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2
3 SUPERIOR COURT OF CALIFORNIA
4 COUNTY OF MARIN
5

6)
7 AMERICAN CIVIL LIBERTIES UNION OF)
8 NORTHERN CALIFORNIA ,)

Case No.: CIV 1504195

9 Petitioner,
10)

v.)

DECISION

11 CALIFORNIA DEPARTMENT OF)
12 CORRECTIONS AND REHABILITATION,)

13 Respondent
14)

15 Petitioner's Verified Petition for Peremptory Writ of Mandate came on for final hearing on
16 March 18, 2016, Paul M. Haakenson presiding. Achyut Phadke, David Fry and Linda Lye appeared
17 for Petitioner. Lowell Finley, Anthony Hakl, and Mark Beckington appeared for Respondent.

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

20 **INTRODUCTION**

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

25 Petitioner filed the instant Petition for Writ of Mandate, seeking a court order requiring
26 disclosure of the public documents. The court herein issues its final ruling, after having entered two
27 prior interim decisions and having now twice reviewed the documents *in camera*.
28

1 The Petition is granted in part as described herein.

2 In addition to the discussion below, the court incorporates its legal analysis from its February
3 10, 2016 decision and order.

4 5 **PROCEDURAL HISTORY**

6 Pursuant to this court's order, CDCR submitted 2,783 documents amounting to more than
7 17,000 pages for the court's *in camera* review. The documents initially reviewed by the court were
8 largely redacted.

9 In its initial submission of documents and logs, Respondent listed 1,652 of the 2,783
10 documents in a privilege log (and later an augmented privilege log). The augmented log identified the
11 nature of each document, the exemptions claimed for each document, and some very basic information
12 relating to each document. The remaining 1,131 documents submitted to the court were not included
13 in the privilege log. Respondent explained during a recent *ex parte* hearing that the failure to include
14 those 1,131 documents in any privilege log was CDCR's mistake based on technical difficulties,
15 compounded by significant time constraints.

16 Prior to February 10, 2016, the court examined the pleadings and declarations filed by the
17 parties, the augmented privilege log, and the 1,652 documents identified in the augmented privilege
18 log. The court did not examine the 1,131 documents that had not been included in any privilege log.
19 The court ruled on the claimed exemptions in its February 10, 2016 decision.

20 In that ruling, the court "tentatively denied" the claimed exemptions as to 692 documents out of
21 the 1,652 documents included in the augmented privilege log. As to these documents, the court
22 permitted Respondent to re-submit the documents without redactions, for further *in camera* review.
23 Respondent in turn re-submitted those 692 documents, un-redacted, for further *in camera* review. The
24 court herein rules on each exemption after examining the un-redacted documents.

25 In its February 10, 2016 decision, the court "denied" the claimed exemptions as to 220 of the
26 1,652 documents. Respondent has resubmitted 14 of those documents for further *in camera* review.

1 The court re-examined and herein issues further decision as to 13 of the 14 above-described
2 documents.¹

3 In its February 10, 2016 decision, the court concluded that 34 documents were “partially
4 exempt.” Respondent has re-submitted those 34 documents for further *in camera* review. The court
5 herein rules on the claimed exemptions as to these 34 documents.

6 Finally, Respondent has re-submitted the 1,131 documents that were initially omitted from the
7 privilege log. Respondent has now submitted a privilege log identifying the nature of each document,
8 the exemptions claimed for each document, and some very basic information relating to each
9 document. The court herein rules on each claimed exemption.

10 As requested by the court, Respondent submitted electronic versions of the documents and
11 logs, divided into two file folders. The first file folder contains the 1,652 documents described above,
12 along with a new version of the corresponding log (identified as Log 1). The second file folder
13 contains the 1,131 documents described above, along with a newly created corresponding log
14 (identified as Log 2). The court’s ruling as to each document is contained in two attached Excel
15 spreadsheets. The first spreadsheet parallels Log 1, and the second spreadsheet parallels Log 2.²

16 17 **DISCUSSION**

18 Without fully repeating the court’s findings and legal rulings discussed in the February 10,
19 2016 decision, the court here notes that it again examined the submitted documents while remaining
20 mindful of the policy considerations underlying the attorney/client and work product privileges, as well
21 as the strong policy favoring disclosure of public documents pursuant to the California Public Records
22 Act.

23
24 ¹ Respondent identifies these 14 documents in footnote 2 at page 1 of its Further Supplemental Brief filed
25 February 26, 2016. However, one such document was apparently misidentified. The list of 14 documents
26 includes document “6750.” No document is so numbered. Page 6750 falls in the middle of PRIV006671. The
claimed exemption as to that document was, and is, denied.

27 ² The court is mindful that Petitioner never had the opportunity to consider, review, or respond to log 2.
28 However, the categories of documents and types of documents found in log 2 are the same as those found in log
1. The legal arguments and exemptions claimed are identical. Thus, the court finds that Petitioner has had the
chance to meaningfully respond.

1 The court also remains mindful of CDCR’s argument, citing *Watt Industries, Inc. v. Sup. Ct.*
2 (1981) 115 Cal.App.3d 802, that the court should resolve “doubtful cases” in favor of the privilege.
3 This caution, however, must be examined in the context of the weighty burden on public agencies
4 seeking to withhold documents from public scrutiny in a Public Records Act case. As the court wrote
5 in *Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 218-19:

6 “The CPRA embodies a strong policy in favor of disclosure of public records....”
7 [Citation.] “Statutory exemptions from compelled disclosure are narrowly construed.
8 [Citation.]” (*Ibid.*) “ ‘[T]he government agency opposing disclosure bears the burden of
9 proving that one or more [of the exemptions] apply in a particular case.’ [Citations.]”
(*County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 63, 149
Cal.Rptr.3d 324; § 6255, subd. (a).)

10
11 In *Caldecott*, the court remanded the case for *in camera* review of documents claimed to be
12 attorney-client privileged. It reasoned:

13 School District maintains certain of the Documents were communications to or from its
14 lawyers and therefore protected from disclosure by the attorney-client privilege. This may
or may not be true.

15 A confidential communication between a lawyer and his or her client is protected from
16 disclosure. (Evid.Code, § 954.) But not all communications with attorneys are subject to
17 that privilege. For example, the privilege does not shield from disclosure underlying facts
18 that may be set out in the communication. (*State Farm Fire & Casualty Co. v. Superior*
19 *Court* (1997) 54 Cal.App.4th 625, 639, 62 Cal.Rptr.2d 834.) Likewise, the privilege does
20 not protect “independent facts related to a communication....” (*Id.* at p. 640, 62
Cal.Rptr.2d 834.) Further, the mere fact nonprivileged information is relayed to an
attorney does not shield the communication. (*Costco Wholesale Corp. v. Superior Court*
(2009) 47 Cal.4th 725, 735, 101 Cal.Rptr.3d 758, 219 P.3d 736.)

21
22 In addition, “[t]he privilege does not apply to communications to an attorney who is
23 transacting business that might have been transacted by another agent who is not an
24 attorney [citation].” (*Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981)
25 119 Cal.App.3d 1, 32, 173 Cal.Rptr. 856.) “For example, the privilege is not applicable
26 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 Wholesale Corp. v. Superior Court, supra*, 47
Cal.4th at p. 735, 101 Cal.Rptr.3d 758, 219 P.3d 736.)

27 (Id. at 227.)
28

1 Here, although the court has examined each document while remaining mindful of the policy
2 considerations in the PRA, the court strictly considered the statutory and legal requirements underlying
3 the attorney/client privilege and work product privileges.

4 The court's spreadsheet recites the ruling for each claimed exemption and lists reasons or
5 comments in the adjacent column. The court has provided the parties with electronic versions of the
6 spreadsheets and will file electronic versions (on a thumb drive) in the case file.

7
8 ACLU Motion to Strike CDCR's Further Supplemental Brief

9 On February 26, 2016, CDCR lodged the above described un-redacted documents and privilege
10 logs with the court. CDCR also filed additional factual declarations and a "Further Supplemental
11 Brief." Petitioner objects to the court's consideration of the Further Supplemental Brief as well as the
12 new exemptions claimed in the brief and newly submitted privilege logs.

13 The Motion to Strike the Further Supplemental Brief, and new claimed exemptions is granted
14 in part, as follows.

15 Indeed the court did not invite or authorize further briefing. However, the Further
16 Supplemental Brief does contain some information invited by the court. That is, the Further
17 Supplemental Brief fairly describes the documents being submitted for further review. The brief is
18 properly considered for such purpose.

19 Beyond the factual information, the brief improperly expands on the attorney-client and work
20 product privilege arguments. At pages 2-6, for example, CDCR engages in a second effort to convince
21 the court that all of the submitted documents are exempt under the attorney-client and work product
22 privileges. Understanding that the court is bound by all current authorities governing the cited
23 privileges in the context of the PRA, the court declines to consider, and strikes, the newly made
24 arguments.

25 Next, at pages 7-11, CDCR expands upon the attorney-client and work product privileges as
26 applicable to communications with the Governor's office counsel and communications with the
27 appointed Receiver in *Plata v Brown*. The court has allowed ACLU to respond to these arguments
28

1 and authorities. Accordingly, the court declines to strike this portion of the Further Supplemental
2 Brief.

3 At pages 11-12 CDCR expands upon its argument that communications with justice department
4 attorneys are privileged. This portion of the brief is stricken and will not be considered, as the content
5 was clearly briefed and argued prior to the February 10, 2016 decision.

6 At pages 12-15 CDCR, for the first time, cites legal authorities and arguments underlying the
7 deliberative process and catchall exemptions. Such arguments and claimed exemptions are tardy, and
8 were not invited or authorized by the court. The court therefore strikes this portion of the Further
9 Supplemental Brief. However, even considering the arguments and claimed exemptions, the court
10 finds that Respondent fails to establish that any document is exempt under these claimed exemptions.
11 Specifically, CDCR fails to establish that the public interest in non-disclosure outweighs the public
12 interest in disclosure of any of these documents.

13 Finally, at page 15, CDCR states that several documents were erroneously included as
14 responsive to the public records request. To the extent CDCR has recently discovered the erroneous
15 inclusion of these documents, the court will consider this portion of the brief and CDCR's claim that
16 the documents are not responsive.

17 18 Rulings on the Claimed Exemptions

19 The court here incorporates its legal reasoning and authorities as outlined in its February 10,
20 2016 decision.

21 Having now reviewed the documents without redactions, the court has been able to discern the
22 nature and purpose of each document. Where the document involves a communication, the court has
23 been able to discern the dominant purpose of the communication; whether the information was
24 transmitted between a client and his or her lawyer in the course of that relationship and in confidence;
25 whether it was communicated by a means which, so far as the client is aware, discloses the information
26 to no third persons other than those who are present to further the interest of the client in the
27 consultation or those to whom disclosure is reasonably necessary for the transmission of the
28 information or the accomplishment of the purpose for which the lawyer is consulted; and whether it

1 includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.
2 The court has also been able to determine whether the content of the document is inextricably
3 intertwined with the attorney's function as legal counsel.

4 The court's finding as to each document is included in the attached Excel Spreadsheets. The
5 bulk of the documents that are not exempt, and must be disclosed, consists of the actual drafts of the
6 death penalty regulations being promulgated. The court, as noted in its prior order, has drawn a
7 distinction between the legal advice underlying the regulations ultimately drafted, and the drafts
8 themselves.

9 It is worth noting here, that the court is not persuaded by CDCR's argument that all of the
10 attorney tasks and communications at issue here are inextricably intertwined with the attorneys' legal
11 function as legal advisors. If the court were to accept CDCR's argument, any public agency adopting
12 regulations could routinely shield its drafts and all related documents in its files from public view—
13 simply by reassigning the drafting task to an attorney, and pointing to some risk of litigation over the
14 regulations.

15 Under this court's approach, the attorneys' advice and information intertwined with the drafting
16 of the regulations is still protected. (See, e.g., *Costco Wholesale Corp. v. Sup. Ct.* (2009) 47 Cal.4th
17 725, 735-36.) However, all factual information considered by the agency does not become
18 immediately protected merely because it is handed from one attorney to another, from attorney to
19 client, or simply is stored as a file on an attorney's computer.

20 21 Communications with Governor's Office Staff and/or Receiver and Receiver's Staff

22 With regard to communications involving the Governor's office attorneys and the *Plata*
23 Receiver, the court examined each such communication in an effort to determine the dominant purpose
24 of the communication, and the relationship of the parties and attorneys included in the
25 communications. The court finds, after again carefully reviewing the documents, that the Governor's
26 office counsel and the Receiver are indeed included in the protected circle of attorney/client and/or
27 those to whom disclosure is reasonably necessary for the transmission of the information or the
28 accomplishment of the purpose for which the lawyer is consulted in most instances. Although the

1 initial declarations submitted by CDCR at the commencement of this litigation did not fully explain the
2 legal relationship of these parties, the Further Supplemental Brief (i.e., the parts the court agreed to
3 consider) together with the court's examination of the contents of the communications enabled the
4 court to make a determination as to the claimed privileges. The communications shared with the
5 Governor's office staff, and those shared with the appointed Receiver are mostly privileged, as noted
6 in the attached spreadsheet.

7 On the subject of the communications including the Governor's office staff, or Receiver staff,
8 the court notes the following: On March 3, 2016, counsel for CDCR agreed to provide the court with a
9 list of all communications/emails that included Governor's office and/or Receiver staff. CDCR
10 provided the court with said list on March 8, 2016. However, based on the court having reviewed the
11 records, it was immediately apparent that CDCR's search did not uncover all applicable
12 communications. It appears first, that CDCR's search term (@gov.ca.gov) would not find those emails
13 wherein the email address in the header was not expanded. That is, in some emails, the addressee is
14 listed only by name. The full email address is contracted or hidden. (For example, some emails would
15 be listed as Gabriel.Sanchez@GOV.ca.gov, while others would just be shown as "Gabriel Sanchez.")
16 Thus, a search for the names of the Governor's office staff would be more inclusive. Second, many
17 emails containing "@gov.ca.gov" were simply missed by CDCR.

18 The court converted all of the .pdf files to searchable text, and conducted its own search. The
19 court first searched for emails with "@gov.ca.gov" in the address. The court then searched
20 individually for all Governor's office staff names as gleaned from the first search. (Those included
21 Acquisto, Marcroft, Lynch, Krause, Sanchez, Sabbah, and Hoch) The court also searched for the
22 Receiver. The court found additional documents containing Governor's office and Receiver's office
23 communications.

24 For the ease of the parties and court to determine which documents include Governor's office
25 or Receiver's office communications, the court included an addition column in the spreadsheet so
26 indicating those documents.³

27
28 ³ This additional column is found in the electronic version only. It is not included in the printed, filed version.

1 Court Ordered Expanded Search

2 In its February 10, 2016 order, the court required CDCR to expand its search, using additional
3 search terms. To the extent CDCR has discovered new responsive documents based on the expanded
4 search, the documents are ordered disclosed unless they fall into an exemption. To the extent *in*
5 *camera* review is necessary, CDCR must first remove any of the documents that are duplicates of those
6 addressed in this order, then provide to the court with a new privilege log. The court will set a
7 schedule as necessary, upon *ex parte* application by either party.

8
9 **ORDER**

10 The Petition for writ of mandate is granted, in part. The specific order as to each document and
11 claimed exemption is included in the attached spreadsheet.

12 Respondent is ordered to release to Petitioner all documents wherein the claimed exemption is
13 “denied” by the end of business, March 24, 2016. Respondent may redact the names of persons,
14 officials, team members and pharmaceutical company consistent with the above decision. Otherwise
15 the documents must be un-redacted.

16 Respondent is ordered to release to Petitioner all non-exempt documents discovered in its
17 expanded search by the end of business, March 24, 2016. The court will set further schedule for *in*
18 *camera* review of any newly discovered documents for which an exemption is claimed upon *ex parte*
19 application by either party.

20
21
22 Dated March 21, 2016

23
24 _____
25 PAUL M. HAAKENSEN
26 Judge of the Superior Court
27
28