BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

FILED
07-19-12
04:59 PM

Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company regarding Anti-Smart Meter Consumer Groups	Investigation 12-04-010 (Filed April 19, 2012)

SECOND AMENDED MOTION OF PACIFIC GAS AND ELECTRIC COMPANY FOR PROTECTIVE ORDER

PUBLIC VERSION

(DECLARATION OF DAVID BAYLESS IN SUPPORT OF SECOND AMENDED MOTION OF PACIFIC GAS AND ELECTRIC COMPANY FOR PROTECTIVE ORDER – PUBLIC VERSION)

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July 19, 2012

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Pursuant to Rule 11.1 of this Commission's Rules of Practice and Procedure, and per the instructions of Administrative Law Judge ("ALJ") Vieth at the July 13, 2012 hearing in this matter, Pacific Gas and Electric Company ("PG&E") hereby requests that the ALJ issue a protective order redacting previously undisclosed individuals' names and personnel records from the Consumer Protection and Safety Division's ("CPSD") Staff Report and related attachments ("CPSD Staff Report"). At the July 13, 2012 hearing, PG&E agreed to more limited redactions than those it proposed in its prior Amended Motion for Protective Order. Specifically, PG&E agreed to include the names of company officers (those holding a title of Vice President and above) in the proposed public version of the CPSD Staff Report. The remaining, narrow set of redactions PG&E requests in connection with this Second Amended Motion for Protective Order ("Motion") are necessary to protect the privacy and safety of non-officer employees and to prevent disclosure of Mr. Devereaux's private, constitutionally-protected personnel files.

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I. THE CONSTITUTIONAL RIGHT OF PRIVACY AND PERSONAL SAFETY CONSIDERATIONS COMPEL ISSUANCE OF THE REQUESTED PROTECTIVE ORDER

A. Individual Privacy is a Guaranteed Constitutional Right

The California Constitution guarantees an individual's right of privacy. Cal. Const., Art. I, § 1; *see also Hill v. National Collegiate Athletic Assn.* 7 Cal.4th 1, 15 (1994). "The constitutional right of privacy is 'not absolute'; it may be abridged when, but only when, there is a 'compelling' and opposing state interest." *Board of Trustees v. Superior Court*, 119 Cal.App.3d 516, 525 (1981) (citations omitted). While the California Public Records Act ("CPRA") generally provides that "every person has a right to inspect any public record" (§ 6253(a)), it also contains express exceptions to that general rule, many of which are designed to protect private information including "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." CPRA §6254(c). The CPRA also permits a public agency to withhold records if it can show that based "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." CPRA §6255(a).

B. The Proposed Protective Order Is Necessary To Ensure the Personal Safety of PG&E Employees

In addition to safeguarding the relevant individuals' constitutional right to privacy, the protective order PG&E requests is necessary to protect company employees from harassment, threats and potential physical violence. Throughout the introduction of PG&E's SmartMeter™ program, PG&E employees, contractors and even some customers have been subjected to escalating threats and acts of physical violence by anti-SmartMeter™ protesters. *See* Declaration of Robert Puts ("Puts Declaration"), submitted concurrently with this Motion. These incidents include but are not limited to a bomb threat to a PG&E facility in Santa Cruz, protests outside the

personal residences of PG&E employees, attacks in which protestors spit on and/or physically assaulted PG&E representatives, threatened shootings of PG&E representatives, gunshots fired directly at SmartMeters™, and protestors surrounding PG&E vehicles in a threatening and intimidating fashion. *Id*. These are serious, documented threats and acts of violence. No PG&E employee should be subjected to such potentially hazardous and harmful conditions, particularly when, as discussed below, the disclosure of their personal identities would serve no countervailing public purpose.

C. The Requested Protective Order Will Not Meaningfully Limit Adjudication of or Public Access to this Proceeding

It is well recognized that "even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a 'careful balancing' of the 'compelling public need' for discovery against the 'fundamental right of privacy.'" *Board of Trustees v. Superior Court*, 119 Cal.App.3d 516, 525 (1981) (citations omitted). Here, PG&E seeks to protect from public disclosure three narrow categories of information: (1) names of non-officer employees copied on purportedly relevant communications from Mr. Devereaux; (2) names of non-officer employees who appear in the CPSD Staff Report in a non-substantive context; and (3) materials that constitute part of Mr. Devereaux's private personnel files. As discussed below, protection of each such category of information will not unduly limit the Commission's investigation or impair public access to this proceeding.

1. The Commission Should Protect the Privacy of Non-Officer Employees Copied on Purportedly Relevant Communications

PG&E's proposed redactions do not encompass job titles, names of company officers or individuals whose names have already been disclosed via media or other public coverage related

to the allegations in the OII. As discussed above, PG&E has consented to public disclosure of the names of company officers appearing in the CPSD Staff Report and now requests redaction only of non-officer employee names that have not been previously disclosed in connection with this proceeding. Per ALJ Vieth's instructions, PG&E has filed concurrently with this Motion the confidential declaration of David Bayless ("Bayless Declaration"), which sets forth the job titles and professional responsibilities of those non-officer employees (or former employees) who are alleged to have received purportedly relevant communications from Mr. Devereaux and whose identities should remain redacted. *See* Bayless Declaration.

Redaction of these individuals' names will not inhibit adjudication of or public access to this proceeding in any meaningful way. The CPUC and other parties to the proceeding will have complete, unredacted access to these names and all other material in the CPSD Staff Report upon execution of a nondisclosure agreement. Moreover, PG&E's proposed redactions do not alter the substance or nature of any of the communications, actions or conduct alleged in the CPSD Staff Report. Instead, the proposed redactions narrowly target only the specific personal names of individuals whose identities are not central to the Commission's investigation or any related public discourse. There is simply no public interest in disclosing the identities of these non-officer employees that outweighs their constitutionally-protected privacy rights and the risks to their safety posed by an increasingly hostile faction of protestors. Accordingly, these names should be redacted from the publicly-filed version of the CPSD Staff Report.

2. Names of Employees Not Directly Relevant to this Proceeding Should be Redacted

In addition to the names set forth in the Bayless Declaration, PG&E also seeks to redact from the public version of the CPSD Staff Report the names of all non-officer PG&E employees who are *not* alleged to have received purportedly relevant communications from Mr. Devereaux

(*see* Report, p. 8, Table 2). The names relevant to this request include the applicable individuals in the organizational charts in Attachment 3 of the Report and the entire list of recipients of the original, October 7, 2010 email in the center of Attachment 18. These individuals appear in the CPSD Staff Report only by happenstance – their names and identities have no consequence or relevance to this proceeding. Disclosing these employees' names would violate their privacy rights and place them at an unnecessary risk of harassment and harm while providing no discernable benefit to the public or the Commission's investigation of this matter.

3. Mr. Devereaux's Personnel Records Should Remain Confidential

As discussed in the OII, the CPSD Staff Report also attaches PG&E's internal investigation memoranda and correspondence regarding Mr. Devereaux's actions during his tenure with PG&E, which are part of Mr. Devereaux's private personnel records. (*see* CPSD Staff Report, Attachments 2, 5). A plain review of these attachments reveals that they constitute disciplinary and employment-related documents over which Mr. Devereaux has a reasonable expectation of privacy. *Hill v. NCAA*, 7 Cal.4th 1, 37 (1994). As a general matter, personnel records are protected from public disclosure under Article I, Section I of the California Constitution. *See El Dorado Sav. & Loan v. Superior Court*, 190 Cal. App. 3d 344, 346 (1987) ("In the context of discovery of confidential information in personnel files, even when such information is directly relevant to litigation, discovery will not be permitted until a balancing of the compelling need for discovery against the fundamental right of privacy determines that disclosure is appropriate. And, even when the balance tips in favor of disclosure, constitutional concerns require a strict circumspection of the scope of the disclosure."); *Harding Lawson Assocs. v. Superior Court*, 10 Cal. App. 4th 7, 10 (1992) ("[T]he balance will favor privacy for confidential information in third party personnel files unless the litigant can show a compelling

need for the particular documents and that the information cannot reasonably be obtained through depositions or from nonconfidential sources.”).

These protections are afforded to Mr. Devereaux directly, and as his former employer and the custodian of his personal records PG&E is not in a position to consent to public disclosure of Mr. Devereaux’s personnel records without his consent or waiver. The “custodian of private information has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of it is entitled to expect that his right will be thus asserted…[a]nd, of course, the custodian of such private information may not waive the privacy rights of persons who are constitutionally guaranteed their protection.” *Board of Trustees v. Superior Court*, 119 Cal.App.3d 516, 525-26 (1981) (holding that the trial court abused its discretion in ordering discovery of university employer’s internal investigation regarding employee) (citations omitted).

Accordingly, PG&E proposes that the Commission redact from public disclosure the entirety of Attachments 2 and 5 to the CPSD Staff Report. Should the ALJ disagree with PG&E that Attachments 2 and 5 constitute Mr. Devereaux’s personnel records in their entirety, PG&E requests that all non-officer employee names appearing in those documents remain redacted to the extent that they have not already been disclosed in this proceeding.

II. CONCLUSION

Consistent with the protections afforded by the California Constitution and concern for the personal safety and security of PG&E employees, PG&E requests that the Administrative Law Judge approve and adopt the proposed redactions to the CPSD Staff Report described herein.

Respectfully submitted,

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