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 16 IN THE UNITED STATES DISTRICT COURT
 17 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 18 SAN JOSE DIVISION

19
 20 **MICHAEL ANGELO MORALES,**

21 Plaintiff,

22 v.

23 **JAMES E. TILTON, et al.,**

24 Defendants.

Case Number C 06 219 JF RS
 Case Number C 06 926 JF RS

DEATH PENALTY CASE

**THE OFFICE OF THE GOVERNOR
 AND THE DEFENDANTS' POINTS
 AND AUTHORITIES IN SUPPORT
 OF JOINT MOTION FOR A
 PROTECTIVE ORDER PURSUANT
 TO FRCP 26 (c) 4**

Date: March 9, 2007
 Time: 9:00 a.m.
 Dept.: Courtroom 3
 Judge: The Honorable
 Jeremy Fogel

I.

INTRODUCTION

This motion seeks an order that will protect the deliberative process of the Governor’s Office and California Department of Corrections and Rehabilitation (CDCR) (jointly, Moving Parties)^{1/} from unnecessary discovery disputes as the Moving Parties work to effectively respond to this Court’s Memorandum of Intended Decision issued December 15, 2006 (Memorandum). A protective order is necessary to: (1) protect the Moving Parties’ ability to obtain accurate and candid information from a variety of sources regarding the deficiencies in the implementation of California’s lethal injection protocol addressed by the Court’s Memorandum; and (2) protect the Moving Parties’ deliberative process as they substantively review and revise the lethal injection protocol. The Moving Parties are seeking this protective order now (rather than waiting for further discovery) because Plaintiff has already repeatedly sought discovery of pre-decisional and deliberative information protected by the deliberative process privilege. The instant protective order will allow the Moving Parties to do the important and sensitive work requested by this Court while still protecting Plaintiff’s right to discovery of non-privileged information.

II.

STATEMENT OF FACTS RELEVANT TO THIS MOTION

In March 2006, Plaintiff sought discovery of documents in the possession of the Governor’s Office relating to a February 28, 2006 meeting attended by the Governor’s Legal Affairs Secretary and attorneys on her staff. The Governor’s Office objected to producing documents in the possession of the Legal Affairs Secretary on several grounds including the deliberative process privilege. On September 22, 2006, this Court “in the interests of comity and respect for the separation of powers” deferred ruling on the objections asserted by the Governor’s Office to discovery orders issued by the assigned Magistrate “until after the impending evidentiary hearing.” (See, Page 5 of Order Regarding Objections to Magistrate Judge’s Order dated September 22, 2006.) No ruling has been issued on these objections.

1. While the Governor’s Office joins CDCR in seeking this protective order, the Governor’s Office is not a party to this case.

1 On September 27, 2006, the Governor’s Legal Affairs Secretary, Andrea Hoch, was
2 served with a subpoena to appear at 9:00 a.m. the following day in the trial of this matter. The
3 Governor’s Office filed a Motion to Quash the subpoena based upon several applicable
4 privileges including deliberative process. Plaintiff subsequently withdrew the subpoena and the
5 Court, on October 2, 2006, terminated the motion to quash the subpoena as moot.

6 Most recently, on December 20, 2006, plaintiff served a deposition subpoena in a related
7 state court proceeding that seeks to depose the person most knowledgeable about “the plans and
8 intentions of the California Department of Corrections and Rehabilitation (“CDCR”) to respond
9 to the Memorandum of Intended Decision and Request For Response issued on December 15,
10 2006 by Judge Jeremy Fogel.” Attached as Exh. “A” to Declaration of Steven Gevercer filed
11 herewith. This subpoena is the latest illustration of why the Moving Parties have an immediate
12 need to obtain protection for pre-decisional work in this case, and is further evidence of
13 Plaintiff’s continuing intent to obtain and disclose protected pre-decisional documents and
14 statements.

15 In light of the repeated efforts by Plaintiff to obtain information protected by the
16 deliberative process privilege, the Moving Parties have a legitimate concern about their ability to
17 address the deficiencies in the implementation of the lethal injection protocol and to review and
18 revise the substance of the protocol without later having to face a discovery request or subpoena
19 for these pre-decisional documents and conversations.

20 III.

21 ARGUMENT

22 A. A PROTECTIVE ORDER IS ESSENTIAL TO ALLOW CALIFORNIA’S 23 EXECUTIVE BRANCH OF GOVERNMENT TO EFFECTIVELY 24 ADDRESS DEFICIENCIES IN BOTH THE IMPLEMENTATION AND SUBSTANCE OF THE LETHAL INJECTION PROTOCOL.

25 1. A Protective Order Will Simply Confirm That the Deliberative 26 Process Privilege Protects California’s Pre-decisional Review of the Lethal Injection Protocol from Discovery.

27 Under well-established Ninth Circuit law, the deliberative process privilege allows
28 government agencies to protect from disclosure pre-decisional information closely related to the

1 decision making process. *National Wildlife Fed. v. U.S. Forest Service*, 861 F.2d 1114, 1116-
2 1117 (9th Cir. 1988). To be protected under the deliberative process privilege, the information
3 must be “both (1) predecisional or antecedent to the adoption of agency policy and (2)
4 deliberative, meaning it must actually be related to the process by which policies are
5 formulated.” *Id.* at p. 1117 (internal quotes and citations omitted). The ability of the Governor’s
6 Office and CDCR to receive candid recommendations from experts, consultants, professionals,
7 and other public officials is essential to their ability to consider policy alternatives when
8 addressing defects in the protocols implementation as well as substantively revising the lethal
9 injection protocol. The need for frank discussion about a change in an important public policy is
10 the quintessential example of when the deliberative process privilege should apply.

11 In addition to the legal elements that must be met before information can be protected by
12 the deliberative process, federal courts have identified three separate policy grounds that explain
13 the need for the deliberative process privilege. First, it protects creative debate and candid
14 consideration of alternatives within an agency, and thereby improves the quality of agency
15 decisions. Second, it protects the public from the confusion that would result from a premature
16 exposure to discussions occurring before the policies affecting it had actually been settled upon.
17 Third, it protects the integrity of the decision making process itself by confirming that “officials
18 should be judged by what they decided not for matters they considered before making up their
19 minds.” *Jordan v. United States Department of Justice*, 591 F.2d 753, 772-773 (D.C. Cir. 1978).
20 Without question, these policy grounds apply directly to the very sensitive and controversial area
21 of capital punishment by lethal injection. Addressing deficiencies in the implementation of the
22 California’s lethal injection protocol and revising the substance of the protocol will both require
23 debate and candid consideration of alternatives by the Moving Parties. Significantly, it is the
24 final policy that truly concerns Plaintiff – not the recommendatory information received,
25 debated, and considered by the Moving Parties while many options are being discussed.

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1 **2. This Court Has Broad Discretion to Grant a Protective Order Where,**
2 **as Here, the Interests of Justice Are Served by Placing Reasonable**
3 **Limits on Discovery.**

4 This court has broad discretion under Federal Rule of Civil Procedure 26(c) to issue “any
5 order which justice requires to protect a party or person from annoyance, embarrassment,
6 oppression, or undue burden.” The Supreme Court has interpreted this language as conferring
7 “broad discretion on the trial court to decide when a protective order is appropriate and what
8 degree of protection is required.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). The
9 Supreme Court further noted that the trial court is in a unique position to weigh the needs of the
10 parties and should be given substantial latitude to do so:

11 [T]rial court is in the best position to weigh the fairly competing
12 needs and interests of the parties affected by discovery. The unique
13 character of the discovery process requires that the *trial court have*
14 *substantial latitude to fashion protective orders.*

15 *Id.* (emphasis added); *see also* 8 Wright, Miller & Marcus, Federal Practice and Procedure, Civil
16 §§ 2036, at 489 (2d ed. 1994) (“Thus, a court may be as inventive as the necessities of a
17 particular case require in order to achieve the benign purposes of the rule.”).

18 Consistent with the requirements of Rule 26(c), good cause exists in this case for a
19 protective order regarding the deliberative process of reviewing, evaluating and revising both the
20 substance and implementation of California’s lethal injection protocol. “[T]he underlying
21 purpose of [the deliberative process privilege] is to protect the consultive functions of
22 government by maintaining the confidentiality of advisory opinions, recommendations, and
23 deliberations comprising part of a process by which governmental decisions and policies are
24 formulated.” *National Wildlife Fed.* 861 F.2d at 1117. There is no question the review of the
25 lethal injection protocol will require frank debate and candid consideration of policy alternatives,
26 and that the threat of disclosure of these executive level deliberations is concrete and continuing.
27 As a consequence, good cause exists for a protective order that will facilitate the free flow of
28 information as the Moving Parties receive information and deliberate about both the
29 implementation deficiencies and substantive changes needed by the lethal injection protocol.

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1 who provide them with recommendations) can have a candid dialogue, this case requires that a
2 protective order issue. Moreover, a protective order that limits access to deliberative matters
3 will not prejudice the plaintiff, who will have ample opportunity to challenge any revised lethal
4 injection protocol once such a revised protocol becomes final. In contrast to the lack of
5 prejudice to Plaintiff, the benefits to the executive decision making process, however, will be
6 invaluable and substantial. For all of these reasons, the protective order outlined in this motion
7 should be granted.

8 DATED: January 16, 2007

9 Respectfully Submitted,

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14 /s/ Steven M. Gevercer

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20 /s/ Dane Gillette - original signature on file with
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