David A. Senior (#108759)
McBreen & Senior
1880 Century Park East, Suite 1450
Los Angeles, CA 90067
Phone: (310) 552-5300
Fax: (310) 552-1205
dsenior@mcbreensenior.com

John R Grele (#167080)
Law Offices of John R Grele
703 Market Street, Suite 550
San Francisco, CA 94103
Phone: (415) 348-9300
Fax: (415) 348-0364
jgrele@earthlink.net

Richard P. Steinken (admitted *pro hac vice)*
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Phone: (312) 923-2938
Fax: (312) 840-7338
rsteinken@jenner.com

Attorneys For Plaintiff MICHAEL ANGELO MORALES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES Plaintiff, v. JAMES TILTON, Acting Secretary of the California Department of Corrections; ROBERT AYERS, Warden of San Quentin State Prison; and DOES 1-50, Defendants.	Case nos. 06-219 (JF)(RS) 06-926 (JF)(RS) **OPPOSITION TO MOTION FOR PROTECTIVE ORDER** Date: February 20, 2007 Time 1:30 p.m. Court: Courtroom 4

ii

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

David A. Senior (#108759)
McBreen & Senior
1880 Century Park East, Suite 1450
Los Angeles, CA 90067
Phone: (310) 552-5300
Fax: (310) 552-1205
dsenior@mcbreensenior.com

John R Grele (#167080)
Law Offices of John R Grele
703 Market Street, Suite 550
San Francisco, CA 94103
Phone: (415) 348-9300
Fax: (415) 348-0364
jgrele@earthlink.net

Richard P. Steinken (admitted *pro hac vice)*
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611-7603
Phone: (312) 923-2938
Fax: (312) 840-7338
rsteinken@jenner.com

Attorneys For Plaintiff MICHAEL ANGELO MORALES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES Plaintiff, v. JAMES TILTON, Acting Secretary of the California Department of Corrections; ROBERT AYERS, Warden of San Quentin State Prison; and DOES 1-50, Defendants.	Case nos. 06-219 (JF)(RS) 06-926 (JF)(RS) **OPPOSITION TO MOTION FOR PROTECTIVE ORDER** Date: February 20, 2007 Time 1:30 p.m. Court: Courtroom 4

In response to the Court's third plaintive request for the State to undertake dramatic action to rectify what is a clearly unconstitutional procedure, the State has returned with a process that appears burdened by the same difficulties that prevented an adequate remedy nearly

a year ago, yet were only discovered on the eve of the hearing. This time, though, the State seeks success by insulating themselves from review. The first paper to hit the Court's screen after all that has transpired and the Court's very clear desire for transparency is a pleading that entangles us in privilege litigation. This is not an auspicious beginning.

I.

ARGUMENT

The Governor's and Defendants' motion for a protective order is so seriously deficient as to lead Plaintiff to the conclusion that they are merely seeking to have the Court issue some sort of guidelines as to how to go about conducting their business. This way, when the issues of discovery and privileges are properly before the Court, they can point to something the Court stated in response to their Motion as a basis for keeping their review of 770 secret. Or, they can have the Court rule now on what type of discovery is necessary on whatever they plan to do, in advance of them having done anything. The Court should not, and cannot, take such bait.

To begin with, the State relies on a highly questionable deliberative process privilege. They cite to Wright and Miller in support, but ignore the authors' very strong denunciation of such a privilege, unknown in the common law, rejected by Congress and untethered to any rationale that can withstand scrutiny. *See* 26A Wright & Miller, *Federal Practice and Procedure* § 5680 (noting the "puny instrumental rationale" for the privilege). They also fail to address Judge Seeborg's cogent analysis of why the privilege does not apply here, and the briefing concerning that order, which will not be repeated here. Assuming such a privilege exists and is one that actually operates here, there is no basis in law or fact for any decision on the issue now, and several very good reasons not to issue one.

A. The Defendants and the Governor are Seeking an Advisory Opinion With Respect to Materials and Information that May Not be Sought in Discovery and May Not be Privileged.

The CDCR, joined by the Governor's Office, has moved this Court to issue an advisory opinion determining whether, as a hypothetical matter, conversations that have not yet occurred, documents that have not yet been created, and deliberations that have not yet been undertaken are likely to be protected by the deliberative process privilege. Because there is no way to know

now, in advance, what discovery Plaintiff may seek upon the conclusion of the State's revision process, and none of the facts necessary to determine privilege issues are yet in existence, the State urges this Court to address issues that are not ripe for decision. Such a ruling would violate the fundamental tenet that federal courts may not rule except upon the existence of a genuine case or controversy.

It is well-established that the federal courts' "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (citing U.S. Const., art. III). "[P]remature adjudication" of unripe issues risks "entangling [the courts] in abstract disagreements," *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), which in turn results in advisory opinions that, because of intervening events or litigation, do not end up affecting or determining the rights of the parties. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (a "hypothetical judgment" where subject-matter jurisdiction may not exist "comes to the same thing as an advisory opinion").

These principles have particular relevance in the context of adjudicating claims of privilege. The privilege analysis is dependent on a number of events: first, a party must seek discovery of the information that may be privileged; second, the party seeking to withhold the information must assert a claim of privilege; and third, the court must determine whether the information is in fact privileged based upon the precise facts surrounding the creation of the information, its purpose, its content, the relative interests of the litigants in disclosure or concealment, and any other circumstances that are relevant to the specific privilege at issue. That this is the case is demonstrated by the rules and decisions governing the determination of privilege. Rule 26(b)(5) provides: "When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." *See also* Rule 45(d)(2). The

importance of providing the court and other litigants with sufficient factual information to determine whether specific documents are privileged in light of their content, creation, and purpose is underscored by the rule that boilerplate objections are not sufficient to assert a privilege. *See Burlington N. & Sante Fe Ry. Co. v. United States Dist. Ct.*, 408 F.3d 1142, 1149 (9th Cir. 2005) (holding that party claiming privilege must provide enough specific information for court to determine whether privilege applies to each document individually); *Pagano v. Oroville Hosp.*, 145 F.R.D. 683, 700 n.16 (N.D. Cal. 1993) (ruling on privilege without a privilege log or "specific designation of documents that are privileged" would be "premature"). Needless to say, therefore, a court cannot adjudicate a blanket privilege that purportedly applies to documents and information that have not yet been created consistently with the Federal Rules and the prohibition on advisory opinions.

Unsurprisingly, courts confronted with anticipatory privilege claims similar to those raised here by the State have refused to adjudicate them on the ground that they are premature. *See, e.g., Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 107 (1961) (finding that a self-incrimination challenge to statute was premature, as there was no way to know whether the individuals at issue would end up asserting the privilege; whether the government would refuse to honor the privilege; and the precise circumstances of the assertion of the privilege); *United States v. Lee, Goddard & Duffy, LLP*, No. SACA06-408DOC (RNBX), 2006 WL 2404137, at *5 n.3 (C.D. Cal. June 29, 2006) (refusing to adjudicate defendants' anticipatory assertion that some of the documents sought by the United States might be privileged, and stating that "any comment in that regard at this stage would be premature and based on an incomplete record"); *Meadows v. Kindercare Learning Ctrs.*, No. Civ. 03-1647-HU, 2004 WL 2203299, at *2-*3 (D. Or. Sept. 29, 2004) (holding that whether a claim would implicate attorney-client privilege could not be determined at the motion to dismiss stage because of its fact-specific nature, and that application of privilege was more appropriately determined in the context of a motion for a protective order).

Applying the deliberative process privilege is a particularly fact-specific inquiry. First, the deliberations at issue must concern "the formulation of important public policy." *Morales v.*

Tilton, Order of May 2, 2006 (Doc. No. 151) (Seeborg, M.J.) (quoting *Scott v. Board of Educ.*, 219 F.R.D. 333, 337 (D.N.J. 2004).) While some aspects of the State's protocol revision process may involve important overarching policy questions, that process will presumably involve relatively minor, detail-oriented decisions as well. There is no way of knowing ahead of time what issues will be analyzed by the State, or which will turn out to be "important public policy" issues. Second, the Court must analyze the nexus between the information at issue and the deliberation process, which requires consideration of whether the material is "interwoven" with the decisional process, and whether revealing the information would reveal that process. *North Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1121-22 (N.D. Cal. 2003). It goes without saying that it is impossible to undertake this inquiry with respect to documents and materials that have not yet been created. Finally, because the deliberative process privilege is qualified, the Court must balance the government's interest in protecting the deliberations at issue and the potential harm from disclosure of the materials at issue, with the plaintiff's need for the information sought and the need for accurate judicial factfinding. *Id.* at 1122. That task cannot be performed without knowing what information Plaintiff seeks, what the end product of the State's deliberations is, and what the equities of disclosure are in light of the substantive issues that may be being litigated at that time.

Thus, it is impossible to know now whether any of the information and materials generated by the State in its review of the lethal-injection system will be covered by deliberative process privilege, or if so, whether that privilege will be outweighed by the parties' interests in light of the circumstances existing after the submission of the proposed revisions. Even more fundamentally, it is impossible to know with certainty whether Plaintiff will seek discovery of matters touching upon the deliberative process at all, since the need to do so is to some extent dependent on the product of that deliberative process. To grant the State's requested relief, therefore, this Court would have to assume hypothetical facts or circumstances and then adjudicate whether those hypothetical situations would support a claim of privilege. *See Calderon v. United States Dist. Ct. for N. Dist. of Cal.*, 134 F.3d 981, 989 (9th Cir. 1998) ("[A]ny ruling as to the legitimacy of a step not yet taken would be tantamount to an advisory

opinion."). This uncertainty compels the conclusion that if this Court were to rule on privilege issues now, it would be issuing an advisory opinion.

Granting the order sought by the State here would not be any less an advisory opinion simply because the State's proposal would allow Plaintiff to overcome the presumption of privilege upon a showing of good cause. The Court must have some basis on which to accept the State's assertion that the burden of proof with respect to privilege should be reversed and placed on Plaintiff. Justifying such a ruling would be no small task, as the traditional placement of the burden of establishing privilege on the party asserting it is established by the Federal Rules, *see* Fed. R. Civ. P. 26(c), and underscored in innumerable decisions, *see, e.g., Hartford Ins. Co. v. Garvey*, 109 F.R.D. 323, 327 (N.D. Cal. 1985) (because of federal policy of broad discovery, burden of establishing privilege is on its proponent). In other words, the Court would have to consider, anticipatorily, all of the issues discussed above, in order to determine that the deliberative process privilege will likely be implicated by the materials created during the revision process and the equities are such that shifting the burden of proof is warranted. Moreover, the Court would have to accept, without any factual support whatsoever, the State's astounding assertion that absent the anticipatory protections it seeks, experts will not be willing to participate in the process, and officials will be chilled in discussing their views. Notably, the State does not represent that it has already attempted to retain experts and encountered problems doing so; it merely speculates that it *might* have trouble doing so in the future. Mot. for Protective Order 3. Thus, the State is asking the Court to assume all of the facts in its favor, and on that basis issue a preemptive ruling, regardless of what the facts may actually turn out to be. This Court should reject the State's attempt to gain, through an advisory opinion, a level of secrecy that goes well beyond that permitted by the Federal Rules and established privilege law.

B. Shifting the Burden of Establishing That Materials Are Discoverable to Plaintiff Contravenes the Policies Underlying the Federal Rules and Privilege Law.

In asserting that its materials should be presumptively privileged, thereby shifting the burden of establishing that materials are discoverable onto Plaintiff, the State is urging this Court to depart from the policy of broad discovery espoused by the Federal Rules of Civil Procedure,

and the longstanding understanding that privilege must be proven by the entity asserting it. The State has provided no justification for such a departure from settled discovery rules. Nor could it; the preemptive endorsement of secrecy that the State seeks is unprecedented and must be rejected.

The discovery provisions of the Federal Rules of Civil Procedure are designed to provide the parties with "the fullest possible knowledge of the issues and facts" relating to relevant issues, and therefore discovery rules "are to be accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 501, 508 (1947). Privilege rules therefore are in some tension with the broad discovery espoused by the Federal Rules. *Kelly v. San Jose,* 114 F.R.D. 653, 659 (N.D. Cal. 1987). Because privileges prevent the disclosure of even relevant information, they "derogate the search for the truth," and consequently "are to be narrowly construed." *Id.*; *see also United States v. Nixon*, 483 U.S. 683, 710 (1974) (same).

Moreover, the "burden of establishing application of the privilege is on the party asserting it." *North Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003); Fed. R. Civ. P. 26(c); Fed. R. Civ. P. 45(c)(3)(A), (d)(2).[1] That allocation of the burden of proof

[1] Although the CDCR and the Governor's Office have maintained that the Governor's Office is not a party to this action -- an assertion that this Court has not resolved, and Plaintiff contests -- the framework of asserting and adjudicating privilege is substantially similar regardless of whether the entity asserting privilege is a party or not. *See Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 48-49 (S.D.N.Y. 1996) (equating the frameworks for litigating privilege in the context of Rule 26, for parties, and Rule 45, for subpoenaed non-parties). Non-parties must be subpoenaed for purposes of discovery, of course, but Rule 45 establishes privilege rules for non-parties that are essentially identical to those that Rule 26 establishes for parties. Thus, in order to quash a subpoena on grounds of privilege, the subpoenaed party must specifically object and provide a privilege log. Fed. R. Civ. P. 45(d)(2). Moreover, the burden of establishing that the subpoena should be quashed because it seeks privileged information rests on the subpoenaed party -- i.e., the entity asserting privilege. *See Fitzgerald v. Cassill*, 216 F.R.D. 632, 636 (N.D. Cal. 2003) (noting, in context of motion to quash subpoena, that burden of demonstrating that subpoenaed documents were privileged rested with the movant); *see also Phillips v. City of Fairfield*, No. CIV. S-04-0377 (FCD), 2006 WL 2868966, at *1 (E.D. Cal. Oct. 6, 2006) (denying motion to quash because movant had not carried the burden of establishing privilege). Regardless of whether a party or non-party asserts a privilege, therefore, the entity asserting the privilege traditionally has the burden of establishing it. Because the litigation burdens on the CDCR and the Governor's Office are not materially different even if the Governor's Office is not a party, this discussion does not distinguish between the Rule 26 and Rule 45 frameworks.

furthers the policy of broad discovery by ensuring that privileges do not sweep too broadly. The litigant asserting the privilege is the only entity with knowledge of the precise contents and purpose of the materials sought, of course, and thus is best positioned to litigate the elements of the claimed privilege. Conversely, placing the burden on the party seeking disclosure would disadvantage that party, as it is obviously more difficult to establish the absence of the elements of the privilege without knowing very much about the relevant facts surrounding the disputed documents. Thus, placing the burden on the party seeking disclosure would result in the over-protection of otherwise discoverable information, as the party seeking disclosure will fail to establish discoverability more often than is warranted simply because of the unequal access to the information necessary to litigate the privilege. Rule 26(c), then, places the burden of establishing privilege on the entity asserting it in order to further the liberal discovery espoused by the Rules. *See Kelly*, 114 F.R.D. at 661 (placing burden on entity asserting privilege expresses a policy decision to weight the scales in favor of disclosure; noting "the well-established notion that because privileges operate in derogation of the truth finding process the law places the burden of proving all the elements essential to invoking any privilege on the party seeking its benefits"). In seeking to reverse this burden, the State is attempting once more to escape the broad discovery to which Plaintiff is entitled.

To justify standing privilege law on its head in this manner, the State relies on the traditional rationale for the deliberative process privilege, asserting that without the unprecedented protection of a preemptive protective order, deliberations will be chilled and experts will be reluctant to participate. Yet this purported justification for shifting the burden to Plaintiff is misplaced because it simply restates the rationale underlying all privileges, without explaining why the traditional degree of protection afforded every other litigant is insufficient here. Every privilege exists in order to foster open, vigorous exchange by providing potential litigants with some expectation that certain types of communications will not be subject to disclosure. *See, e.g., Hickman*, 329 U.S. at 510-511 (work product privilege protects attorney's ability to prepare for litigation); *Kelly*, 114 F.R.D. at 658-59 (deliberative process privilege fosters honest assessments of policies and free exchange of policy ideas). But both the drafters

of the Federal Rules and courts confronted with claims of privilege have determined that the freedom of deliberation fostered by the various privileges is sufficiently protected by the entity's knowledge that it will be able to assert privilege once the communications have already occurred, and obtain an adjudication of the applicability of the privilege to individual communications after the fact. It is understood, and accepted, that litigants take the risk that some of their communications eventually will be subject to disclosure, despite their reasonable expectation, at the time of the communications, that the communications were privileged. *See Soto v. City of Concord*, 162 F.R.D. 603, 612 (N.D. Cal. 1995) (rejecting unsupported assertion that the mere risk of future disclosure would render police officers less candid in internal affairs investigations); *cf. Nixon*, 483 U.S. at 712 (discussing the President's interest in confidentiality, stating that "we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution").

In other words, existing privilege law, with its placement of the burden of proof on the entity asserting privilege, is understood to adequately protect deliberations and provide parties with the necessary sense of security. *See North Pacifica, LLC*, 274 F.R.D. at 1120-22 (explaining how traditional law of deliberative process privilege, with burden placed on the party asserting it, protects the state's ability to formulate policy); *Kelly*, 114 F.R.D. at 658-59 (same); *cf. United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002) ("Our expectation of privacy, in other words, has been embodied in the law of privilege, which protects certain communications."). This is the case even where it is the government that asserts a privilege, and regardless of the subject of deliberations. *Kelly*, 114 F.R.D. at 658-59. The State provides no justification for disturbing this established understanding.

The State may argue, in reply, that the unprecedented degree of secrecy it seeks here is justified because the deliberations in question concern a "sensitive" or controversial topic. *See* Mot. for Protective Order at 3. That argument is meritless because, once again, it attempts to invert the deliberative process privilege. The established framework of deliberative process privilege does allow courts to account for the sensitivity of the deliberations at issue, but not in

the manner the State proposes. Importantly, the sensitivity of the topic at issue does not increase the likelihood that particular communications will be covered by the deliberative process privilege or that the privilege will be implicated in the first place. *See North Pacifica*, 274 F. Supp. at 1121-22 (whether something is subject to deliberative process privilege is determined by whether an important policy (as opposed to a day-to-day decision) is at issue; whether the materials are predecisional; and whether they are closely related to the deliberative process). Rather, the deliberative process doctrine allows courts to consider the sensitivity of the deliberations at issue in determining whether, *notwithstanding the fact that the privilege applies*, the government should nonetheless be forced to disclose the information. *Id.* at 1122. Thus, the sensitivity of the issue may help the government prevent the privilege from being *overcome* by the plaintiff's interests in disclosure, but it does not affect whether or not the materials are privileged in the first place. Clearly, this framework reflects a judicial conclusion that the sensitivity of the issue should not lessen the government's burden of establishing the existence of the privilege. By arguing that the sensitivity of the lethal-injection protocol should be considered first, and cause the Court to shift the burden to Plaintiff, the State once again seeks to subvert established discovery law and replace it with a judicial endorsement of presumptive secrecy.

Finally, the State points to no case in which a court has determined that an entity's need to deliberate or communicate will be adequately protected only by an anticipatory guarantee that all communications related to a topic will be presumptively shielded from disclosure. Nor can it: For the reasons stated above, such a ruling would directly contravene the longstanding policies embodied in existing privilege law. Indeed, the *Kelly* court, considering shifting the burden of proving discoverability to the plaintiff in a civil rights case, unequivocally rejected the idea:

> Since privileges operate in derogation of the truth finding process, and since the policies that inform federal civil rights statutes are profoundly important, courts should not use empirically unsupported and debatable assumptions to rationalize shifting a burden of justification away from the party asserting privilege (where the burden of justification classically rests) and on to a plaintiff who is attempting simultaneously to enforce his rights and policies that the people, speaking through Constitutional amendments and federal statutes, have elevated to the highest levels of priority.

114 F.R.D. at 664; *see also Soto*, 162 F.R.D. at 612. These words have particular resonance here, where the State has repeatedly attempted to thwart Plaintiff's diligent attempts to enforce his Eighth Amendment rights by pressing meritless assertions of privilege. Despite the State's continuing obduracy and derogation of its discovery obligations, Plaintiff has proven his substantive allegations. Throughout the duration of this litigation, this Court has been able to use existing privilege law to chart a course that protects both the State's asserted interests in deliberation -- where they are legitimate -- and Plaintiff's interest in obtaining the information necessary to prove his claims. The State provides no legitimate justification for abrogating well-established privilege law now, and this Court should not accept the invitation to do so.

C. The State Has Failed to Demonstrate Good Cause for a Protective Order.

In order to establish its entitlement to a protective order, the State must demonstrate good cause. Fed. R. Civ. P. 26(c). Instead of attempting to put forth an actual showing of good cause, however, the State has simply proffered conclusory assertions of "chill" and difficulty employing experts that would be insufficient even if they were not belied by events in other states. This Court should reject the State's baseless assertions.

To the extent that the State proffers any reason for its asserted need of presumptive secrecy in revising its lethal injection apparatus, the State appears to rely primarily on its belief that it may have difficulty receiving "candid recommendations from experts [and] consultants" unless those experts and consultants are assured that they will forever be insulated from deposition or other discovery. Mot. for Protective Order at 3. Notably, the State proffers no evidence that potential experts have asked for such protection, or expressed reluctance to participate because of concerns regarding future discovery.

Indeed, there is every reason to think that experts will be willing to participate in the revision process even if their identities and deliberations are public. Notably, Florida's Commission on Administration of Lethal Injections, established after the botched execution of Angel Diaz, is operating in public, and has been able to retain medical and corrections experts to deliberate over potential improvements in the lethal-injection protocol. The commission members, all of whom have been publicly identified, include Dr. David Varlotta, an

anesthesiologist with Unicom Anesthesia Associates; Dr. Peter Springer, the Volusia County EMS Medical Director; and Dr. Steve Morris, an expert in hospital administration and quality assurance at the University of Florida. *See* Exhibits B & C (newspaper articles).[2] These experts clearly are willing to participate even knowing that the Commission's meetings are public, and that its findings will also be public. *See* Exhibit A, Exec. Order No. 06-260, at 3 (Florida, Dec. 15, 2006). Moreover, these individuals apparently had no qualms about public identification, giving lie to the State's suggestion that experts will not participate unless completely shielded from discovery.

That the Florida Commission is undertaking the protocol revision process outside of the context of pending litigation does not render Florida's experience irrelevant here. The Commission's meetings are contemporaneously open to the general public, which is if anything *more* likely to chill discussion than the uncertain prospect of future disclosure to the litigants in a single case. Moreover, it is self-evident that should Florida's revised protocol be subject to lethal-injection litigation in the future, the expert members of the Commission will possess relevant information concerning the new protocol and therefore will be potentially subject to deposition or subpoena. Yet that prospect has not stopped Florida from retaining experts and proceeding with its revision process.

In addition, experts have provided Missouri and Maryland with advice regarding their protocols even in the context of litigation. In Missouri, following the district court's order that the State create a written protocol in consultation with a board-certified anesthesiologist, the State was able to retain an anesthesiologist to consult on the development of the protocol. *See* Submission of Proposed Execution Protocol, at 4 n.2 [Doc. No. 198], *Taylor v. Crawford*, No. 05-4173 (FJG) (W.D. Mo. July 14, 2006). In Maryland, during litigation over their protocol, Dr. Dershwitz advised counsel for the State that Maryland needed to have a "plan B" for obtaining central line access if peripheral access was impossible. Dr. Dershwitz later testified that he would have given the same advice even had he known that it would be discoverable. *See* Exhibit

[2] Unless otherwise indicated, all exhibits referenced herein are appended to the Declaration of John R Grele, submitted herewith.

D (Trial Tr. 204-05, *Evans v. Saar*). Clearly, then, experts have been willing to participate and give advice on execution protocols even when the circumstances suggest that their advice will become discoverable.

The remainder of the State's purported justifications for the protective order are simply boilerplate assertions of the standard rationales behind the deliberative process privilege. Mot. for Protective Order at 4. Conclusorily -- and circularly -- stating that the State's deliberations regarding public policy should be protected by the deliberative process privilege is a far cry from establishing good cause for a protective order. Rather, it simply highlights the principal failing of the State's motion: While some materials and information created by the State *might* be subject to deliberative process privilege, there is simply no way to know whether that is the case now, before any deliberations have been undertaken. The State simply cannot establish good cause without pointing to some evidence or proffering some sort of rationale based on actual facts, but this is precisely what the State cannot do at this juncture.

Indeed, the import of the State's motion is that it is attempting to secure protection from disclosure for information that is not actually subject to the deliberative process privilege. By shifting the burden of persuasion to Plaintiff, and by arguing without any factual support that *every* conversation, document, or other interaction that occurs during the revision process implicates the deliberative process privilege, the State is attempting to broaden the scope of the deliberative process privilege. *But see Kelly,* 114 F.R.D. at 658-59 (stating that the deliberative process privilege applies narrowly to important policy decisions, and "the rationale that supports this privilege should fix the limits of its reach"). Such an unprecedented expansion of the privilege must rest on a strong showing of important interests that outweigh Plaintiff's well-established interest in normal civil discovery. But again, the State provides absolutely no basis to afford protection even to information that, under the normal privilege framework, would most likely end up being subject to discovery.

Finally, the State cannot establish good cause for its sweeping proposed protective order because there are less-intrusive protections that can be employed should the Court determine, at the appropriate time, that certain materials should be protected from full public disclosure. Thus,

the Court, for good cause, could enter a protective order that permits disclosure of certain information only to Plaintiff's counsel; protects the identities of experts; allows redactions; or implements any other measure that is tailored to the specific interests and information at issue.[3] The State does not attempt to argue, for instance, that experts invariably will not be willing to participate *even if their identities will be protected*. Nor does it assert that conversations will be unduly chilled by the mere possibility that Plaintiff will seek to conduct depositions of the individuals involved, even if the substance of those depositions were protected from general public disclosure. Moreover, Plaintiff's counsel have demonstrated throughout this litigation that they are fully willing and able to comply with a protective order: Counsel have closely guarded any identifying information that was disclosed, and have respected the wishes of even non-team members to remain anonymous (such as Anesthesiologist #2, who was deposed anonymously). Thus, there is no reason that this Court cannot consider the appropriateness of a more narrow protective order should the need arise, once the parties and the Court are in possession of facts that will allow meaningful adjudication.

D. A Protective Order Would Interfere with State Processes

There is another, more difficult aspect of the Motion. Should any anticipatory protective order issue now, the State is very likely to use it to preclude discovery in the state court hearing on the Administrative Procedures Act, and to frustrate potential legislative, administrative or other state court inquiry, by seeking refuge in the Supremacy Clause. As counsel for the media notes, it directly flies in the face of the will of 83% of the California electorate, which is why they need a federal court to issue the order and cannot move for one in state court. Even more troublesome, because the State seems uninterested in or incapable of criminal investigation into the illegal dispensing and disappearance of Schedule II drugs, a protective order may allow the State to conceal evidence of criminal wrongdoing. In short, any anticipatory protective order, like every other advisory opinion, serves no legitimate purpose and has the potential to create great mischief.

[3] Plaintiff does not concede, of course, that such protections will be necessary or justified. These issues, however, are more properly litigated when and if they actually arise.

That this is a concern is shown by the Governor's use of a deposition notice in the APA litigation. Motion, at 2 & Exhibit A. They decline to inform the Court that the deposition was never taken, and that the assertion of privilege as to the current revision process was respected in that litigation during Ms. Dull's deposition. *See* Declaration of John R Grele, ¶ 5 & Exhibit E. They further decline to indicate that this notice has in any way caused them difficulty in their review process. More important, the use of the deposition notice here highlights the intent to have this Court issue an order they could not lawfully obtain in state court, and raises concerns that this is the true intent behind the Motion.

E. A Protective Order Would Frustrate Constitutional Inquiry and Only Insulate Incompetence

Plaintiff implores the Court to examine the record here when considering any need for a deliberative process privilege in advance of state action.

On February 28, 2006, a meeting was called in Sacramento by the Governor's Legal Affairs Secretary, Andrea Hoch, and was attended by Robert Singler, M.D., Dane Gillette, Steven Ornoski, Bruce Slavin, Dan Maguire, Tami Bogert, Peter Szkrenyi, Dave Runnels, and Darc Keller. UF 116.[4] The meeting was in response to the Court's February 14, 2006 order for CDCR to review its lethal-injection protocol, and lasted approximately an hour to an hour and a half. UF 115. All present had read a copy of this Court's February 14, 2006 order, and appeared to be familiar with this Court's respectful suggestion to CDCR that it review its lethal-injection protocol. UF 117. Warden Ornoski recalls that the Senior Assistant Attorney General was present and provided an opinion to the attendees of the meeting that the claims raised by Michael Morales "were pretty meritless." UF 117c.

[4] In this regard, the meeting was attended by not less that three lawyers from the Governor's staff (Hoch, Bogert, and Maguire), and CDCR's General Counsel (Slavin) and its counsel in this litigation, a Senior Assistant Attorney General (Gillette). The meeting also was attended by Darc Keller, an Assistant Secretary at CDCR. Singler testified that it was "not at all" his intent to participate at the meeting "to assist the state in designing a lethal injection protocol." RT 992 (Singler testimony, Sept. 28, 2006). Yet, according to Warden Ornoski, Singler in fact provided the State with the expertise which led Hoch to reduce the dose of Thiopental to 1.5 grams. Ornoski Depo. at 288-89.

Hoch was "quite frankly, she was the -- the most prolific speaker as far as questions, she wanted to know just about everything . . ." UF 117b. "[I]t was difficult for her to visualize all that without seeing the [execution facility], probably would have been more fruitful if she had gone out there before we had the meeting." Ornoski Depo. at 295. It was clear to Warden Ornoski that Hoch needed to come "out with [CDCR Secretary Jeanne Woodford] to view the death chamber and see the process firsthand so that she had a better sense of what was -- what was going on in there." Ornoski Depo. at 291.

Notwithstanding, Hoch rendered a conclusion without any reasonable understanding of the issues. She concluded that the:

> only change that would be undertaken at that time was what was described as a 'tweak' of the chemical aspects of the protocol. It was decided that the dosages of the three drugs would be adjusted and that a continuous infusion of sodium thiopental during the administration of pancuronium bromide and potassium chloride would be added. There is no indication from the record that the participants in the meeting addressed or considered issues related to the selection and training of the execution team, the administration of the drugs, the monitoring of executions, or the quality of execution logs and other pertinent records.

Morales v. Tilton, 2006 U.S. Dist. LEXIS 92243, *15 (N.D. Cal. Dec. 15, 2006).

CDCR issued a revised version of its execution protocol six days later reflecting only this "tweak." No one was assigned any tasks or responsibilities to take any further action. UF 118.

When the February 28, 2006 meeting took place, all attendees believed their discussions and writings were protected deliberations, thereby allowing the free unmitigated flow of ideas to address this Court's February 14, 2006 respectful suggestion to CDCR that it review its lethal-injection protocol. Operating under the ambit of deliberative tranquility, the free flow of unencumbered thoughts and ideas – with full access to shared information from other States' Attorneys Generals, CDCR records and personnel, execution team members, execution facilities in and out of California, anesthesiologists, access to observe actual executions in Texas, scientific research, and legal expertise – resulted in a one hour round table meeting, headed by a lawyer who had never even seen the California execution chamber. Moreover, the meeting was predicated on the Attorney General's legal opinion that the undertaking was in response to

contentions without merit, and the CDCR Director's opinion that the issues evolved from "loose language" from the Ninth Circuit, and a District Court's failure to understand the process.

What little is known about the prior venture into the issue is that the State completely failed to do what this Court has now been compelled to do – "review of every aspect of the protocol, including the composition and training of the execution team, the equipment and apparatus used in executions, the pharmacology and pharmacokinetics of the drugs involved, and the available documentary and anecdotal evidence concerning every execution in California since lethal injection was adopted as the State's preferred means of execution in 1992. (Citation omitted)." *Morales v. Tilton*, 2006 U.S. Dist. LEXIS 92243, *5 (N.D. Cal. Dec. 15, 2006). The LAS also failed to review "a mountain of documents, including hundreds of pages of legal briefs, expert declarations, and . . . the execution chamber and related facilities" (*id.*) when rendering her "tweak" decision. All of this information was readily available to her while she operated under what she perceived to be the deliberative process privilege, yet not one bit of it was entertained. If anything, the deliberative process privilege was used as a basis to do nothing, and hide it.

Not only would a privilege hide and perpetuate state inaction, it would conceal the use of highly questionable "experts" who have opinions unsupported by anything other than conjecture, and then insulate that reliance from review. The difficulty with such an approach is highlighted by the discovery process and hearings conducted so far here. As the Court heard already, the modification of the bolus dose was arrived at based on a circulatory collapse theory that was announced on the eve of Mr. Morales' scheduled execution and without any review of the doctor execution logs, the observing doctor's testimonies, or the heart data, all of which seriously question that opinion.[5] As the parties stipulated, the drip mechanism was designed by an expert who thought the initial bolus dose being delivered was 5 grams. All of the experts involved assumed a delivery mechanism that applied the bolus dose without any delays. None of this would have been available to the Court if such a protective order were in place.

[5] Not to mention that lack of any supporting scientific basis for such an opinion.

Additional information would have been hidden with such an order. This includes the highly dysfunctional process which was employed (i.e. "tweak" 770). *See* Evid. Hrg. Exhibit 71. It also includes that the State ignored the initial input from their own expert that a single dose barbiturate would be sufficient because the State was concerned about the "cosmetics" of the process that pancuronium provides (i.e. hide the "death rattle"). *Id*.

Not only would the State be able to hide such information as was presented at the hearing, it would be able to hide highly relevant information that may surface through its review. For instance, if all agree that pancuronium's purpose would be to hide difficulties in the process (a position shared by Dr. Heath, Dr. Dershwitz and at one time, Dr. Singler), the Court and the public need to know this. Or, if the State decides not to undertake certain efforts, this needs to be known and acknowledged. It may be that they have a reason for such actions, but given the Court's Memorandum and the evidence presented so far, they should be able to articulate them in some sort of persuasive fashion.

The Governor, of course, can appoint whomever he wishes to do whatever he desires in whatever fashion he feels is appropriate. That is his prerogative. However, that does not mean it warrants a blank check and, as a result, can avoid constitutional scrutiny.

II.

CONCLUSION

The Court should deny the Motion without prejudice, not issue any "guidelines" as to what type of process they are engaged in, or should engage in, not discuss what would or would not be privileged, and wait to see how Defendants and the Governor conduct their review and what the results are. It is only then that issues of privilege and necessary protections should be addressed. That is the process under the Rules of Civil Procedure and the one used here prior to the hearing, which preserved anonymity while uncovering vital information.

Dated: January 31, 2007

Respectfully submitted,

By: _____/s/_____
JOHN R GRELE