



By hand delivery

July 8, 2016

Mr. Timothy Lockwood
Chief, Regulation and Policy Management Branch
California Department of Corrections and Rehabilitation
P.O. Box 94283-0001
1515 S Street
Sacramento, CA 95811

**RE: Procedural Comments Regarding Amendments to Title 15, Article 7.5,
Sections 3349, Proposed Lethal Injection Regulations**

Dear Mr. Lockwood,

The American Civil Liberties Union of California (“ACLU”) submits these procedural objections and supporting exhibits to the California Department of Corrections and Rehabilitation’s (“CDCR”) rulemaking process regarding proposed changes to Title 15 California Code of Regulations Section 3349, pertaining to lethal injection. This letter sets forth the ACLU’s procedural objections to CDCR’s current rulemaking process.¹ As we explain below, CDCR has not substantially complied with the California Administrative Procedures Act (“APA”) and its actions have prevented meaningful public participation. Because the procedural flaws are so fundamental, the agency should recommence these proceedings entirely. If it does not do so, the Office of Administrative Law (“OAL”) should disapprove these regulations. We request that you include these comments and the attached 102 exhibits (which are provided electronically on a DVD) in the rulemaking file.

I. Interest of Commenting Party

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan, membership organization dedicated to the defense and promotion of the guarantees of privacy, liberty and other individual rights embodied in the state and federal constitutions and statutes. The American Civil Liberties Union of California consists of the ACLU’s three geographic affiliates in California: the American Civil Liberties Union of Northern California, the American Civil

¹ In a separate letter, the ACLU presents its substantive comments about the proposed regulations.

Liberties Union of Southern California, and the American Civil Liberties Union of San Diego and Imperial Counties.

The ACLU is deeply involved in criminal justice reform issues, including the death penalty. It was a long history of working to ensure quality legal representation for those facing a sentence of death, including by providing post-conviction representation to Robert Alton Harris, the first person executed under our current death penalty statute.

The ACLU has a substantial interest in the proposed regulations. The ACLU has been deeply concerned about the method and means of carrying out executions in California for many years. The American Civil Liberties Union of Northern California has successfully challenged the use of the gas chamber in California as cruel and unusual punishment and the use of a curtain to prevent the media and witnesses from viewing the entire execution process. The ACLU of Northern California has also successfully challenged CDCR's withholding of public records pertaining to lethal injection. Finally, it also represents Pacific News Service in a challenge to California's three-drug lethal injection protocol.

The purpose of the APA is to allow interested members of the public and individuals directly affected by a proposed regulation to provide meaningful feedback to the agency proposing the regulation and to ensure that all regulations actually adopted are in fact necessary, understandable, and the least burdensome possible to the public. The APA serves as the central check on the vast authority of executive agencies to promulgate rules and regulations, an authority which can easily be abused to the detriment of the civil rights and civil liberties of individuals. The APA acts as a check on agency authority by ensuring that the public has a role and a voice in the rulemaking process, by requiring OAL to ensure that every procedural safeguard in the APA has been followed, and by allowing judicial review of the process and the regulation finally adopted.

II. Background

CDCR has gone to great lengths to avoid any disclosure, let alone timely disclosure, of documents that bear on the public's ability to provide meaningful comment on its proposed lethal injection regulations. In particular, CDCR has attempted to delay disclosure of and shroud in secrecy documents it generated and relied upon in the course of formulating the proposed regulations.

A. The ACLU requested information from CDCR related to lethal injection and CDCR's deficient response.

On August 14, 2015 and September 4, 2015, the ACLU submitted Public Records Act ("PRA") requests to CDCR related to CDCR's lethal injection procedures and protocols. *See*

Exhibit 1 (August 14, 2015 ACLU PRA Request) and Exhibit 2 (September 4, 2015 ACLU PRA Request).²

CDCR responded to the ACLU's requests on September 28, 2015 and October 2, 2015, respectively, identifying a handful of responsive documents but largely asserting various exemptions from the PRA. *See* Exhibit 3 (September 28, 2015 CDCR Response) and Exhibit 4 (October 2, 2015 CDCR Response). After the ACLU submitted the duplication fees requested by CDCR, CDCR produced to ACLU 40 pages it contended were responsive to the August 14, 2015 request. *See* Exhibit 5 (October 23, 2015 CDCR Production in Response August 14, 2015 Request). On the same day, it also produced 10 pages it contended were responsive to the September 4, 2015 request. *See* Exhibit 6 (October 23, 2015 CDCR Production in Response to September 4, 2015 Request). The 10 pages produced in response to the September 4, 2015 were entirely duplicative of pages included in the 40-page production in response to the August 14, 2015 request. Thus, CDCR's response to both requests totaled only 40 pages.

On October 29, 2015, the ACLU sent CDCR a letter expressing concerns that CDCR's response was deficient because it failed to produce responsive records and the exemptions from disclosure it invoked were without merit. *See* Exhibit 7 (October 29, 2015 ACLU letter to CDCR).

On November 6, 2015, CDCR published notice in the California Regulatory Notice Register of proposed changes to its lethal injection regulations. *See* Cal. Reg. Notice Register 2015, No. 45-Z, p. 2024. The notice provided that the public comment period on the proposed regulations would close on January 22, 2016.

B. The information requested by the ACLU was relevant to the public's evaluation of CDCR's proposed lethal injection regulations.

Prompted by concerns about botched executions in other states,³ the ACLU sought the information in its PRA requests to assist the public in evaluating whether California has taken the necessary steps and is in a position to administer a safe execution. Indeed, researchers, journalists and other legal organizations also made similar PRA requests, underscoring the widespread interest in this information. *See infra* Exhibit 16 (December 7, 2015 CDCR Production in Response to August 14, 2015 PRA). The records sought are thus highly relevant to the public's evaluation of CDCR's proposed lethal injection regulations. Obtaining all records responsive to the ACLU's PRA requests sufficiently in advance of the close of the comment period was thus critical if the public were to have any meaningful opportunity to comment.

² The PRA requests were submitted by the ACLU of Northern California but for simplicity, these comments will refer to that entity, as well as the ACLU of California, as the ACLU.

³ These are described in the ACLU's separately submitted substantive comments regarding the proposed regulations.

C. The ACLU was forced to sue CDCR to obtain the requested information.

After almost three weeks passed without a written response from CDCR to the ACLU's October 29, 2015 letter, the ACLU filed a PRA suit on November 18, 2015 in the Marin Superior Court seeking a writ of mandate ordering CDCR to produce responsive documents and a privilege log. *See* Exhibit 8 (Verified Petition; Memorandum of Points and Authorities; Zamora Declaration; Lye Declaration; Civil Case Cover Sheet; Notice of Case Assignment; Proof of Service).

The ACLU then promptly filed an *ex parte* application to set an immediate hearing date because the next available hearing date would otherwise have been January 8, 2015, just two weeks before the January 22, 2016 close of the public comment period. *See* Exhibit 9 (Ex Parte Application to Set December 4, 2015 Hearing; Memorandum of Points and Authorities; Lye Declaration; [Proposed] Order). The court granted the *ex parte* application, set an expedited hearing and briefing schedule, and ordered all pleadings to be served electronically. *See* Exhibit 10 (Notice of Entry of Order).

On December 7, 2015, CDCR filed a brief and supporting declarations, arguing that it had already produced all responsive non-exempt documents and had no obligation to provide a privilege log; it claimed at the time to have over 79,000 documents related to lethal injection on the computer of one attorney at CDCR, but that *all* of those documents were exempt attorney-client communications or attorney work product. *See* Exhibit 11 (Opposition to Verified Petition for Preemptory Writ of Mandate and Writ of Mandate; McCleave Declaration; Jugum Declaration; Proof of Service).

D. CDCR identified additional responsive records after being sued, but delayed in producing them.

After the ACLU filed suit, and just before CDCR filed its brief, CDCR also wrote to the ACLU indicating that it had identified additional responsive records. *See* Exhibit 12 (December 4, 2015 CDCR Response to August 14, 2015 Request) and Exhibit 13 (December 4, 2015 CDCR Response to September 4, 2015 PRA Request). Despite the time sensitivity, however, CDCR initially indicated that it would only mail the records to the ACLU after receipt of payment for the records by mail. Only after the ACLU objected to the unnecessary delay, *see* Exhibit 14 (December 7, 2015 ACLU Letter), did CDCR provide the records electronically. *See* Exhibit 15 (December 7, 2016 CDCR email), Exhibit 16 (December 7, 2015 CDCR Production in Response to August 14, 2015 PRA), and Exhibit 17 (December 7, 2015 CDCR Production in Response to September 4, 2015 PRA).

In response to CDCR's brief, the ACLU filed a brief on December 9, 2015 arguing that the Court should order CDCR to produce all disclosable documents immediately and to provide a privilege log so that its claims of exemption could be tested. *See* Exhibit 18 (Reply Brief in Support of Verified Petition for Preemptory Writ of Mandate and Writ of Mandate; Declaration

of David Fry in Support of Verified Petition for Peremptory Writ of Mandate and Writ of Mandate).

CDCR filed a supplemental declaration in support of its opposition to the ACLU's petition on December 10, 2015. *See* Exhibit 19 (Supplemental Declaration of Kelly McCleave in Support of Opposition to Petition for Preemptory Writ of Mandate and Writ of Mandate).

E. The Court recognized the importance of resolving the public's right to the requested records before the close of the public comment period on the proposed lethal injection regulations.

On December 10, 2015, the Court issued a tentative order, which it adopted at the hearing on December 11, 2015, ordering CDCR (1) to conduct a search for responsive records that was not limited to the files on the computer of a single CDCR attorney; (2) to immediately produce non-exempt documents to the ACLU; and (3) to provide a privilege log. *See* Exhibit 20 (December 11, 2015 Order). Recognizing the importance of the public having access to responsive documents *before* the close of the public comment period on the proposed lethal injection regulations, the Court ordered CDCR to produce non-exempt responsive records by December 21, 2015, and to file and serve an exemption log, a supplemental brief and any additional declarations by December 22, 2015. It authorized the ACLU to file a supplemental brief by December 30, 2015. The Court also set a hearing in the matter on January 8, 2015. The Court acknowledged that its order would require "both parties and the court" to "burn[] the midnight oil over the holidays," but concluded that "equity and justice demands as much." The Court indicated that it would consider extending the deadlines if CDCR chose to extend the public comment period on the proposed regulations.

On December 14, 2015, the ACLU issued deposition notices for December 28, 2015 (a date after CDCR was to file its exemption log and brief, and before the ACLU's brief was due) of Kelly McCleave (who had previously submitted a declaration about CDCR's lethal injection records) and the person most qualified at CDCR to testify as to various specified topics. The deposition notice of CDCR also sought the production of various documents. *See* Exhibit 21 (December 14, 2015 ACLU Letter to CDCR; Notice of Deposition of CDCR; Notice of Deposition of Kelly McCleave).

On December 22, 2015, CDCR informed the Court that it would agree to extend the public comment deadline by 31 days, so that it could have until January 22, 2016 to prepare its privilege log. *See* Exhibit 22 (December 22, 2015 CDCR Letter to Court). The same day, the ACLU submitted a letter to the Court indicating its view that the entire 31 days should not be allocated to CDCR to prepare the privilege log but that the public be given more time between the hearing on CDCR's claimed exemptions (the earliest point at which any documents would be ordered released) and the close of the public comment period. *See* Exhibit 23 (December 22, 2015 ACLU Letter to Court). As the ACLU explained, "the public should have more than a few

days to review any documents produced as a result of this process prior to the expiration of the comment period.” *Id.*

The Court noticed a hearing for December 24, 2015 to address the schedule in the case. *See* Exhibit 24 (Notice of Hearing). It adopted a scheduling order setting forth new deadlines; the order was based on CDCR’s decision to extend the public comment period on its proposed lethal injection regulations by 31 days to February 22, 2016: By January 21, 2016, CDCR was to produce any responsive records that it determined not to be exempt. By January 22, 2016, CDCR was to file and serve a supplemental brief, file and serve an exemption log in the format specified by the Court’s December 11, 2015 Order, and file under seal all withheld, responsive records for *in camera* review in the format specified by the Court’s December 11, 2015 Order. By February 1, 2016, the ACLU was to file and serve a supplemental brief. The hearing on the matter was set for February 10, 2016 at 10 am. *See* Exhibit 25 (December 24, 2015 Docket Entry).

In light of the new scheduling order, the ACLU continued the depositions previously noticed for December 28, 2015, proposed new deposition dates of January 25 and 26, 2016 (*i.e.*, after the due date for CDCR’s exemption log and brief and before the due date for the ACLU’s brief), inquired as to the availability of CDCR’s witnesses on those dates, and issued new deposition notices of Kelly McCleese and CDCR’s person most qualified based on the dates CDCR indicated the witnesses were available. *See* Exhibit 26 (December 24, 2015 email to CDCR; December 31, 2015 email to CDCR; January 6, 2016 email from CDCR; Notice of Deposition of Kelly McCleese; Notice of Deposition of CDCR).

On January 15, 2016, CDCR published notice that the written comment period on its proposed lethal injection regulations would be extended to February 22, 2016 at 5 pm. *See* Cal. Reg. Notice, No. 3-Z, p. 79.

F. CDCR identified additional responsive documents after claiming it had already produced everything.

Despite CDCR’s earlier protestations in December that it had already produced all responsive documents (*see, e.g.*, Exhibit 19 (Supplemental Declaration of Kelly McCleese) at ¶¶ 3-4), it produced additional responsive documents on January 21, 2016. *See* Exhibit 27 (January 21, 2016 letter from CDCR; Documents Produced on January 21, 2016).

G. CDCR obstructed the ACLU’s efforts to litigate over its right to public records.

CDCR then engaged in various acts and omissions in the PRA litigation that significantly interfered with the ACLU’s ability to fairly litigate its right to the documents sought in its request for lethal injection records.

First, the scheduling order provided the ACLU only ten calendar days from the filing of CDCR's brief and exemption log to submit its own brief in response. But CDCR filed and served its materials three days late, shortening that already small window. Although the scheduling order called for CDCR to file and serve its exemption log and supplemental brief on January 22, 2016, CDCR did not do so. Instead, on January 22, 2016, it filed a Report on Status of Exemption Log and Redacted Documents for In Camera Review stating that "CDCR's attorneys have learned that their office's processing of the electronic data in the form to be submitted to the court cannot be completed before the Court closes on Friday, January 22, 2016" but that CDCR anticipated the process to be complete by the following Monday, January 25, 2016. See Exhibit 28 (CDCR's Report on Status of Exemption Log and Redacted Documents for In Camera Review). In addition to filing its exemption log with the Court late, CDCR also failed to provide the ACLU with the exemption log on Friday, January 22, 2016. Although it promised to serve the log by email "over the weekend," CDCR did not serve it until the following Monday, January 25, 2016. See Exhibit 29 (January 22, 2016 email from CDCR; January 25, 2016 email from CDCR).

CDCR's brief, supporting papers, and exemption log are attached as Exhibits 30 (Respondent CDCR's Supplemental Brief); Exhibit 31 (Declaration of Kelly McCleave); Exhibit 32 (Declaration of Rafael Davtian); Exhibit 33 (Declaration of Lowell Finley); Exhibit 34 (Supplemental Declaration of Lowell Finley); Exhibit 35 (Application to File Under Seal Exhibits in Support of CDCR's Supplemental Brief); Exhibit 36 (Privilege Log).

Second, the ACLU had noticed depositions for the short window between CDCR's filing of its brief and the due date of the ACLU's brief. CDCR unilaterally refused to appear for the depositions, providing the ACLU only with telephonic notice the business day before the first scheduled deposition. The purpose of the depositions was to explore the adequacy of CDCR's search for records and the factual basis for its claimed exemptions. The information sought in the depositions would thus inform the ACLU's brief in opposition to CDCR's claimed exemptions. CDCR's refusal to produce witnesses with information relevant to the ACLU's brief, forced the ACLU to bring an ex parte motion to compel CDCR to produce witnesses, further interfering with ACLU's ability to prepare its brief in opposition to CDCR's claimed exemptions.

The ACLU's ex parte papers are attached as Exhibit 37 (Ex Parte Application; Memorandum of Points and Authorities; Declaration of Achyut J. Phadke in Support of Ex Parte Application; Declaration of David Fry in Support of Ex Parte Application; [Proposed] Order Granting Ex Parte Application). The court granted the ACLU's application and ordered CDCR to produce the witnesses for the depositions. See Exhibit 38 (Notice of Entry of Order). The depositions went forward. The transcript of the deposition of Kelly McCleave is attached as Exhibit 39 (Deposition of Kelly McCleave; Exhibits 1-16; Errata). The transcript of the deposition of Rafael Davtian is attached as Exhibit 40 (Deposition of Rafael Davtian; Exhibits 1-4; Errata).

Despite the obstacles CDCR erected, the ACLU filed its brief and supporting papers on February 1, 2016. *See* Exhibit 41 (Petitioner’s Supplemental Memorandum in Support of Verified Petition for Peremptory Writ of Mandate and Writ of Mandate), Exhibit 42 (Declaration of Achyut Phadke), Exhibit 43 (Declaration of Jeanne Woodford), Exhibit 44 (Opposition to Application to File Under Seal Exhibits).

H. CDCR took deliberate steps to shroud in secrecy its entire process of developing lethal injection regulations.

CDCR admitted in its court filings that it shifted the job of overseeing preparation of its proposed lethal injection regulations to its legal department. *See* Exhibit 31 (Declaration of Kelly McCleave) at ¶ 14. This constituted a departure from the standard practice at CDCR, where regulations have historically been prepared by non-lawyers. *See* Exhibit 43 (Declaration of Jeanne Woodford) at ¶¶ 4-6. CDCR then took the sweeping position in the PRA action that because its legal department oversaw preparation of its proposed lethal injection regulations, all documents related to those proposed regulations were covered by the attorney-client and/or attorney work product privileges and should therefore be kept out of public view. *See* Exhibit 30 (Respondent CDCR’s Supplemental Brief). In other words, CDCR took deliberate steps to shroud its entire process of developing its proposed lethal injection regulations in secrecy.

CDCR also provided scant information to the ACLU about the factual basis for its claimed exemptions. For example, even though it asserted the attorney-client relationship, the exemption log it submitted failed to provide basic information, such as author or recipient, about many of the documents on the log. *See* Exhibit 36. Then, *after* the ACLU submitted its brief, CDCR submitted an “Augmented Exemption Log,” providing slightly more information about certain entries on the log, on February 4, 2015. *See* Exhibit 45 (Augmented Exemption Log; Declaration of Service). It provided another Augmented Exemption Log on February 5, 2015. *See* Exhibit 46 (Augmented Exemption Log; Declaration of Service).

I. CDCR repeatedly and intentionally sought to delay resolution of the ACLU’s right to lethal injection records until after the close of the public comment period.

On February 9, 2016, the Court issued a tentative ruling based on its careful in camera review of thousands of documents. *See* Exhibit 47 (Tentative Ruling). The tentative ruling denied certain exemptions, tentatively denied additional exemptions, and granted some exemptions.

The tentative ruling rejected CDCR’s broad position that it could cloak everything related to the preparation of the regulations in privilege simply by assigning the work to attorneys. Instead, it recognized that some of the documents involved “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." *Id.* at page 10.

Many of the tentative denials were based on CDCR's failure to provide the Court with sufficient information to evaluate the claimed exemption, including by *redacting* the documents it provided to the Court *in camera*. CDCR had indicated to the Court however that it would be willing "to provide un-redacted versions of the documents to the court for further review, should its claimed exemptions be denied." *Id.* at page 3.

But the Court was mindful of "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." *Id.* It observed that "*Respondent [CDCR] 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.*" *Id.* (emphasis added). As a result, "[t]o avoid mooted 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," *i.e.*, to obtain documents relevant to the public's right to comment on the proposed lethal injection regulations, "will have been meaningless." *Id.*

In other words, CDCR sought to run out the clock on the public comment by proffering insufficient information to sustain its claimed exemptions, assuming it would get a "second bite at the apple" that would delay an adjudication on its claimed exemptions beyond the close of the public comment period—and thus defeat the public's right to public records at the time when the records mattered most.

The Court held the hearing on February 10, 2016. *See* Exhibit 48 (Transcript of Feb. 10, 2016 hearing). At the conclusion of the hearing, CDCR agreed to extend the public comment period for 30 days. The Court then adopted a modified version of its tentative ruling, and agreed to "conduct further *in camera* review of any documents Respondent [CDCR] wishes to re-submit without redaction." *See* Exhibit 49 (Decision; Attached Spreadsheet 1; Attached Spreadsheet 2). The Court also set forth a schedule specifying the dates by which CDCR was to submit further exemption logs, provide documents for *in camera* review, and conduct a further search.

A few days later, on February 15, 2016, CDCR submitted an *ex parte* application to modify the schedule to provide it additional time to complete the tasks required by the Court in its February 10, 2016 order; CDCR agreed to extend the deadline for public comments on its proposed lethal injection regulations to April 6, 2016. *See* Exhibit 50 (Respondent's *Ex Parte*

Application to Modify Schedule; [Proposed] Order). The Court entered CDCR's proposed schedule. *See* Exhibit 51 (Order Granting Ex Parte Application to Modify Schedule Set in Court's February 10, 2016 Decision and Order).

Although the officially noticed close of the public comment period was February 22, 2016, CDCR did not notify the public of its decision to extend the public comment to April 6, 2016 until *after* February 22, 2016. *See* Cal. Reg. Notice Register 2016, No. 9-Z, p. 289.

Although the scheduling order prepared by CDCR called for it to produce to the Court and the ACLU revised exemption logs on or before February 26, 2016, CDCR once again failed to meet the deadline. Instead, it served its exemption logs on the ACLU late and additionally served a supplemental brief and supporting declaration rearguing exemptions that had already been litigated and raising entirely new exemptions. *See* Exhibit 52 (Respondent CDCR's Further Supplemental Brief), Exhibit 53 (Declaration of Mark Beckington), Exhibit 54 (Declaration of Anthony Hakl), Exhibit 55 (Declaration of Sara Curtis), Exhibit 56 (Filed Under Seal (2 DVDs)), Exhibit 57 (Log 1), Exhibit 58 (Log 2).

Because the Court's prior orders did not contemplate the filing of any supplemental briefs, the ACLU had no choice but to file yet another ex parte motion, in this instance, to strike CDCR's improper brief. *See* Exhibit 59 (Ex Parte Application; Memorandum of Points and Authorities; Declaration of Linda Lye; Declaration of Achyut Phadke; Proposed Order).

At the hearing on the ACLU's ex parte application on March 3, 2016, the Court deferred ruling on the application but indicated it was disinclined to consider CDCR's new papers except to the extent that they answered questions the Court had posed in its February 10, 2016 order. *See* Exhibit 60 (Transcript of March 3, 2016 hearing). The Court requested from CDCR an identification of specific documents which involved correspondence either with the Governor's Office or the Receiver's Office and over which CDCR was claiming attorney-client privilege; it also invited briefing from the ACLU on whether correspondence with either office should be covered by the privilege.

On March 8, 2016, CDCR submitted the requested letter. *See* Exhibit 61 (March 8, 2016 letter from CDCR). On March 11, 2016, the ACLU submitted a further brief, pursuant to the Court's instruction and invitation at the March 3, 2016 ex parte hearing. *See* Exhibit 62 (Response to CDCR's Further Briefing on Privilege Claims Relating to Governor's Office and Receiver Communications) and Exhibit 63 (Declaration of Achyut Phadke).

The Court issued a tentative ruling on March 17, 2016. *See* Exhibit 64 (Tentative Ruling; Tentative Rulings on Exemption Log 1; Tentative Rulings on Exemption Log 2). The tentative ruling held, among other things, that communications sent to or from the Governor's Office counsel and Receiver were not privileged. The Court also noted that CDCR had failed to provide the Court with a complete list of documents involving the Governor's and Receiver's

office; the Court's own diligent review of the documents revealed that the list identified by CDCR on March 8, 2016 was significantly underinclusive.

The Court held a hearing on March 18, 2016. *See* Exhibit 65 (Transcript of March 18, 2016 hearing). It issued a final ruling on March 21, 2016. *See* Exhibit 66 (March 21, 2016 Final Ruling; Final Rulings on Exemption Log 1; Final Rulings on Exemption Log 2). The Court affirmed the position it had previously taken in its February 10, 2016 ruling and reiterated that CDCR could not cloak under a veil of privilege "all factual information considered by the agency... merely because it is handed from one attorney to another, from attorney to client, or simply is stored as a file on an attorney's computer." *Id.* at page 7. But the Court also reversed the position it had taken in the March 17, 2016 tentative on the applicability of the privilege to communications involving the Governor's and Receiver's offices, and ruled in CDCR's favor that those offices fell within the "protected circle of attorney/client and/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 in most instances." *Id.* at page 7. All told, the Court sustained in full CDCR's claimed exemptions as to 1,938 out of 2,783 documents and required CDCR to disclose in full or in part just over 800 documents, less than one-third of those CDCR sought to withhold. It ordered CDCR to disclose the documents by the close of business on March 24, 2016, just nine working days before the close of comment period.

J. CDCR sought to delay production of records that the Superior Court ordered disclosed until after the close of the public comment period.

CDCR then expended significant resources seeking to delay the production of records that the trial court had ordered disclosed, and forced the ACLU to expend significant resources attempting to ensure that records would be produced before the close of the public comment period.

Despite prevailing on its bid to withhold two-thirds of the 2,783 documents at issue, and prevailing on its claim that communications with the Governor's and Receiver's offices were privileged, CDCR filed a writ petition on March 23, 2016 seeking review of the trial court's ruling and sought an immediate stay. *See* Exhibit 67 (Petition for Extraordinary Writ of Mandate). CDCR's stay request nowhere acknowledged that the public comment period was set to close on April 6, 2016. On March 23, 2016, the same day CDCR filed its writ petition and stay request, and before the ACLU had an opportunity to file an opposition to the stay, the Court of Appeal stayed the trial court order. *See* Exhibit 68 (Stay Order).

On March 24, 2016, CDCR informed the ACLU that it would not produce the documents ordered disclose by the trial court in light of the appellate court's stay. *See* Exhibit 69 (March 24, 2016 email from CDCR).

Also on March 24, 2016, the ACLU filed a motion to vacate the appellate court's March 23, 2016 stay order. *See* Exhibit 70 (Motion to Vacate Stay Order; Application to Shorten Time

on Motion to Vacate Stay; Declaration of David Fry in Support of Motion to Vacate Stay). The Court of Appeal promptly modified its March 23, 2016 stay order and provided that the stay was “conditional on [CDCR’s] agreement to extend the public comment period deadline for proposed changes to lethal injection regulations, currently set for April 6, 2016, until May 15, 2016,” and that the stay would be lifted unless CDCR provided notice by March 30, 2016 of its agreement to extend the public comment period until May 15, 2016. *See* Exhibit 71 (Modified Stay Order).

Rather than producing records ordered disclosed by the Superior Court, or simply extending the public comment period, CDCR responded on March 28, 2016 by filing in the Court of Appeal a motion for reconsideration and in the Supreme Court a further petition for review and request for an immediate stay. *See* Exhibit 72 (Emergency Motion for Reconsideration), Exhibit 73 (Petition for Review of Interlocutory Order of Court of Appeal). On the same day, the Court of Appeal granted reconsideration and declined to modify its March 24, 2016 conditional stay order. *See* Exhibit 74 (Order Declining to Modify Stay Order). Also that day, the Supreme Court ordered ACLU to file an answer to CDCR’s petition by 10 am the next day. *See* Exhibit 75 (March 28, 2016 Letter from Clerk of the Supreme Court). The ACLU filed a timely answer on March 29, 2016. *See* Exhibit 76 (Answer to Petition for Review). CDCR filed a reply. *See* Exhibit 77 (Reply). On March 30, 2016, the Supreme Court denied the petition for review and application for a stay. *See* Exhibit 78 (Order of Supreme Court).

Later that day, CDCR provided notice that it would extend the public comment period until May 15, 2016. *See* Exhibit 79 (Notification of Extension of Public Comment Period).

The parties thereafter filed briefs on the merits of CDCR’s writ petition in the Court of Appeal. *See* Exhibit 80 (ACLU’s Opposition to Petition for Extraordinary Writ of Mandate or Other Appropriate Relief; Declaration of David Fry in Support), Exhibit 81 (Reply).

On April 22, 2016, the Court of Appeal denied CDCR’s petition for writ of mandate. *See* Exhibit 82 (Order Denying Petition).

Even after the Court of Appeal *denied* CDCR’s writ petition seeking review of the Superior Court’s disclosure order, CDCR still refused to produce the documents. Instead, on April 25, 2016, it asked the Superior Court to further revisit its careful decision and asked the Superior Court to delay CDCR’s deadline for production of documents until April 29, 2016. *See* Exhibit 83 (Respondent’s Ex Parte Application; Respondent’s Memorandum of Points and Authorities). The ACLU filed opposition papers. *See* Exhibit 84 (Opposition to Respondent CDCR’s Ex Parte Application; Declaration of Achyut Phadke). The Superior Court denied most of CDCR’s request, although it revised its ruling on a few select documents. It also expressly denied CDCR’s request to establish April 29, 2016 as its deadline for producing documents. *See* Exhibit 85 ([Proposed] Order Granting in Part and Denying in Part Respondent’s Ex Parte Application; Minute Order). It also expressly denied CDCR’s request to establish April 29, 2016 as its deadline for producing documents. *See id.*

Even though CDCR failed in its bid to delay its document production deadline until April 29, 2016, CDCR still refused to produce the documents. The ACLU was thus forced to file a motion requesting that the Superior Court issue an Order to Show Cause (“OSC”) why CDCR should not be held in contempt. *See* Exhibit 86 (Ex Parte Application for OSC re Contempt; Memorandum of Points and Authorities In Support; Declaration of David Fry; Declaration of Achyut Phadke). On April 27, 2016, the Superior Court issued an OSC and directed CDCR to appear on April 28, 2016. *See* Exhibit 87 (Order to Show Cause re Contempt).

At the April 28, 2016 hearing on the OSC, the parties negotiated a stipulated resolution which provided CDCR an opportunity to file a Petition for Review in the Supreme Court, conditioned on an extension of the public comment period to July 11, 2016. *See* Exhibit 88 (Stipulated Order). The stipulation fulfilled the ACLU’s goal of obtaining the records prior to the close of the public comment period, its consistent goal throughout the litigation.

CDCR filed a petition for review and stay request in the California Supreme Court. The ACLU filed an answer. *See* Exhibit 89 (Answer). The Supreme Court denied the stay request and the petition for review. *See* Exhibit 90 (Order Denying Stay); Exhibit 91 (Order Denying Petition for Review).

On May 4, 2016, CDCR finally produced the documents that the Superior Court had ordered disclosed on March 21, 2016. *See* Exhibit 92 (Documents Produced by CDCR on May 4, 2016).⁴

The ACLU identified a number of documents that had been ordered disclosed but that CDCR had failed to produce. *See* Exhibit 93 (May 10, 2016 Letter to CDCR; Enclosure). CDCR produced additional documents on June 1, 2016. *See* Exhibit 94 (May 31, 2016 CDCR cover email; Enclosure); Exhibit 95 (Documents Produced by CDCR on June 1, 2016).⁵

The ACLU has made all of the documents obtained in response to this Public Records Act request available to the public by publishing them on its website.

K. CDCR redacted information that if disclosed would not raise safety concerns.

CDCR argued to the Superior Court that it should be permitted to redact information pertaining to a pharmaceutical company that produces drugs used in lethal injection. It argued, based on evidence it submitted under seal, that disclosure would raise safety concerns. *See*

⁴ Some of the documents produced by CDCR on May 4, 2016 did not contain bates numbering. They were produced in “pdf” format. For documents that lacked bates numbering, we have inserted bates numbering that conforms to the file name on the pdfs as they were produced by CDCR.

⁵ The documents produced by CDCR on June 1, 2016 did not contain bates numbering. They were produced in “pdf” format and the numbering reflected on Exhibit 95 reflects the file names of the pdfs as they were produced by CDCR.

Exhibit 30 (CDCR's Supplemental Brief at 11:24-12:4); Exhibit 35 (CDCR's Application to File Under Seal Exhibits in Support of CDCR's Supplemental Brief). Although the ACLU argued that it should be granted access to the "evidence" of safety threats, the Superior Court granted CDCR's motion to file the evidence under seal. *See* Exhibit 49 (February 10, 2016 Court Order at 5:14-15). As a result, CDCR's "evidence" was never subjected to adversarial testing. When CDCR ultimately produced the records, it became clear that its safety concerns were meritless. It is clear from the documents produced that the pharmaceutical company name it redacted was Hospira, the manufacturer of sodium thiopental. *See, e.g.*, Exhibit 92 at PRIV007261. The fact that Hospira was the manufacturer of sodium thiopental is widely known and has been the subject of much media coverage, as discussed in the ACLU's separately submitted substantive comments. Thus, there is no conceivable safety concern from disclosing the fact that "Hospira" manufactured sodium thiopental.⁶ CDCR's invocation of safety concerns to justify redacting Hospira from public records undermines all of CDCR's other purported safety concerns.

L. CDCR delayed in disclosing records responsive to a supplemental PRA request.

Based on concerns that CDCR may have used a cut-off date of September 2015 in searching for records responsive to the PRA requests at issue in the litigation discussed above, *see* Exhibit 39 (McCleave Deposition at 166:25-167:25), the ACLU submitted a follow-up PRA request on February 12, 2016 for documents related to the lethal injection regulations generated after September 1, 2015. *See* Exhibit 96 (February 12, 2016 PRA request). CDCR initially produced 15 pages. *See* Exhibit 97 (March 7, 2016 CDCR Response; March 24, 2016 CDCR Document Production). CDCR then identified a further 1,052 pages, but did not make those documents available until July 1, 2016. *See* Exhibit 98 (June 20, 2016 CDCR Response; July 1, 2016 email from CDCR); Exhibit 99 (July 1, 2016 CDCR Supplemental Document Production in response to February 12, 2016 PRA request). CDCR then identified a further 332 pages on July 7, 2016, just two business days before the close of the public comment period. *See* Exhibit 102 (July 7, 2016 CDCR Response and Further Supplemental Document Production in response to February 12, 2016 PRA request).

Because CDCR delayed producing these documents until just before the close of the public comment period, the ACLU has not had a meaningful opportunity to review them before submitting these comments.

III. Failure to Comply with APA

A. Interference with public's ability to provide meaningful opportunity for public comment

⁶ Had the ACLU been aware that CDCR sought to redact "Hospira" from public records, it could have made this point to the Superior Court.

CDCR has violated the public's right under the APA to provide meaningful comment on the proposed regulations.

1. Failure to include required information in the rulemaking file

CDCR failed to provide the public with a complete rulemaking file. CDCR is required to include in the rulemaking file, *inter alia*, “[a]ll data and other factual information, any studies or reports, and written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation,” and “[a]ll data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation....” Gov. Code § 11347.3(b)(6)-(7). In *POET, LLC v. California Air Resources Board*, 218 Cal.App.4th 681 (2013), the Court of Appeal held that the agency violated the APA by failing to include in the rulemaking file four emails from consultants hired by the agency. *Id.* at 743. The emails were required to be included pursuant to Government Code § 11347.3(b)(6) because they contained “other factual information” and were “submitted to the agency.” *Id.* In failing to include the emails in the rulemaking file, the agency “violated its disclosure obligations under the rulemaking procedures of the APA” and “thwart[ed] the public’s right to information.” *Id.*

In the PRA litigation, CDCR acknowledged the existence of, but sought to withhold, documents reflecting the work of its staff in preparing the regulations to conduct “research, investigation, [and] fact-finding.” See Exhibit 52 (Respondent CDCR’s Further Supplemental Brief) at 3:7 (emphasis added). It also acknowledged the existence of, but sought to withhold, “communications with subject matter consultants, including attachments with seemingly publicly available information.” *Id.* at 3:8-9 (footnote omitted).

Indeed, the record is clear that CDCR considered and relied upon, but sought to withhold, a significant body of data and other factual information provided to it by its hired consultant and a former member of the execution team on a variety of topics such as compounding of drugs, drug preparation, drug dosage/amount, the lethal effect of drugs, drug handling, drug storage, drug disposal, and IV access. See Exhibit 39 (McCleave Deposition at, *e.g.*, 221:16-20 (consultant answered attorney’s questions as CDCR decided what to include in regulations), 222:11-16 (same), 232:10-14 (consultant provided substantive input), 235:4-13 (consultant and former team member provided input on compounding of drugs), 238:5-14 (same regarding drug preparation), 239:6-240:12 (same regarding dosage and number of grams to select for drugs in protocol), 245:20-25 (same regarding lethal effect of various drugs in humans), 246:1-5 (same regarding drug handling, drug storage, drug disposal, drug preparation, IV access, dosage), 248:9-11 (same regarding IV access)). The Court explicitly found, after its careful *in camera* review of the documents CDCR sought to withhold in the PRA action, that many of the withheld documents involve communications related to *factual* issues, such as “costs or purchase of pharmaceuticals, availability of pharmaceuticals, expiration dates of pharmaceuticals.” See Exhibit 49 (February 10, 2016 Order) at page 12.

All of the factual information gathered by its staff, whether attorneys or not, in developing the proposed regulations constitute “data and other factual information, technical, theoretical, and empirical studies or reports ... on which the agency is relying,” and should have been included by CDCR in the rulemaking file pursuant to Government Code § 11347.3(b)(7).

Similarly, all of the factual information submitted to CDCR by its hired consultants constitute “factual information...submitted to the agency in connection with” the proposed regulations and should also have been included by CDCR in the rulemaking file pursuant to Government Code § 11347.3(b)(6). Indeed, *POET, LLC*, which involved consultant emails, is exactly on point.

CDCR had an affirmative obligation under the APA to include these materials in the rulemaking file. Yet not only did CDCR fail to include these materials, it actively fought the ACLU’s efforts to obtain this information. Examples of documents obtained through the PRA, but that CDCR has failed to include in the rulemaking file include, but are not limited to:

- Factual information submitted to the agency by its consultant. *See, e.g.*, Exhibit 92 at PRIV006880 (information about compounding pharmacies), PRIV006891 (information about Florida’s protocol), PRIV006939 (information about botched Florida execution).
- Data and other factual information, technical, theoretical, and empirical studies or reports on which the agency relied. *See, e.g.*, Exhibit 92 at PRIV009663 (information about Texas running out of execution drugs), PRIV015817 (California Correctional Health Care Services expressing unwillingness to “have any role in this process”).

Nor is the harm sufficiently cured by the fact that the ACLU, after engaging in vigorous litigation, was able to obtain *some* of these documents prior to the close of the public comment period.

First, the Superior Court sustained CDCR’s claims of attorney-client or attorney work product privilege for hundreds of documents that were undisputedly submitted to the agency or relied upon by the agency in developing the proposed lethal injection regulations. *See* Exhibit 66 (March 21, 2016 Final Ruling). These documents, or portions thereof, have not been disclosed to the public. And notwithstanding the Superior Court’s determination that they fall within the attorney-client or work-product privilege, these same documents fall within the express terms of section 11347.3(b)(6) or (7) and thus should have been included in the rulemaking file. *Cf. POET, LLC*, 218 Cal.App.4th at 754 (“inquiry into the disclosures required by the APA is analyzed separately from the question whether the deliberative process privilege applies to a particular document”).⁷

⁷ The issue before the court in the PRA action was whether the documents were subject to disclosure under the PRA. The court did not address the distinct legal question of whether the

Second, as to documents the Superior Court ordered disclosed, CDCR has not added any of them to the rulemaking file. Many, however, should have been included from the outset pursuant to Sections 11347.3(b)(6) and (7). *See* Gov. Code § 11347.1(a) (setting forth procedure for agency to “add[] any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action”). The APA creates a specific procedure for adding documents to the rulemaking file; it requires notice to persons who have submitted oral or written testimony and who requested notification of the availability of changes to the text of the proposed regulation, and a minimum of an additional 15 calendar days for public comment; any comments on the newly added information must be addressed in the agency’s final statement of reasons. *See* Gov. Code §11347.1(b), (d). CDCR has failed to follow these procedures.

Third, the mere fact that CDCR eventually disclosed documents to the ACLU that should have been included in the rulemaking file pursuant to Sections 11347.3(b)(6) and (7) does not cure the problem. Even if mere disclosure to the ACLU could be construed as adding these documents to the rulemaking file pursuant to §11347.1 (which it cannot be), the disclosure did not occur until May 4, 2016, approximately six months after it issued the Notice of Change to Regulations.⁸ Government Code Section 11347.3(a) requires the agency to make the rulemaking file available to the public “*no later* than the date that the notice of the propose action is published in the California Regulatory Notice Register.” (Emphasis added.) The six month delay in making these documents public violates the APA. *See Sims v. Dep’t of Corr. and Rehab.*, 216 Cal.App.4th 1059, 1075 (2013) (CDCR substantially failed to comply with APA where, *inter alia*, CDCR did not include “important information required by the APA to be included in the rulemaking file, and that file was not made available to the public until...six weeks after the CDCR published notice of the proposed regulation”).

CDCR’s failure to include all of the factual information upon which it relied or which was submitted to it, *see* Gov. Code § 11347.3(b)(6) and (7), has interfered with the public’s ability to comment meaningfully on these regulations. CDCR’s document production in the PRA litigation consisted of some 11,000 pages. *See* Exhibits 92 (May 4, 2016 production) & 95 (June 1, 2016 production). Initial review of these documents revealed issues of significant import. For example:

* *CDCR’s fiscal estimate in the ISOR grossly understates the cost of procuring the lethal injection chemical.* The ISOR states that the cost of lethal injection chemical for use in one execution is \$4,193 or \$70 per gram. *See* ISOR at 10. As explained in the ACLU’s substantive comments submitted separately, CDCR’s own documents demonstrate that

documents constituted information required to be included in the rulemaking file, pursuant to the APA.

⁸ The ACLU promptly made the documents available to the public at large on its website within a week of CDCR’s disclosure of the documents to the ACLU.

the true cost may range from \$2,218 to \$2,500 per gram. *See* Exhibit 92 at PRIV 000377 (May 8, 2014 from CDCR attorney Kelly McCleave discussing one potential source that would charge “approximately \$500,000 for an initial 200 gram order”); PRIV 007718 (April 16, 2014 from CDCR attorney Kelly McCleave discussing source that would charge “list price [of] \$1,109 per 500 mg” of pentobarbital). Based on CDCR’s estimated need to purchase 60 grams, lethal injection costs would range from \$133,080 to \$150,000 per execution.

- * *CDCR has been unrepentant about flouting federal law and considered importing foreign drugs, again.* In 2012, the FDA demanded that CDCR return its supply of imported sodium thiopental because the FDA determined that the CDCR’s supply was illegal. The CDCR responded to the FDA’s demand by refusing to surrender its stash of illegal drugs, blatantly ignoring this command by a federal agency. Shockingly, the documents reveal that the CDCR again considered acquiring drugs from foreign sources, even after the FDA demanded in 2012 that it surrender its illegal, foreign-manufactured drugs. *See id.* at PRIV009577. CDCR has simply refused to acknowledge that it has run afoul of federal drug laws in the past, making the lack of safeguards to ensure legal compliance in the proposed regulations all the more worrying. For example, a key CDCR attorney in charge of developing the CDCR’s regulations wrote in 2014: “CA is the only state that did everything properly via the FDA and DEA for importation and acquisition.” This is a remarkable statement in light of CDCR’s stubborn flouting of the FDA’s 2012 demand to hand over its illegal supply of lethal injection drugs. *See id.* at PRIV008461. It also underscores the need for safeguards regarding the manner in which CDCR acquires lethal injection chemicals.
- * *CDCR considered very troubling drug sources.* The consultant retained by CDCR specifically to help develop its lethal injection protocol proposed a number of troubling sources, including an online pharmacy that boasts about offering “cheap” pentobarbital without a prescription and a compounding pharmacy that specializes in prescriptions for animals. *See id.* at PRIV008556-008561, 008585. The FDA has been cracking down on online pharmacies that sell controlled substances without a prescription, because they essentially sell illegal drugs for illicit use. The fact that CDCR considered troubling drug sources again underscores the need for safeguards regarding CDCR’s acquisition of lethal injection chemicals.
- * *CDCR officials dismissed the seriousness of botched executions in other states and demonstrated a troubling indifference to their possibility in California.* Documents show that CDCR officials not only failed to study botched executions elsewhere, they denied that gruesome executions in other states were, in fact, botched. For example, the CDCR attorney tasked with overseeing the development of the regulations commented that news coverage of a horrific execution in Ohio, in which an inmate gasped for air for 25 minutes, was just “a big hoopla” and “beyond ridiculous.” She dismissed media reports, insisting that “[w]hat they witnessed was snoring.” *See id.* at PRIV 008406. In addition,

the consultant forwarded to CDCR a news article of a botched execution in Florida that included graphic photos of chemical burns and extensive “skin slippage” on the inmate’s body. Commenting “I do not know where or how they got these pictures!”, the consultant apparently harbored deep concerns that the media was able to secure photos, but expressed none about what actually happened to the inmate. The CDCR’s response to the news article similarly reflected no concern about what happened in Florida or how to prevent the same tragedy in California. *See id.* at PRIV006953. CDCR’s dismissive attitude about botched executions underscores concerns that the proposed regulations lack safeguards to prevent similar tragedies from occurring in California.

These are just a few of the documents that shed light on CDCR’s proposed regulations, that should have been included in the rulemaking file, and that would have informed the public’s comments on the proposed regulations. Failure to designate them in the rulemaking file interfered with the public’s ability to comment meaningfully. Even if some members of the public have now had a chance to comment on these topics based on the ACLU’s efforts to publicize this information, the ACLU cannot be expected to reach an audience CDCR was intended to inform. Additional interested members the public may have shared their perspective had this information been included in the rulemaking file. Many members of the public submitted comments well before May 4, 2016, when CDCR produced the lion’s share of documents responsive to the ACLU’s PRA request. Moreover, there are likely many additional documents that shed light on the proposed regulations. CDCR’s failure to include them in the rulemaking file from the outset thwarted the public’s ability to submit informed comments.

2. Failure to provide all information relevant to proposed regulations

Even if CDCR complied with the bare procedural minima regarding the information it was required to include in the rulemaking file—which it did not—CDCR still failed to provide *all* available information that is relevant to the proposed regulations. It thereby thwarted meaningful public participation and effective judicial review.

“The APA is intended to advance ‘meaningful public participation in the adoption of administrative regulations by state agencies’ and create ‘an administrative record assuring effective judicial review.’ In order to carry out these dual objectives, the APA (1) establishes ‘basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations’ (Gov.Code, § 11346) which give ‘interested parties an opportunity to present statements and arguments at the time and place specified in the notice and calls upon the agency to consider all relevant matter presented to it,’ and (2) ‘provides that any interested person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief in the Superior Court.’” *Voss v. Superior Court*, 46 Cal.App.4th 900, 908-09 (1996) (citations omitted).

The APA’s twin objectives of meaningful public participation and effective judicial review, “[a]lthough implied rather than expressed, ... are just as statutory and just as binding as

the APA's itemized directions." *California Optometric Ass'n v. Lackner*, 60 Cal.App.3d 500, 509 (1976). "Compliance with procedural minima does not necessarily achieve these goals." *Id.* at 509, 510.

In particular, the APA requires that "the interested public ... timely receive[] *all* available information that is relevant to the proposed regulations, accurate, and as complete as reasonably possible." *Sims v. Dep't of Corr. and Rehab.*, 216 Cal.App.4th 1059, 1073 (2013) (emphasis added). Courts have emphasized the importance of making available to the public, and preserving for subsequent judicial review, all evidence upon which the agency based its decision. *See California Optometric Ass'n*, 60 Cal. App.3d at 510 ("an agency 'may not base its decision upon evidence outside the record and not made available for rebuttal by the affected parties'"; "effective judicial review is impossible without an identified body of the evidence upon which the agency acted").

As a result, *all* information relevant to the lethal injection regulations and upon which the agency based its decision should have been made available to the public and the court for any potential subsequent APA challenge. This is so even if the information was not expressly required to be included in the rulemaking file pursuant to Section 11347.3(b), which sets forth only the bare "minimum standards" of the APA. *See California Optometric Ass'n*, 60 Cal.App.3d at 511 ("[a] proceeding which satisfies the minimum standards of the APA may be fatally deficient").

It is clear that CDCR has failed to make public all information relevant to the lethal injection regulations and upon which it based its decision. CDCR identified 2,783 documents on its privilege log in the ACLU's PRA suit for records related to the lethal injection regulations. Although the Superior Court ordered 710 documents disclosed, it also found 1,938 of the documents to be exempt from disclosure, and 113 partially exempt from disclosure.⁹ *See* Exhibit 66 (Final Ruling; Final Rulings on Exemption Log 1; Final Rulings on Exemption Log 2). The Superior Court made clear that it was permitting CDCR to withhold "the legal advice underlying the regulations ultimately drafted," including "the attorney's advice *and information*" where it was "intertwined with the drafting of the regulations." *See id.* (Final Ruling at 7) (emphasis added). There are thus potentially over a thousand documents that contain *information* on which CDCR relied in developing the regulations, that CDCR has refused to disclose to the public, and that would shed light on the proposed regulations.

The APA requires disclosure of all factual information upon which the agency actually based its decision, even if the information is found in documents generated by lawyers, and even if it is contained in documents that also contain legal advice. Any other approach would allow the agency, in formulating regulations, to engage in "substantial 'off record' investigations" and to "base its decision upon evidence outside the record and not made available for rebuttal by the

⁹ It also permitted CDCR to withdraw as non-responsive 21 documents, and it appears inadvertently to have omitted ruling on one document.

affected parties.” *California Optometric Ass’n*, 60 Cal.App.3d at 510 (“assurances of public participation ‘cannot be fulfilled by recorded hearings which are paralleled by substantial “off record” investigations.”) (citations omitted).

By failing to provide the public with as many as 2,000 documents containing information related to lethal injection, CDCR has hidden in secrecy the information on which it based its actual decisionmaking process and thereby prevented the meaningful public participation the APA was intended to foster.

3. Delay in producing documents that should have been included in rulemaking file and that are relevant to proposed regulations

The ACLU also submitted a supplemental PRA request for documents related to the lethal injection regulations on February 12, 2016. CDCR produced a handful of responsive documents on March 24, 2016 but did not make available the additional 1,052 responsive documents until Friday, July 1, 2016, just 5 business days before the close of the public comment period. It then identified an additional 332 pages on Thursday, July 7, 2016, just two business days before the close of the public comment period. Neither the ACLU nor the public has had a meaningful opportunity to review these documents, many of which are likely to be items that CDCR should have but did not include in the rulemaking file; relevant to the proposed regulations and would thus have informed public comments; or both. By failing to make these documents available earlier or to include all or some of them in the rulemaking file, CDCR has interfered with the public’s ability to understand CDCR’s reasons for adopting these regulations and to provide meaningful comment.

4. Failure to consult with affected parties prior to publication of notice of proposed changes

CDCR failed to consult with affected parties before publishing notice of the proposed changes.

The APA provides: “In order to increase public participation and improve the quality of regulations, state agencies proposing to adopt regulations shall, prior to publication of the notice required by Section 11346.5, involve parties who would be subject to the proposed regulations in public discussions regarding those proposed regulations, when the proposed regulations involve complex proposals or a large number of proposals that cannot easily be reviewed during the comment period.” Gov. Code § 11346.45(a).

The proposed regulations are clearly “complex.” *Id.* They raise myriad issues under the complex federal and state statutory and regulatory regimes governing controlled substances. And there is a well-defined, easily ascertainable group of individuals who “would be subject to the proposed regulations,” in particular, inmates on death row. *Id.* CDCR therefore was required to involve these inmates in “public discussions regarding those proposed regulations.”

Id. It failed to do so. Nor has it “state[d] the reasons for noncompliance with reasonable specificity,” or indeed any specificity, “in the rulemaking record.” *Id.*

This provides yet another example of CDCR’s efforts to stymie public participation.

5. Failure to provide required information in public notices extending public comment period

In each of the four notices that CDCR published announcing an extension of the written public comment period, CDCR failed to provide information required to be included pursuant to the APA.

Section 11346.5(a) provides: “The notice of proposed adoption, amendment, or repeal shall include the following: (1) A statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation,” as well as 20 other statutorily enumerated items. The statute is express: “*The* notice” that includes “[a] statement of the *time* ... of proceedings” must also include these other items. *Id.* Nothing in the statute authorizes a notice regarding the timing of the proceedings not to include the 20 other statutorily enumerated items.

On January 15, 2016, February 22, 2016, April 15, 2016, and May 13, 2016, CDCR published notices regarding the close of the written public comment period, *i.e.*, notices pertaining to the timing of the proceedings. Each of these notices merely stated that CDCR was extending the written comment period regarding its proposed amendments to specified sections of the California Code of Regulations and stated that notice had been originally published on November 6, 2015. Each of these notices lacked, however, the remaining items required by Section 11346.5(a). Nor is the defect cured simply because the notices refer to the original November 6, 2015. Nothing in the statute authorizes notice by reference. The Legislature could easily have authorized this type of notice but chose not to do so.

6. Failure to provide access to view lethal injection chamber

On December 17, 2015 the ACLU requested that CDCR provide access to the Lethal Injection facility as well as the gas chamber in order to assess the impact on the individuals who are subject to the proposed regulations. *See* Exhibit 100 (December 17, 2015 ACLU Letter). The letter also requested an opportunity to videotape the facilities in order to consult with experts. The letter clearly stated that denial of access to these facilities to tour and videotape would prevent full assessment of the potential impact of the proposed regulations. By letter dated December 22, 2015, the CDCR responded, denying access to the facilities. *See* Exhibit 101 (December 22, 2015 CDCR Response). In this regard as well, CDCR has undermined meaningful public participation. It has prevented the ACLU and the public from commenting on critical aspects of the regulation that would require familiarity with the physical layout of the lethal injection and lethal gas facilities.

B. Failure to demonstrate with substantial evidence that each portion of the regulation is reasonably necessary to effectuate the purpose of the statute

The proposed regulations are invalid because the agency has failed to demonstrate with substantial evidence that each portion of the regulations is necessary to effectuate the purpose of the statute. *See* Gov. Code §11350(a).

For example, the proposed regulations provide for the administration of five doses of the lethal injection chemical if death does not result, and before the execution is called off. *See* §§ 3349.7(c)(9), 3349.7(c)(1), 3349.7(d)(5), 3349.7(d)(6). This is inhumane and inconsistent with CDCR's own insistence that a single dose is lethal. *See* ISOR at 7. CDCR states it is necessary to stop the execution if death has not been declared within 10 minutes after administration of the last syringe in the last of the five doses "because the amount of lethal injection chemical in the inmate by that time should have resulted in death. If it did not, it indicates that there may be an issue with delivery of the lethal injection chemical." ISOR at 44. But this reasoning applies after administration of the first dose if CDCR is correct that a single dose is lethal. If the inmate has not died after administration of the first dose, something has clearly gone very wrong. The proposed regulations would unnecessarily and inhumanely prolong a botched execution and there is no evidence, let alone substantial evidence, to demonstrate that it is necessary to administer five doses before calling off a botched execution.

Other provisions of the regulation suffer from the same defect.

C. Failure to describe why each provision of the regulation is reasonably necessary

CDCR has also failed to explain why each portion of the proposed regulations is reasonably necessary to effectuate the purpose of the statute. *See* Gov. Code §11346.2(b)(1); §11349.1; 1 Cal Code Regs. §10.

For example, the regulations grant the Warden unbridled discretion to select on a "case-by-case basis" from among the four chemicals listed in the protocol for use in any particular execution. *See* Proposed Regulation §3349.5(f)(1)(A) & (C). The ISOR states that the provision for "case-by-case" selection "is necessary to ensure that the San Quentin Warden has the discretion required to make a lethal injection chemical selection." ISOR at 25. This is entirely circular reasoning and merely states that it is necessary to give the Warden discretion in order to give the Warden discretion.¹⁰

¹⁰ CDCR's statement that "it is necessary to provide alternative chemical options to contend with potential issues complicated by the shifting availability of the chemicals" (ISOR at 2) purports to provide an explanation for why it is necessary to list multiple chemicals in the protocol; it does not provide a justification for giving the Warden unbridled discretion to select from among the four chemicals listed in the protocol.

Other provisions of the regulation suffer from the same defect.

D. Failure to discuss alternatives considered

The APA requires CDCR to describe alternatives considered and explain why no alternative would be more effective and less burdensome. *See* Gov. Code §11346.2(b)(4)(A) & Gov. Code §11346.9(a)(4). The documents produced in the PRA litigation demonstrate that CDCR actually considered various alternatives that it failed to discuss in the ISOR. For example, CDCR considered lower dosages than the 7.5 grams proposed in the regulations. The documents produced in the PRA litigation reflect other alternatives considered that the agency has failed to discuss. The public cannot providing meaningful input about whether alternatives are more effective and less burdensome because CDCR has failed to disclose each alternative considered.

E. Failure to accurately or adequately discuss reasons for rejecting alternatives

The APA requires CDCR to describe accurately and adequately the reasons for rejecting the alternatives considered. *See* Gov. Code §11346.2(b)(4)(A) & Gov. Code §11346.9(a)(4); *Sims*, 216 Cal.App.4th at 1074. The documents produced in the PRA litigation demonstrate that CDCR offered shifting rationales for justifying the regulations and rejecting alternatives. The public cannot provide meaningful input about whether alternatives are more effective and less burdensome if CDCR fails to accurately or adequately describe the reasons for rejecting them.

* * *

In sum, CDCR has failed to abide by the letter and spirit of the APA in adopting these regulations and instead invested significant resources in thwarting meaningful public participation. CDCR should reissue the notice of proposed action and recommence these proceedings, given the incurable flaws in the procedures. If CDCR does not reissue the notice, then OAL should disapprove these regulations.

Sincerely,



Linda Lye
Senior Staff Attorney



Ana Zamora
Criminal Justice Policy Director

Enclosure (1 DVD with exhibit list and Exhibits 1 through 102)

Exhibits to ACLU of California Procedural Comments

1. August 14, 2015 ACLU PRA Request
2. September 4, 2015 ACLU PRA Request
3. September 28, 2015 CDCR Response
4. October 2, 2015 CDCR Response
5. October 23, 2015 CDCR Production in Response August 14, 2015 Request
6. October 23, 2015 CDCR Production in Response to September 4, 2015 Request
7. October 29, 2015 ACLU letter to CDCR
8. Verified Petition; Memorandum of Points and Authorities; Zamora Declaration; Lye Declaration; Civil Case Cover Sheet; Notice of Case Assignment; Proof of Service
9. Ex Parte Application to Set December 4, 2015 Hearing; Memorandum of Points and Authorities; Lye Declaration; [Proposed] Order
10. Notice of Entry of Order
11. Opposition to Verified Petition for Preemptory Writ of Mandate and Writ of Mandate; McCleave Declaration; Jugum Declaration; Proof of Service
12. December 4, 2015 CDCR Response to August 14, 2015 Request
13. December 4, 2015 CDCR Response to September 4, 2015 PRA Request
14. December 7, 2015 ACLU Letter
15. December 7, 2016 CDCR email
16. December 7, 2015 CDCR Production in Response to August 14, 2015 PRA
17. December 7, 2015 CDCR Production in Response to September 4, 2015 PRA
18. Reply Brief in Support of Verified Petition for Peremptory Writ of Mandate and Writ of Mandate; Declaration of David Fry in Support of Verified Petition for Peremptory Writ of Mandate and Writ of Mandate

19. Supplemental Declaration of Kelly McClease in Support of Opposition to Petition for Preemptory Writ of Mandate and Writ of Mandate
20. December 11, 2015 Order
21. December 14, 2015 ACLU Letter to CDCR; Notice of Deposition of CDCR; Notice of Deposition of Kelly McClease
22. December 22, 2015 CDCR Letter to Court
23. December 22, 2015 ACLU Letter to Court
24. Notice of Hearing
25. December 24, 2015 Docket Entry
26. December 24, 2015 email to CDCR; December 31, 2015 email to CDCR; January 6, 2016 email from CDCR; Notice of Deposition of Kelly McClease; Notice of Deposition of CDCR
27. January 21, 2016 letter from CDCR; Documents Produced on January 21, 2016
28. CDCR's Report on Status of Exemption Log and Redacted Documents for In Camera Review
29. January 22, 2016 email from CDCR; January 25, 2016 email from CDCR
30. Respondent CDCR's Supplemental Brief
31. Declaration of Kelly McClease
32. Declaration of Rafael Davtian
33. Declaration of Lowell Finley
34. Supplemental Declaration of Lowell Finley
35. Application to File Under Seal Exhibits in Support of CDCR's Supplemental Brief
36. Privilege Log

37. Ex Parte Application; Memorandum of Points and Authorities; Declaration of Achyut J. Phadke in Support of Ex Parte Application; Declaration of David Fry in Support of Ex Parte Application; [Proposed] Order Granting Ex Parte Application
38. Notice of Entry of Order
39. Deposition of Kelly McCleese; Exhibits 1-16; Errata
40. Deposition of Rafael Davtian; Exhibits 1-4; Errata
41. Petitioner's Supplemental Memorandum in Support of Verified Petition for Peremptory Writ of Mandate and Writ of Mandate
42. Declaration of Achyut Phadke
43. Declaration of Jeanne Woodford
44. Opposition to Application to File Under Seal Exhibits
45. February 4, 2016 Augmented Exemption Log; Declaration of Service
46. February 5, 2015 Augmented Exemption Log; Declaration of Service
47. February 9, 2016 Tentative Ruling
48. Transcript of February 10, 2016 hearing
49. February 10, 2016 Decision and accompanying spreadsheets
50. CDCR's Ex Parte Application to Modify Schedule; CDCR's [Proposed] Ex Parte Order
51. Order Granting Ex Parte Application to Modify Schedule
52. Respondent CDCR's Further Supplemental Brief
53. Declaration of Mark Beckington
54. Declaration of Anthony Haklin
55. Declaration of Sara Curtis
56. Notice of Filing Under Seal (2 DVDs)

57. CDCR Log 1
58. CDCR Log 2
59. ACLU Ex Parte Application; Memorandum of Points and Authorities; Declaration of Linda Lye; Declaration of Achyut Phadke; [Proposed] Order
60. Transcript of March 3, 2016 hearing
61. March 8, 2016 letter from CDCR
62. Response to CDCR's Further Briefing on Privilege Claims Relating to Governor's Office and Receiver Communications
63. Declaration of Achyut Phadke
64. March 17, 2016 Tentative Ruling and accompanying spreadsheets
65. Transcript of March 18, 2016 hearing
66. March 21, 2016 Final Ruling and accompanying spreadsheets
67. CDCR Petition for Extraordinary Writ of Mandate
68. March 23, 2016 Court of Appeal Stay Order
69. March 24, 2016 email from CDCR
70. ACLU Motion to Vacate Stay Order; Application to Shorten Time on Motion to Vacate Stay; Declaration of David Fry in Support of Motion to Vacate Stay
71. March 23, 2016 Modified Stay Order
72. CDCR Emergency Motion for Reconsideration
73. CDCR Petition for Review of Interlocutory Order of Court of Appeal
74. Court of Appeal Order Declining to Modify Stay Order
75. March 28, 2016 Letter from Clerk of the Supreme Court
76. ACLU Answer to Petition for Review

77. CDCR Reply
78. Supreme Court Order Denying Petition for Review and Stay Application
79. Notification of Extension of Public Comment Period
80. ACLU Opposition to Petition for Extraordinary Writ of Mandate or Other Appropriate Relief; Declaration of David Fry in Support
81. CDCR Reply
82. Court of Appeal Order Denying Petition
83. Respondent's Ex Parte Application; Respondent's Memorandum of Points and Authorities
84. Opposition to Respondent CDCR's Ex Parte Application; Declaration of Achyut Phadke
85. [Proposed] Order Granting in Part and Denying in Part Respondent's Ex Parte Application; Minute Order
86. Ex Parte Application for OSC re Contempt; Memorandum of Points and Authorities In Support; Declaration of David Fry; Declaration of Achyut Phadke
87. Order to Show Cause re Contempt
88. Stipulated Order
89. ACLU Answer
90. Supreme Court Denial of Stay Request
91. Supreme Court Order Denying Petition for Review
92. Documents Produced by CDCR on May 4, 2016
[Note: This exhibit is contained in 5 files on the attached DVD.]
93. May 10, 2016 Letter to CDCR and Enclosure
94. May 31, 2016 CDCR cover email; Enclosure
95. Documents Produced by CDCR on June 1, 2016

96. February 12, 2016 PRA request
97. March 7, 2016 CDCR Response; March 24, 2016 CDCR Document Production
98. June 20, 2016 CDCR Response; July 1, 2016 email from CDCR
99. July 1, 2016 CDCR Supplemental Document Production in response to February 12, 2016 PRA request
100. December 17, 2015 ACLU Letter
101. December 22, 2015 CDCR Response
102. July 7, 2016 CDCR Response and Further Supplemental Document Production in response to February 12, 2016 PRA request