



**FILED**  
12-31-15  
04:59 PM

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Order Instituting Investigation And Order to Show Cause on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company with Respect to Facilities Records for its Natural Gas Distribution System Pipelines.

I.14-11-008  
(Filed November 20, 2014)

**PACIFIC GAS AND ELECTRIC COMPANY'S  
MOTION TO COMPEL DISCOVERY  
FROM INTERVENOR THE CITY OF CARMEL-BY-THE-SEA**

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## **MOTION TO COMPEL DISCOVERY FROM INTERVENOR CARMEL**

Pacific Gas and Electric Company (“PG&E”) respectfully submits this Motion to Compel Discovery from Intervenor Carmel-by-the-Sea (“Carmel”) pursuant to Rule 11.3 of the Commission’s Rules of Practice and Procedure. PG&E requests that the Commission direct Carmel to provide responses to Questions 13 through 23 in PG&E’s third sets of data requests no later than January 14, 2016, two business days before the hearing in this proceeding begins. For ease of reference, these questions are attached to this Motion as Appendix A.

### **I. INTRODUCTION**

This discovery dispute arises out of Carmel’s refusal to provide substantive responses to PG&E’s data requests, which sought to clarify what facts, if any, supported allegations of wrongdoing that Carmel raised for the first time during the last few weeks of this proceeding, and the sources of any such information.

On November 19, 2015, Carmel served PG&E with 41 data requests asking, in part, for PG&E to admit a number of very specific allegations, including that PG&E employees had either improperly accessed, inserted documents into, or removed documents from the job file for the work PG&E performed in Carmel on March 3, 2014. Carmel’s allegations appeared to be based on information provided by a former PG&E employee, Leslie Banach, who was identified (by title) in a number of Carmel’s data requests as having witnessed the alleged events that PG&E was being asked to admit.<sup>1</sup> PG&E diligently searched for information that might be responsive to Carmel’s requests, but was unable to identify any evidence supporting the allegations.

Because it had been unable to substantiate Carmel’s allegations, PG&E served its own data requests, asking Carmel, among other things, to state the facts supporting the allegations.

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<sup>1</sup> As PG&E subsequently learned and as discussed below, Carmel had been in contact with Ms. Banach before serving its data requests, including serving her with a subpoena.

Carmel objected and refused to provide responses on the ground that the requested information was privileged, despite the fact that Carmel’s counsel had no privileged relationship with Ms. Banach and that the facts underlying Carmel’s allegations could not be shielded by a claim of privilege, no matter what their source. Carmel claims these facts are protected work product because some of them were learned in the course of witness interviews. But the United States Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1946), addressed this issue and concluded that, even when the records of witness interviews are work product, the facts learned during the course of such interviews are not.

Not only is Carmel’s position contrary to law, but it also contravenes the important public interest in conducting a full, fair, and open inquiry into all allegations relevant to this proceeding. The integrity of this public process would be undermined if Carmel were permitted to voluntarily intervene to make serious accusations and then refuse to disclose any related facts. PG&E respectfully requests an order compelling Carmel to provide responses to PG&E’s requests.

## **II. BACKGROUND**

### **A. Carmel’s November 19 Data Requests Ask PG&E to Admit Specific Allegations About the Conduct of PG&E Employees Following the Carmel Incident.**

One of the incidents described in the OII involved a March 3, 2014 explosion in the City of Carmel (the “Carmel Incident”).<sup>2</sup> On November 19, Carmel served its second set of data requests on PG&E,<sup>3</sup> asking PG&E to admit, among other things, a series of allegations about the conduct of its employees in the days immediately following the Carmel Incident. Several of Carmel’s data requests made reference to PG&E’s “Director of Information Management

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<sup>2</sup> OII at 6–7.

<sup>3</sup> Ex. B at Questions 14–17, 19, 22. All exhibits, which are referenced herein as “Ex.,” are attached to the concurrently filed Declaration of Marie L. Fiala in Support of PG&E’s Motion to Compel (“Fiala Decl.”).

Compliance” at the time of the Carmel Incident.<sup>4</sup> This position was held by Ms. Banach, who worked at PG&E from 2012 to 2014.<sup>5</sup> For example, Carmel’s data requests included the following:

14. Admit that approximately 2 to 4 days after the March 3, 2014 explosion in Carmel, PG&E employees or agents . . . contacted PG&E’s former Director of Information Management Compliance and requested the Carmel job file or a portion thereof.
15. Admit that the requestors identified in the previous data request expressly instructed that the Carmel records NOT be tracked by your internal electronic tracking system (explained on p. 2-9 of Sumeet Singh’s prepared reply testimony). In other words, admit the requestors wanted no tracking of checking out the Carmel job file.
16. Admit PG&E’s former Director of Information Management Compliance objected to the request without tracking the file, but she was instructed to do it anyway.
17. Admit PG&E’s former Director of Information Management Compliance was instructed to send the Carmel job file to “corporate.”

Other requests suggested that unnamed individuals at PG&E had inserted or removed documents from the job file following the Carmel Incident.<sup>6</sup>

Following a diligent review of its records, which included email correspondence from custodians who might have viewed the Carmel job file, as well as electronic logs tracking all changes to data in, or documents added to or removed from, the job file, PG&E found no evidence to support Carmel’s allegations.<sup>7</sup>

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<sup>4</sup> See, e.g., Ex. B at Questions 16, 17.

<sup>5</sup> Fiala Decl. ¶ 2.

<sup>6</sup> *Id.* at Questions 23–26.

<sup>7</sup> Fiala Decl. ¶ 4 and Ex. C at Responses 13–23, 29.

**B. PG&E Learned That Carmel Had Subpoenaed Ms. Banach Without Notice to the Parties.**

On October 30, 2015, Ms. Banach emailed the PG&E human resources department to state that she had received a subpoena from the law firm of “Meyers Nave representing the City of Carmel in a hearing for the Public Utilities Commission of the State of California.”<sup>8</sup> Her email did not include a copy of the subpoena.<sup>9</sup> However, given the references to Ms. Banach in Carmel’s November 19 data requests, PG&E sent a letter that same day to Meyers Nave, counsel for Carmel in this proceeding, requesting a copy of the subpoena served on Ms. Banach.<sup>10</sup>

Carmel did not respond until December 1, twelve days later, and claimed (incorrectly) that it had already served the subpoena on the offices of PG&E’s counsel. Carmel also claimed it had not received any documents from Ms. Banach in response to the subpoena.<sup>11</sup> PG&E replied on December 1, reiterating that it had never received the subpoena and again requesting a copy.<sup>12</sup> Carmel provided a copy of the subpoena later that day. On its face, the subpoena showed that it had been issued by CPUC Chief ALJ Karen Clopton on October 29, 2015, and the certificate of service indicated that it was served on Ms. Banach at the Meyers Nave offices that same afternoon.<sup>13</sup> The subpoena was marked for a deposition, but a handwritten notation stating “(Interview only)” had been added to the cover page of the subpoena.<sup>14</sup> Despite Carmel’s earlier assurances, Carmel eventually disclosed in discovery responses that it had never served a copy of

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<sup>8</sup> Ex. A.

<sup>9</sup> *Id.*

<sup>10</sup> Ex. D.

<sup>11</sup> Ex. E.

<sup>12</sup> Ex. F.

<sup>13</sup> Ex. G.

<sup>14</sup> *Id.*

the subpoena on the other parties to this proceeding, as required by California Code of Civil Procedure section 2025.240.<sup>15</sup>

**C. PG&E Served Carmel with Data Requests Seeking Facts Related to Its Allegations.**

On December 3, PG&E sent Carmel its third set of data requests in this proceeding, which, among other things, included contention interrogatories asking Carmel to state any facts related to the allegations contained in Carmel’s November 19 requests, as well as the identities of knowledgeable witnesses.<sup>16</sup>

Carmel answered those requests on December 17.<sup>17</sup> In its responses, Carmel admitted for the first time that it had in fact never served PG&E or any other party to this proceeding with the subpoena it propounded on Ms. Banach.<sup>18</sup> In response to PG&E’s contention interrogatories requesting the facts supporting Carmel’s allegations, Carmel provided no information, only general objections.<sup>19</sup> First, Carmel claimed that the requests sought attorney-client communications and attorney work product, despite the fact that the requests asked for the facts underlying Carmel’s allegations. Carmel also claimed that the information PG&E requested was obtained in the course of an investigation by the Carmel Police Department, though it did not attempt to make the threshold showing for the application of the official-information privilege, nor did it attempt to explain why that privilege should be applied under these circumstances. In

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<sup>15</sup> Cal. Pub. Util. Code § 1794 makes provisions of the California Civil Discovery Act applicable to discovery conducted in Commission proceedings; *see also* CPUC Rule of Practice and Procedure, Rule 10.2. Carmel’s current contention is that, “[t]o the best of [its] knowledge,” Banach—the party being subpoenaed—“served” PG&E, though Carmel does not know when this service took place or have any documents showing it actually did. In any event, to have a subpoenaed witness take responsibility for effecting service would be irregular, to say the least. Ex. N at Response 8(a).

<sup>16</sup> Ex. K at Questions 13–23.

<sup>17</sup> Ex. N.

<sup>18</sup> *Id.* at Response 8(a).

<sup>19</sup> *Id.* at Responses 13–23.

addition, Carmel objected to PG&E's "legal characterization of the subpoena and the purpose for which it was issued," though Carmel did not explain how this objection is relevant to its refusal to respond.

**D. PG&E Explained to Carmel That Its Objections Were Improper.**

On December 28, PG&E sent Carmel a letter explaining why it is entitled to the requested information and why Carmel's objections were meritless.<sup>20</sup> PG&E asked Carmel to indicate by the close of business on December 29 whether it was willing to substantively supplement its responses, so that ALJ Bushey would have an opportunity, if necessary, to address this dispute before the start of the hearing on January 19.<sup>21</sup>

After some additional email correspondence regarding timing, Carmel responded to PG&E's meet and confer letter on December 30.<sup>22</sup> Carmel's response letter focused on the issue of whether "witness statements" and "notes, reports, and impressions of an interview" of Ms. Banach by Carmel's counsel constitute protected work product. On that basis, Carmel refused to provide any additional responses to PG&E's data requests. Carmel's letter ignored the fact that PG&E's data requests called for the facts that support the assertions made in Carmel's data requests, which are clearly discoverable.

In a final effort to resolve the parties' disputes, PG&E sent Carmel an email on December 30, clarifying that PG&E does not seek discovery of witness statements, interview notes, or other similar material that might constitute qualified work product.<sup>23</sup> PG&E also suggested that the parties might be able to resolve their disagreement if Carmel were willing to answer a few targeted questions, stating specifically whether Carmel had received documents from Ms.

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<sup>20</sup> Ex. O.

<sup>21</sup> *Id.*

<sup>22</sup> Fiala Decl. ¶¶ 15-16 and Ex. Q.

<sup>23</sup> Fiala Decl. ¶ 17 and Ex. R.

Banach, and whether Carmel intended to make the allegations contained in its data requests at the OII hearing. If the answers to both of those questions were “no,” there would be no need for PG&E to file its motion to compel.

Carmel’s reply on December 31 finally confirmed that it had not obtained any documents from Ms. Banach.<sup>24</sup> But Carmel refused to stipulate that it would not raise the contentions set forth in its data requests in the OII and refused to respond to PG&E’s requests for the facts underlying those contentions. Because the parties are clearly at an impasse, PG&E brings this motion to compel Carmel to respond no later than January 14, 2016, which is only two business days before the hearing begins.

### **III. ARGUMENT**

#### **A. The Information PG&E Requested Is Not Only Relevant, But Necessary to Clarify the Allegations Carmel Has Interjected into This Proceeding.**

Rule 10.1 of the Commission’s Rules of Practice and Procedure states, in part, that “any party may obtain discovery from any other party regarding any matter, not privileged, that is relevant to the subject matter involved in the pending proceeding.” PG&E’s data requests seek information that is not only relevant, but crucial to PG&E’s ability to understand and respond to the allegations Carmel has introduced into this proceeding.

Questions 13 through 23 in PG&E’s third set of data requests are basic contention interrogatories that ask Carmel to state the facts related to its allegations regarding the conduct of PG&E employees following the Carmel Incident, and also to identify the documents related to, and persons with knowledge of, those facts.<sup>25</sup> Carmel has refused to provide any information in response to any of these requests, instead asserting an identical series of objections based on (i)

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<sup>24</sup> Ex. S.

<sup>25</sup> Ex. K.

attorney-client privilege; (ii) the work-product doctrine; (iii) the official-information privilege; and (iv) PG&E's asserted "characterization" or "purpose" of the subpoena Carmel served on Ms. Banach.<sup>26</sup>

**B. No Attorney-Client Privilege Exists Between Carmel and Ms. Banach.**

Carmel claims that these requests seek documents or information protected by the attorney-client privilege. No privileged relationship exists, or can exist, between counsel for Carmel and Ms. Banach. Cal. Evid. Code § 954 (limiting attorney-client privilege to "confidential communication[s] between client and lawyer"). Carmel has never asserted that it represents Ms. Banach and, in fact, its responses referenced the fact that Ms. Banach may be represented by her own counsel.<sup>27</sup>

Moreover, even if a privileged relationship existed, Carmel's objections would be overbroad in claiming that the facts underlying its allegations are protected by the attorney-client privilege. That privilege protects only communications between an attorney and his or her clients, never facts. Even if Carmel learned a fact through a privileged communication, which again, would not be true of communications with Ms. Banach, that would not shield the fact itself from discovery. *State Farm Fire & Casualty Co. v. Superior Court*, 54 Cal. App. 4th 625, 639 (1997) ("[T]he attorney-client privilege only protects disclosure of communications between the attorney and the client; it does not protect disclosure of underlying facts which may be referenced within a qualifying communication.").

**C. Facts Learned from Ms. Banach Are Not Protected as Work Product.**

Carmel claims that the facts sought in these requests are the work product of its attorneys. This objection is also baseless. Parties are routinely required to disclose the facts that underlie

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<sup>26</sup> Ex. N at Responses 13–23.

<sup>27</sup> Ex. N at Response 8(a).

their allegations by responding to contention interrogatories. This is because, like the attorney-client privilege, the work-product doctrine does not shield facts from discovery, no matter how they are learned. For example, the California Code of Civil Procedure provides that interrogatories may seek any “facts” on which a contention is based. Cal. Code Civ. Proc. 2030.010(b). Even the fact that responsive information might have been recorded in a privileged document would not excuse Carmel from providing that information. As the Federal Rules of Civil Procedure explain, a party may discover the “relevant facts” available to another party even when “such facts are contained in a document which is not itself discoverable.” Fed. R. Civ. P. 26(b)(3) Advisory Comm. Note, 48 F.R.D. 487, 501 (1970).

During the parties’ meet and confer, Carmel cited *Coito v. Superior Court*, 54 Cal. 4th 480 (2012), in support of its argument that “the information it received from” Ms. Banach is protected work product.<sup>28</sup> Carmel is wrong. The Court in *Coito* merely held that an audio recording of a witness interview was protected work product. *Id.* at 487, 499–500. PG&E is not seeking discovery of interview recordings or any other witness statements, only facts, however they were learned—an issue the Court in *Coito* did not address.

The seminal United States Supreme Court decision on this issue is *Hickman v. Taylor*, 329 U.S. 495 (1946). *Hickman*, unlike *Coito*, addressed the work-product doctrine in the context of discovery requests such as PG&E’s, and concluded that, while the records of witness interviews may be protected work product, the facts learned during the course of such interviews are not. *Id.* at 508–509, 513. The Supreme Court drew a sharp line between “an ordinary request for relevant, nonprivileged facts in the possession of [one’s] adversaries or their counsel,” such as the requests propounded by PG&E, and requests for transcripts or attorney

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<sup>28</sup> Ex. Q.

notes reflecting witness statements elicited by counsel, which PG&E does not seek. *Id.* at 508. As the *Hickman* Court explained, the fact that witness statements might be subject to work-product protection “does not mean that any material, non-privileged facts can be hidden,” as “all pertinent information gleaned by [the other party’s lawyer] through his interviews with the witnesses” had been properly obtained through interrogatories in that case. *Id.* The same is true under California law, as the Court in *Coito* explained that it was affording witness statements “the same [work product] protection that the high court afforded to the witness statements in *Hickman*.” *Id.* at 497; *see also Tehachapi-Cummings County Water Dist. v. Superior Court*, 267 Cal. App. 2d 42, 46 (1968) (ordering response to interrogatory seeking “facts” underlying contentions, even if they are derived from protected attorney work product).

**D. Carmel Has Not Shown That the Official-Information Privilege Applies.**

Carmel also objects on the basis that the facts underlying its allegations against PG&E were obtained as part of an investigation conducted by the Carmel Police Department in connection with the March 3, 2014 incident. This objection does not provide a basis to withhold any of the information PG&E has requested. First of all, Carmel has not made the foundational showing for the application of the official-information privilege. Cal. Evid. Code § 1040(a). For example, the information on which the allegations in Carmel’s data requests are based appears to have been obtained, at least in part, by the Meyers, Nave law firm, not by public employees. And any responsive facts would be no more protected by the official-investigation privilege than they would be by the attorney-client privilege or the work-product doctrine.

But in any event, the official-information privilege would still be inapplicable under these circumstances because the need for disclosure far outweighs any interest Carmel might have in keeping the information secret. *Id.* § 1040(b)(2). The integrity of this public process would be

undermined if Carmel were permitted to voluntarily intervene to make serious accusations and then refuse to disclose any related facts or evidence.

**E. Carmel’s Objection Based on the “Characterization” or “Purpose” of the Subpoena Does Not Provide a Basis for Refusing to Respond.**

Carmel objects rather confusingly to PG&E’s “legal characterization of the subpoena [served on Ms. Banach] and the purpose for which it was issued.” This objection is too vague to be meaningful as PG&E’s requests did not “characterize” the subpoena or describe its “purpose.” In its third set of data requests, PG&E merely defined “SUBPOENA” as “the subpoena caused to be issued in this proceeding and served on behalf of the CARMEL on BANACH on or about October 29, 2015.” If Carmel has a dispute with this description, it has not adequately explained what it is.

Carmel makes a point of denying that it obtained the subpoena pursuant to Public Utilities Code section 314, but PG&E never suggested it had done so. The only time PG&E referred to that Code provision was to instruct Carmel to provide data request responses pursuant to it. Carmel also suggests that Ms. Banach’s severance agreement prohibits her from discussing her work at PG&E absent a subpoena—but, again, Carmel does not explain how this assertion might be relevant to its responses. As a result, PG&E does not understand the basis for this objection, or know whether Carmel is withholding any information on this basis.

**IV. CONCLUSION**

For all these reasons, PG&E respectfully requests that ALJ Bushey adopt the proposed ruling filed with this Motion, which directs Carmel to provide responses and all responsive, non-privileged documents to Questions 13 through 23 in PG&E’s third sets of data requests not later than January 14, 2016.

Respectfully submitted,

*/s/ Elizabeth Collier*

*/s/ Marie L. Fiala*

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Dated: December 31, 2015

## **APPENDIX A**

Question 13: With respect to CARMEL DR\_02,

- a. Data Request 14 states:  
  
“Admit that approximately 2 to 4 days after the March 3, 2014 explosion in Carmel, PG&E employees or agents. . . contacted PG&E’s former Director of Information Management Compliance and requested the Carmel job file or a portion thereof.”
- b. State all facts RELATED TO the statements made in Data Request 14 or on which Data Request 14 is based.
- c. Identify all persons with knowledge of such facts.
- d. Produce all DOCUMENTS that reflect, pertain, or relate to such facts.

Question 14: With respect to CARMEL DR\_02,

- a. Data Request 15 states:  
  
“Admit that the requestors identified in the previous data request expressly instructed that the Carmel records NOT be tracked by your internal electronic tracking system (explained on p. 2-9 of Sumeet Singh’s prepared reply testimony). In other words, admit the requestors wanted no tracking of checking out the Carmel job file.”
- b. State all facts RELATED TO the statements made in Data Request 15 or on which Data Request 15 is based.
- c. Identify all persons with knowledge of such facts.
- d. Produce all DOCUMENTS that reflect, pertain, or relate to such facts.

Question 15: With respect to CARMEL DR\_02,

- a. Data Request 16 states:  
  
“Admit PG&E’s former Director of Information Management Compliance objected to the request without tracking the file, but she was instructed to do it anyway.”
- b. State all facts RELATED TO the statements made in Data Request 16 or on which Data Request 16 is based.
- c. Identify all persons with knowledge of such facts.

- d. Produce all DOCUMENTS that reflect, pertain, or relate to such facts.

Question 16: With respect to CARMEL DR\_02,

- a. Data Request 17 states:  
  
“Admit PG&E’s former Director of Information Management Compliance was instructed to send the Carmel job file to ‘corporate.’”
- b. State all facts RELATED TO the statements made in Data Request 17 or on which Data Request 17 is based.
- c. Identify all persons with knowledge of such facts.
- d. Produce all DOCUMENTS that reflect, pertain, or relate to such facts.

Question 17: With respect to CARMEL DR\_02,

- a. Data Request 18 states:  
  
“Identify which person(s) viewed the Carmel job file approximately 2 to 4 days (or more, pending on turnaround time) after the March 3, 2014 explosion in Carmel.”
- b. State all facts RELATED TO the statements made in Data Request 18 or on which Data Request 18 is based.
- c. Identify all persons with knowledge of such facts.
- d. Produce all DOCUMENTS that reflect, pertain, or relate to such facts.

Question 18: With respect to CARMEL DR\_02,

- a. Data Request 19 states:  
  
“Admit the person(s) who viewed the Carmel job file approximately 2 to 4 days (or more, pending on turnaround time) after the March 3, 2014 explosion in Carmel was one or more persons in management at its corporate headquarters.”
- b. State all facts RELATED TO the statements made in Data Request 19 or on which Data Request 19 is based.
- c. Identify all persons with knowledge of such facts.
- d. Produce all DOCUMENTS that reflect, pertain, or relate to such facts.

Question 19: With respect to CARMEL DR\_02,

- a. Data Request 20 states:  
  
“Explain in detail why the person(s) who wished to view the Carmel job file did not want a tracking record of who borrowed the file.”
- b. State all facts RELATED TO the statements made in Data Request 20 or on which Data Request 20 is based.
- c. Identify all persons with knowledge of such facts.
- d. Produce all DOCUMENTS that reflect, pertain, or relate to such facts.

Question 20: With respect to CARMEL DR\_02,

- a. Data Request 22 states:  
  
“Admit you did not follow internal protocol of tracking the Carmel job file in March 2014.”
- b. State all facts RELATED TO the statements made in Data Request 22 or on which Data Request 22 is based.
- c. Identify all persons with knowledge of such facts.
- d. Produce all DOCUMENTS that reflect, pertain, or relate to such facts.

Question 21: With respect to CARMEL DR\_02,

- a. Data Request 23 states:  
  
“Were any records, data, or documents removed from the Carmel job file in March 2014?”
- b. State all facts RELATED TO the statements made in Data Request 23 or on which Data Request 23 is based.
- c. Identify all persons with knowledge of such facts.
- d. Produce all DOCUMENTS that reflect, pertain, or relate to such facts.

Question 22: With respect to CARMEL DR\_02,

- a. Data Request 25 states:

“Were any records, data, or documents inserted into the Carmel job file in March 2014?”

- b. State all facts RELATED TO the statements made in Data Request 25 or on which Data Request 25 is based.
- c. Identify all persons with knowledge of such facts.
- d. Produce all DOCUMENTS that reflect, pertain, or relate to such facts.

Question 23: With respect to CARMEL DR\_02,

- a. Data Request 27 states:

“Were any records, data, or documents lost from the Carmel job file in March 2014?”

- b. State all facts RELATED TO the statements made in Data Request 27 or on which Data Request 27 is based.
- c. Identify all persons with knowledge of such facts.
- d. Produce all DOCUMENTS that reflect, pertain, or relate to such facts.