing every document in the log, the court found that 1,652 separate .pdf documents were listed. The court herein issues its decision as to each of those 1,652 documents. However, after tallying the number of documents identified in the log, the court recognized that the separate file containing the .pdf documents contains many more documents than does the log. The separate file folder contains 2,783 documents. Thus, the court has received 1,131 documents that are not identified

in any log, and are not discussed in any claim for exemption. The court presumes, or hopes, that these additional documents are duplicates and are not the subject of separate exemption claims that were not identified in any log. If indeed these are separate documents for which an exemption is claimed, the court is compelled to deny said claimed exemptions. The time urgencies present in this case prevent further delay absent some change in the public comment period.

In addition to the discussion herein, the court has prepared a spreadsheet identifying each of the documents appearing in the exemption log, along with the court's ruling as to the claimed exemptions. The following terms, as used in the spreadsheet, are identified as follows:

"Denied":

These documents are found not to be exempt. The claimed exemption is therefore denied. The court has issued this decision only after examining the document contents and log entries, and finding sufficient content to render a final decision as to whether an exemption applies. However, since the public comment period is again extended, any "denied" documents that were redacted may be re-submitted for further *in camera* review.

"Tentatively Denied":

These documents are found not to be exempt, based on the information available to the court. These documents are highly redacted and provide insufficient information, together with the log entries, to support any exemption. As discussed below, Respondent is entitled to seek further *in camera* review of un-redacted versions of these documents. Absent further review by the court, these documents must be disclosed.

"Exempt":

These documents are exempt and need not be disclosed. The basis for each exemption is listed in the court's spreadsheet.

"Partially Exempt":

These documents contain some exempt content. The exempt content may be redacted. The redacted documents thereafter must be disclosed.

As noted above, for those claimed exemptions that are "tentatively denied," Respondent is legally entitled to choose, if it desires, to provide the un-redacted documents for further review by the court. (See *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 and *League of California Cities* v. *Sup. Ct.* (2015) 241 Cal.App.4th 976, 990, 992.) Respondent has previously communicated its desire to provide un-redacted versions of the documents to the court for further review, should its claimed exemptions be denied.

Under the unique circumstances of this case, particularly because the public comment period driving this litigation expires just 12 days after the scheduled hearing on this matter, the court is disinclined to prolong the *in camera* review without imposing strict conditions. To avoid mooting the basis for this litigation, the court must place certain condition on any further document review. Accordingly, here, the court will consider reviewing additional un-redacted versions of any documents only upon Respondent's agreement to extend the public comment period relating to the proposed rule change underlying this case. Any further delay in this action will only prejudice Petitioner to the extent this entire process will have been meaningless.

The court recognizes Respondent's right to present un-redacted documents. However, Respondent undoubtedly knew that it could have submitted un-redacted documents earlier in this process. In fact, Respondent did provide many of the documents without redaction. By submitting many of the documents literally, fully and entirely redacted, Respondent could have predicted that it would not meet its burden.

Thus, should Respondent choose to sufficiently extend the public comment period, allowing time to submit documents without redaction, or to submit an exemption log for those documents submitted without a log identification, the court will conduct further in *camera review*. The court recognizes that *League of California Cities* v. *Sup. Ct, Supra*, holds that the court should permit Respondent to submit un-redacted records should Respondent wish to do so. Here, however, because of the time constraints which Respondent alone controls, the court declines any further delays absent extension of the public comment period.

DISCUSSION

At the outset, the court notes that Petitioner reasonably argues that Respondent failed to provide sufficient information through its exemption log and witness declarations to allow a meaningful response by Petitioner. Respondent's initial log lacked detail regarding the basis for the claimed exemptions or other basic information that might have assisted in determining whether an exemption applied. Respondent could have submitted more information without disclosing privileged material. The augmented log does provide more information, but is still not complete.

Nevertheless, due to the extreme time constraints under which the parties have been operating, the court finds that Respondent did nearly all that might be possible in the short time available. Further, based in part on the fact the court allowed Petitioner to take depositions relating to the log entries, the court finds that Petitioner has meaningfully responded. The court is not persuaded that it should deny the exemptions in their entirety based on the insufficiency of the log. Review of the documents submitted under seal is warranted.

Regarding Petitioner's opposition to the sealing of various submissions, the objection is denied. The court accepts the sealed declarations and orders them sealed. Pursuant to California Rules of Court 2.550 and 2.551, the court finds that there exists an overriding interest that overcomes the right of public access to the record; the overriding interest supports sealing the record; a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; the proposed sealing is narrowly tailored; and no less restrictive means exist to achieve the overriding interest. The records lodged are ordered sealed and may be viewed only by the court.

General Principles

"The CPRA embodies a strong policy in favor of disclosure of public records. Any refusal to disclose public information must be based on a specific *narrowly construed* exception to that policy." (*Bakersfield City School Dist.* v. *Superior Court* (2004) 118 Cal.App.4th 1041, 1045 (emphasis added).) Government Code section 6254 lists more than two dozen exceptions to the general disclosure requirement. Government Code section 6254 subdivision (k) provides that "records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not

limited to, provisions of the Evidence Code relating to privilege" are also exempt. "[S]ubdivision (k) specifically refers to matters of privilege, including the attorney-client privilege." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373.)

Further, Government Code section 6255, subdivision (a) provides a catchall exemption:

> "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

The "catchall" provision "contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality." (*Michaelis, Montanari & Johnson* v. *Superior Court* (2006) 38 Cal.4th 1065, 1071.) Respondent here does not claim any exemption under the catchall exemption, and engages in no analysis relating to the public interest served by disclosure versus non-disclosure.

Where the court denies the claimed privilege, Respondent is legally entitled to ask the court to further review the documents without redaction, in order to establish the privilege. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725.) Of course Respondent cannot be required to do so. The *Costco* court explained:

> [T]he party claiming the privilege may *choose* to reveal the communication in camera to prevent the court from ordering disclosure of private information bearing no relevance to the litigation. Such a procedure does not violate Evidence Code section 915 because the court, without examining the confidential communication, has previously ruled that an exception to the privilege applies, and the in camera review is now sought by the party holding the privilege to prevent its disclosure.

Costco, 47 Cal.4th at 738.

Here, as noted above, the court has received the submitted documents in a variety of forms: un-redacted, entirely redacted, and partially redacted. The court has reviewed the documents with the above-cited policy considerations in mind. Respondent's claimed exemptions are discussed in turn, below.

Attorney - Client Privilege

Evidence Code section 952 provides:

> As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

"During the course of the attorney-client relationship, the protected communication may consist of information transmitted between a client and his lawyer, advice given by the lawyer, *or* a legal opinion formed and given by the lawyer in the course of that relationship." (*Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 345 (emphasis added).)

"[T]he information must have been transmitted, or the advice given, 'in the course of that relationship' (Evid. Code, § 952)...." (Id.) "The privilege includes only confidential communications. It does not attach to a communication the client does not intend to be confidential....Thus, the communication must be made 'in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted....'" (Id. at 346 (citation omitted).)

Evidence Code section 917, subdivision (a) provides:

> If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client... relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

However, "[t]he party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) "Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden

of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." (Id. (emphasis added).)

> As the court observed in *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 911:
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> The party claiming the privilege usually makes the preliminary showing via declarations. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 8:192....In general, the court cannot require disclosure for in camera review of materials assertedly protected by attorney-client privilege. (Evid.Code, § 915; *Costco, supra,* 47 Cal.4th at pp. 736–737, 101 Cal.Rptr.3d 758, 219 P.3d 736.)

The first question here is whether the log discloses enough information about each document to allow a conclusion that it is part of a communication made in the course of an attorney-client relationship. Absent such information, the court may turn to the submitted documents. While the court cannot *order* an in camera review of a communication claimed to be attorney-client privileged to allow a ruling on the claim of privilege (*Costco, supra,* at 739), it should grant a request for in camera review by the party claiming the privilege. (*League of California Cities* v. *Sup. Ct., supra,* 241 Cal.App.4th at 990, 992.) Here, Respondent has submitted the documents for *in camera review*. Many are fully redacted, while others are left un-redacted, or partially redacted.

The court's focus is on "whether the dominant purpose of the relationship between the parties to the communication was one of attorney-client." (*League of California Cities, supra,* 241 Cal.App.4th at 991.)

In *Costco, supra,* the court held that legal advice was the dominant purpose of the relationship between Hensley and Costco. The *Costco* court explained:

> Plaintiffs next point out that the attorney-client privilege does not attach to an attorney's communications when the client's dominant purpose in retaining the attorney was something other than to provide the client with a legal opinion or legal advice. (*2,022 Ranch v. Superior Court, supra,* 113 Cal.App.4th at pp. 1390–1391, 7 Cal.Rptr.3d 197; *Aetna Casualty & Surety Co. v. Superior Court* (1984) 153 Cal.App.3d 467, 475, 200 Cal.Rptr. 471.) For example, the privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice (see *Aetna Casualty & Surety Co.,* at p. 475, 200 Cal.Rptr. 471); in that case, the relationship between the parties to the communication is not one of attorney-client. But while plaintiffs insist Hensley's interviews of Costco's warehouse managers was simple fact gathering that could have been done by a nonattorney, *they have never disputed that Costco retained Hensley, an expert in California wage and hour law, to provide it with legal advice regarding the exempt status of some of its employees, nor did the trial court base its discovery order on*

> *a finding that Costco's dominant purpose in retaining Hensley was to obtain her services as a fact gatherer.* The situation is comparable to that in *Aetna,* where in reversing the trial court's order allowing discovery of the attorney's files, the appellate court explained: "This is a classic example of a client seeking legal advice from an attorney. The attorney was given a legal document (the insurance policy) and was asked to interpret the policy and to investigate the events that resulted in damage to determine whether Aetna was legally bound to provide coverage for such damage." (*Id.* at p. 476, 200 Cal.Rptr. 471.) Here, *Hensley was presented with a question requiring legal analysis and was asked to investigate the facts she needed to render a legal opinion.* As we have explained, when the communication is a confidential one between attorney and client, the entire communication, including its recitation or summary of factual material, is privileged. In sum, if, as plaintiffs contend, the factual material referred to or summarized in Hensley's opinion letter is itself unprivileged it may be discoverable by some other means, but plaintiffs may not obtain it by compelling disclosure of the letter. (Id. at 735.)

Here, CDCR initially provided only names seemingly linked to a government email account, leaving the court with no way to know whether any one of the senders or recipients for each communication was asked to provide legal advice or was engaged in colloquy relating to legal advice. The augmented log provides further detail as to some of the communications but in most instances is insufficient to establish a privilege absent review of the document.

In *League of California Cities, supra,* 241 Cal.App.4th at 976, the court considered the attorney/client privilege in the Public Records Act context. The court specifically addressed the asserted privilege holder's initial burden of "providing the preliminary facts to show that the doctrine applies." (Id. at 993.) Citing *Costco,* the court noted at page 989:

> To evaluate whether the party claiming the privilege has made a prima facie showing, the focus is on the *purpose of the relationship* between the parties to a communication. (*Id.* at pp. 739–740, 101 Cal.Rptr.3d 758, 219 P.3d 736.) "[W]hen the party claiming the privilege shows the dominant purpose of the relationship between the parties to the communication was one of attorney-client, the communication is protected by the privilege." (*Clark v. Superior Court* (*Verisign, Inc.*) (2011) 196 Cal.App.4th 37, 51, 125 Cal.Rptr.3d 361 (*Clark*).) "Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." (*Costco,* at p. 733, 101 Cal.Rptr.3d 758, 219 P.3d 736.)
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> *An analysis of the* attorney-*client privilege begins with an identification of the attorney, the client and the communication sought to be protected.* (See Evid. Code, §§ 950–952.) *The fact the client or attorney intended the material transmitted to be confidential is not dispositive; rather, there must be a communication between attorney and client.* (*Suezaki*

> *v. Superior Court* (*Crawford*) (1962) 58 Cal.2d 166, 176, 23 Cal.Rptr. 368, 373 P.2d 432.) Stated differently, the attorney-client privilege attaches only if the information is transmitted "in the course of the attorney-client relationship." (Evid. Code, § 952.) "For example, the privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice [citation]; in that case, the relationship between the parties to the communication is not one of attorney-client." (*Costco, supra,* 47 Cal.4th at p. 735....) [Emphasis in second paragraph added.]

Here, in first examining the log and declarations, the court finds that Respondent failed to establish a *prima facie* claim that any of the submitted documents is exempt from disclosure pursuant to the attorney-client privilege. While it is evident that the communications were sent and received primarily amongst persons with CDCR-related email addresses, little more can be gleaned from the log. The court is not able to identify the "attorney," or the "client" or to glean anything about the primary purpose of the communication. The purpose of the communication may involve legal advice, but may also include policy-making activities, business advice, or non-legal colloquy. It is impossible to conclude that emails are privileged simply due to the fact the emails are sent between CDCR staff.

Thus, as in *League of California Cities, supra*, Respondent initially failed to meet its burden through the log and declarations that any of the documents are protected by the attorney/client privilege.

The augmented log provided more information relating to some items. Where the log described the basic purpose of the document (for example, identifies the email as providing legal advice on a certain subject), and that communication is between attorney and client for the purpose of engaging in legal advice, the exemption is granted.

The document review provided the bulk of the information on which the court rules herein.

While the court indicates its ruling as each item below, the decisions fall into a few general categories:

1. *Recipients not shown to be part of attorney-client team*:

Several of the emails or records include recipients or authors who are not part of the attorney/client team, and who were not listed in the log. By scrolling down each email, the court was able to find several instances wherein the email chain involved others. Where the correspondences do not involve those within the attorney-client relationship, the emails or portions of the emails outside

the privilege must be disclosed. The court's order indicates such circumstances. Specific to this category is the question whether Respondent's hired consultant is included in the privileged conversations. The court finds that the hired consultant is indeed included in the privileged communications. His/her involvement is necessary to the purpose of the attorney-client relationship.

2. Attachments

Many of the emails included in this category contain attachments. To the extent the attachments are identified and are shown to be part of confidential communication, they are also exempt. However, where CDCR staff simply transfer a document to staff attorney, such document does not automatically become privileged. "Documents that are not originally protected do not become so merely by being provided to or transmitted by an attorney." (*Laguna Beach County Water Dist. v. Superior Court* (2004) 124 Cal.App.4th 1453, 1458.) Where there is an attachment to an email, the court rules on the exemption as to the attachment as well as the email. Such orders are included in the spreadsheet.

3. Regulation Drafts

Respondent includes "draft" as a separate category of exemption. To the extent this includes drafts not kept in the ordinary course of business, or the deliberative process exemption, such exemptions would require a balance of public interest in disclosure versus non-disclosure. Respondent does not make any such argument. Further to the extent the drafts are largely redacted, such evaluation could not be taken on by the court. To the extent "drafts" means the document was drafted by an attorney and is included in the attorney work product privilege, the court has considered such claimed exemption.

The court concludes that the actual drafts of various regulations are not protected by the attorney-client privilege. First, the drafts are not described to be part of any communication to or from counsel or client. Rather, they seem to be the resulting product. To the extent the drafts are the product of attorney advice, such advice does not protect the eventual product. The emails and communications relating to legal discussions and proposed language are protected. The resulting drafts are not. In the court's view, this aspect of the regulation promulgation is a policy making act.

While policy makers are entitled to obtain confidential legal advice, their actual resulting policy regulations do not enjoy the attorney-client privilege.

Here, Petitioner's evidence shows that the drafting of regulations could have been done by a non-attorney (and has historically been done by non-attorneys). Under the approach expressed in *Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1, communications about the regulations would not be privileged "unless the dominant purpose of the particular communication was to secure or render legal service or advice." In *Montebello*, the hearing officer was able to analyze the "dominant purpose" of *each* particular communication through *in camera* review.

Here, to the extent the communications were un-redacted and subject to this court's review, the court has ruled based on the dominant purpose of the communication. Where the documents are redacted to such a degree the court cannot discern the dominant purpose, the claimed privilege is tentatively denied. Where the document appears to be the actual regulation in draft form, the exemption is denied, or tentatively denied depending upon whether it was redacted.

4. Other non-legal functions

Several of the documents show activity that seemingly is unrelated to legal advice, but rather is related to activities carrying out or implementing policy. For example, communications relating to costs or purchase of pharmaceuticals, availability of pharmaceuticals, expiration dates of pharmaceuticals and other activities not normally part of an attorney's function as legal advisor do not meet the attorney-client privilege. The activities cannot be shielded from public disclosure simply because an attorney engaged in the activity. Where the court finds that the purpose of the communication or document is unrelated to the attorney-client relationship and primary purpose of giving or receiving legal advice, the exemption is denied.

5. Legal communications

Many of the communications are shown to be protected. Those include legal discussions, legal advice and are between and among those as part of the attorney –client team.

Absolute Attorney Work Product

The "work product" doctrine protects the attorney's work, regardless of whether it was communicated to the client. (See CCP § 2018.030; Ev.C. § 950 et seq.; *Fireman's Fund Ins. Co. v. Sup.Ct. (Front Gate Plaza, LLC)* (2011) 196 CA4th 1263, 1272-1274, 127 CR3d 768, 775-776.)

CCP Section 2018.030, subdivision (a) provides that "a writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances."

In contrast, subdivision (b) states: "The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." Here, Respondent claims the absolute work product protection. The parties do not discuss prejudice in their pleadings.

"Work produced by an attorney's agents and consultants, as well as the attorney's own work product, is protected by the attorney work-product doctrine." (*Citizens for Ceres v. Superior Court, supra,* 217 Cal.App.4th at 911.)

> A party asserting the privilege must "prove the preliminary facts to show that the privilege applies." (*Mize v. Atchison, Topeka & Santa Fe Ry. Co.* (1975) 46 Cal.App.3d 436, 447, 120 Cal.Rptr. 787.) When a party asserts the absolute privilege, the court cannot require the material to be produced for *in camera* review to evaluate the claim of privilege, but the court can require production for in camera review when the party asserts only the qualified privilege. (Evid.Code, § 915.)
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> The purposes of the work product doctrine are to "[p]reserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases," and to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018.020.)(Id. at 912.)

(*Citizens for Ceres v. Superior Court, supra,* at 912.)

Here, Respondent claims the work product privilege in connection with the attorney client privilege in most instances. The general categories of the documents falling under this claimed exemption are the same as articulated above. The court has ruled on each claim. To the extent content

was redacted, as noted, Respondent may seek further *in camera* review. The court will review un-redacted records on the condition Respondent agrees to extend the public comment period.

Threatened Harm/Privacy

Respondent has claimed an exemption for many of the documents on the basis of "threatened harm." Most of these documents are redacted because other privileges are also claimed. The court has been unable to read the content of those redacted documents to determine whether disclosure would endanger any specifically identified person or pharmaceutical company employees.

However, Respondent has provided some detailed information about specific officials, persons, and/or team members threatened. Further, a federal court order is in place, protecting execution team members.

Generally, the court grants the claim of exemption to the extent it seeks redaction of the named consultant, the named pharmaceutical company, the officials and team members threatened, and those protected by federal court order. Those may be redacted from any documents to be disclosed. This order includes even the "lower level" team members. It is not interpreted as narrowly as Petitioner asserts. All execution team members reasonably included in the federal court order may be redacted. Thus, where the court has denied the claimed exemptions, and ordered Respondent to disclose certain documents, Respondent is granted authority to redact the names of the execution team members, as well as the threatened persons/officials and pharmaceutical company specifically described in the affidavits.

Further, while the court has stated that it will not consider further *in camera* review absent extension of the public comment period, the court will consider an immediate further *in camera* review of un-redacted records where disclosure of such records will endanger the identified persons, team members or pharmaceutical company, if redaction of the name/company is insufficient for protection.

Remaining Claimed Exemptions

Respondent includes other claimed exemptions in the exemption log. No argument or authorities address these other claimed exemptions. They are therefore denied. They are also denied on their merits.

Governor's correspondence

Respondent's log cites the Governor's correspondence exemption. This is found in Government Code section 6254, subdivision (l). This exemption encompasses:

> Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary. However, public records shall not be transferred to the custody of the Governor's Legal Affairs Secretary to evade the disclosure provisions of this chapter.

This exemption does not apply to all written communications with the governor's office. In *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1336-37, the Times made a PRA request for then-governor Deukmejian's calendars and schedules. One of the Governor's arguments was that the calendars and schedules were "correspondence" falling within the scope of section 6254(l). Though finding the catch-all exemption to apply, the court gave section 6254(l) a relatively narrow interpretation.

In *ACLU-NC* v. *Sup. Ct.* (2011) 202 Cal.App.4th 55, the court dismissed CDCR's claimed subdivision (l) exemption. It commented:

> The order did not allow CDCR to withhold internal governmental communications under section 6254, subdivision (*l*), the Governor's correspondence exception to disclosure, because, as stated in *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 168, 78 Cal.Rptr.2d 847, that exception is "intended to protect communications to the Governor and members of the Governor's staff from correspondents outside of government" and was therefore inapplicable to the documents petitioner sought. (Id. at 65.)

Here, the cited items do not appear to be "communications to the Governor and members of the Governor's staff from correspondents outside of government."

Drafts

Respondent's log cites the "drafts" exemption. To the extent this is meant to encompass Government Code Section 6254, subdivision (a), Respondent has not met its burden. Government Code section 6254, subdivision (a) extends to: "Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure."

Here, Respondent fails to establish that the drafts, emails or other documents are not kept in the ordinary course of business. Rather, the declaration of Achyut Phadke and the cited references to Ms. McClease's testimony show that all records here are kept in the ordinary course of business.

Additionally, Respondent does not weigh the public interest in disclosure versus non-disclosure.

Rule 26(b)(4)(D)

Respondent cites Rule 26(b)(4)(D) in its log. Presuming Respondent references Federal Rules of Civil Procedure, 26, Petitioner fails to meet its burden of establishing any such exemption applies here.

Adequacy of Search

Respondent concedes that it was required to submit declarations that "describe what records were searched, by whom, and through what processes" and that show that its search "was reasonably calculated to uncover all relevant documents." The declarations must be "relatively detailed and non-conclusory, and...submitted in good faith." (See CDCR's supplemental memo, p.4:13-5:5, citing *Steinberg* v. *U.S. Dept. of Justice* (D.C.Cir.1994) 23 F.3d 548, 552; *Weisberg* v. *U.S. Dept. of Justice* (D.C. Cir. 1983) 705 F.2d 1344, 1350-1351; and *SafeCard Services, Inc. v.* SEC (D.C.Cir.1991) 926 F.2d 1197, 1200.).) "Agency affidavits are accorded a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" (*SafeCard Services, Inc. v. S.E.C.* (D.C. Cir. 1991) 926 F.2d 1197, 1200.) The issue is "*not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." (*Weisberg*, supra, at 1351.)

The court agrees with Petitioner that the search terms utilized by Respondent were insufficient to reveal all potentially responsive documents. Certain additional terms could have been used. Those include: (1) "execution," (2) "anesthesiologist," and (3) any drugs considered for use other than "Sodium Thiopental" and "Thiopental." The proposed one-drug protocol gives the prison warden the option of using one of *four* barbiturates. The search terms included only thiopental. Seemingly the other 3 were not specifically listed.

An additional search with the above specific terms must be conducted. If additional documents are discovered, Respondent must immediately disclose to Petitioner any documents that are not exempt. If further exemptions are claimed, Respondent must include those in a separate exemption log, and submit for *in camera* review.

ORDER

At the conclusion of the hearing, Petitioner agreed to extend the public comment period relating to the rules at issue and discussed herein for 30 days. Consequently, the court will conduct further *in camera* review of any documents Respondent wishes to re-submit without redaction, under the following deadlines:

1. On or before February 17, 2016, Respondent is ordered to produce to the court and Petitioner an exemption log containing the 1,652 documents referenced in the court's spreadsheet containing the court's decision as to each of said documents. This exemption log shall list the documents in numerical order and shall not be divided into the 5 categories previously used. It should parallel the court's spreadsheet. This exemption log shall contain a column identifying those documents that are being submitted without redaction for further *in camera* review.
2. On or before February 17, 2016, Respondent is ordered to produce to the court a separate file containing the documents included in the 1,652 documents referenced above, that are being submitted un-redacted, for further *in camera* review. The above ordered log shall hyperlink to each of the documents re-submitted for further review.
3. On or before February 17, 2016, Respondent is ordered to produce to the court and Petitioner a separate exemption log containing the 1,131 documents referenced in the court's spreadsheet identifying those documents not previously appearing on any log. This log should parallel the court's spreadsheet.
4. On or before February 17, 2016, Respondent is ordered to produce to the court a separate file containing the documents included in the 1,131 documents reference above, that are being re-submitted, redacted or un-redacted for *in camera* review. Since the court has not reviewed these documents, they may be redacted if Respondent is claiming the attorney-

client or absolute work product privilege. However, the court will not later conduct further review of these documents. The decision will be final after this review. The above ordered log shall hyperlink to each of the documents re-submitted for further review.

5. By March 4, 2016 Respondent is to conduct further search using as search terms described on page 16 of this decision. Respondent must report the results of this search, that is, whether any new documents are discovered and whether any exemptions are to be claimed, at the hearing on March 4, 2016.
6. The matter is set for further hearing at 9:00 AM, March 4, 2016.

Dated February 10, 2016

PAUL M. HAAKENSON
Judge of the Superior Court