

Study N-300

April 7, 1999

## First Supplement to Memorandum 99-20

**Administrative Rulemaking: Comments on Draft Tentative Recommendation**

We have received a letter from the California State Employees Association commenting on Memorandum 99-20 (Administrative Rulemaking: Draft Tentative Recommendation). It is attached. The letter also makes one suggestion with regard to AB 486, which will be discussed in conjunction with the First Supplement to Memorandum 99-17 (Legislative Program: Issues on AB 486 (Administrative Rulemaking)).

Respectfully submitted,

Brian Hebert  
Staff Counsel



# California State Employees Association

Local 1000, SEIU, AFL-CIO, CLC

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April 7, 1999

California Law Revision Commission  
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Re: Administrative Rulemaking (Study N-300)  
Draft Tentative Recommendation Memorandum 99-20

Dear Commission Members:

The California State Employees Association (CSEA) has reviewed Memorandum 99-20, and submits the following comments to the Law Revision Commission's recommended changes to the Administrative Procedure Act (APA). Specifically, CSEA is raising concerns regarding the 1) individual advice exception, 2) internal management exception, 3) rules that will be exempt from public disclosure, 4) policy manual exception, and 5) negotiated rulemaking.

### Individual Advice Exception

As discussed in my February 3, 1999 letter to you, CSEA contends that the addition of an individual advice exception is unnecessary. Government Code section 11343(a)(3) already provides an exception for letters directed to a specifically named person or to a group of persons that does not apply generally throughout the state. The Office of Administrative Law (OAL) has correctly interpreted this exception as not applicable if the advice letter is a standard of general application. The LRC's recommended changes would broaden the exception so widely that an agency could avoid the APA's notice and comment requirements by simply announcing a regulation in letter form.

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The draft memorandum purports to address the concerns CSEA previously raised, by "recognizing that such an exception might create a loophole for agencies that wish to circumvent the rulemaking procedure, the Commission directed the staff to draft the exception narrowly." However that the prohibition that such advice is not to be used to promulgate underground regulations is not addressed in the statutory amendment or comments. Instead the recommendation alleges that it resolves this problem because agencies would be deterred from promulgating underground regulations. The statute does not directly prohibit agencies from doing so. Rather, the recommendation alleges that agencies could not provide statements to its employees, and such requested advice would not be given any judicial deference. (CLRC Memorandum 99-20, p. 1-2.) Thus, an agency could still illegally promulgate regulations through the use of advice letters, and only face consequences if someone seeks to challenge such regulations in the courts.

CSEA asserts that Government Code section 11343(a)(3) currently provides an appropriate exception, while preventing the promulgation of underground regulations through advice letters. If the advice letter applies to an identifiable group of persons *throughout the state*, then this advice is a regulation as defined by Government Code section 11342(g), regardless of whether or not it is technically addressed to an individual. Individuals or groups of individuals are not prohibited from seeking advice letters. Rather, only agencies are prohibited from promulgating regulations through the use of advice letters.

#### Internal Management Exception

CSEA appreciates the Commission's consideration of its comments to the internal management exception and the Commission's recognition that this exception should not apply to rules that affect the legal rights and obligations of state employees. However, it is unclear if the proposed statutory amendment continues to recognize this exemption; state employee rights are not expressly addressed in the comments.

Additionally, the proposed language "directly and significantly" creates an unnecessary requirement that may unintentionally muddle and extend this exception. Does this mean that rules that significantly affect a person's legal rights are exempt as long as it is indirect?

#### Rules that Should Not Be Disclosed Publicly

CSEA is not opposed to the concept that certain rules should be kept secret when disclosure would facilitate evasion of the law. However, CSEA is concerned that what "should properly be kept secret" may be defined too broadly. (See, proposed subsections (f)(1), (2), and (3) of Government Code section 11340.9, CLRC Memorandum 99-20, p. 5.) The proposed statutory addition would exempt rules from disclosure if disclosure would:

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- (1) Enable Law violators to avoid detection.
- (2) Facilitate disregard of requirements imposed by law.
- (3) Give a clearly improper advantage to persons who are in an adverse position to the state.

The listed criteria may often times be a more subjective than objective standard and is therefore subject to abuse. In contrast, the Public Records Act specifically enumerates exceptions to disclosure. (*See*, Government Code sections 6254 - 6254.21.) In the rare event that the withholding of records outweighs the public interest in disclosure of such records for reasons not enumerated, the Public Records Act provides that an agency can withhold records if it demonstrates nondisclosure is in the public interest. The Commission should consider mirroring the Public Records Act for parallel rulemaking exceptions.

Furthermore, if the Commission intends to make an exception, it should be addressed in the APA, as well as in the Public Records Act, to give appropriate notice to individuals, as well as agencies that intend to promulgate such regulations.

#### Policy Manual Exception- AB 486

CSEA agrees with the Commission's decision not to codify *Tidewater* exception. However, CSEA is concerned that the decision not to codify was not addressed in Assembly Bill 486.

Government Code section 11340.5 prohibited agencies from issuing and using policy manuals that are improper regulations. However, *Tidewater v. Bradshaw* (1996) 14 Cal.4th 557, arguably created a exception for the restatement of an agency's prior decisions and advice letters. Pursuant to rules of statutory interpretation, failure to address this in legislation might lead state agencies and the courts to conclude that *Tidewater* is now incorporated into the APA.

#### Negotiated Rulemaking

A new statute to define and regulate negotiated rulemaking is unnecessary. Those agencies who wish to engage in "negotiated" rulemaking can and do so. In fact, the proposed addition would limit flexibility of those engaging in such cooperative rulemaking. Furthermore, current APA notice and comment procedures protect groups and public omitted from informal negotiated rulemaking. If problems currently exist in informal negotiated rulemaking, then these problems should be specifically addressed. New procedures should not be implemented if they do not have a specific purpose.

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Thank you for your consideration. Please call me if you have any questions for would like to discuss this matter further.

Sincerely,



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Attorney

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