

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



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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.

Investigation 14-11-008
(Filed November 20, 2014)

**CITY OF CARMEL-BY-THE-SEA'S OPPOSITION TO
PACIFIC GAS & ELECTRIC'S MOTION TO COMPEL DISCOVERY**

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January 11, 2016

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I. INTRODUCTION

In typical heavy handed manner, PG&E rushes in just days before the administrative hearing is set to begin on January 19, 2016, and asks this Commission to compel further discovery responses from Intervenor Carmel-by-the-Sea (“Carmel”) which are specifically derived from its attorney initiated interview of former employee Leslie Banach, Director of Information Management Compliance. Carmel has advised PG&E that Carmel did not receive any documents, either in hard copy or electronic, from Ms. Banach. Undaunted, PG&E asks the Commission to compel the release of all the information gained as a result of Carmel’s attorney self-initiated interview of Ms. Banach, which is subject to the work product privilege. (Code of Civil Procedure § 2018.030(b).) This interview, which occurred on October 29, 2015, was also attended by Police Chief Michael Calhoun and is also privileged under the official information privilege. (Evidence Code § 1040).

II. THE ORIGINAL DATA REQUESTS THAT UNDERLIE THIS MOTION TO COMPEL DERIVE FROM CARMEL’S EFFORTS TO PROBE PG&E’S RECORDKEEPING PRACTICES ON THE CARMEL JOB FILE

This discovery dispute starts from Carmel’s Data Request, Set Two, Requests Nos. 14-27, that were sent to PG&E on November 19, 2015, and sought to probe the recordkeeping issues at play relative to the job file for the work performed in Carmel by PG&E on March 3, 2014 as to the natural gas distribution pipeline and related facilities (“the Carmel job file”).¹ The issue of the integrity and veracity of the recordkeeping on the natural gas distribution pipelines is the heart of the issue at play in this pending administrative matter.² The record keeping of PG&E is not a new issue raised by Carmel

¹ Exhibit B, Request Nos. 14-27. For ease of reference, Carmel employs the same exhibit numbers found in PG&E’s moving papers and has provided copies of same attached to the Declaration of attorney Strottman so that all the relevant exhibits can be found together. Any newly referenced exhibits by Carmel are also attached to the Strottman Declaration starting with Exhibit T.

² See Exhibit T; Commission Order Instituting Investigation and Order to Show Cause of November 20, 2014, p. 1 [the Commission institutes a formal investigation as to PG&E’s safety recordkeeping for its natural gas distribution service and facilities].

but rather, was initiated by this Commission to assess PG&E's compliance with the law pertaining to safety-related recordkeeping for natural gas distributions.³ This series of data requests on the Carmel job file specifically starts by calling out by name PG&E employees/agents Kurt Kremptotic and Alfonso Cornejo, and references by title former employee Leslie Banach, Director of Information Management Compliance. The requests seek information relating to these PG&E individuals' actions or inactions on the Carmel job file.⁴ Each of these individuals are currently or formerly affiliated with PG&E and, accordingly, available to PG&E. Indeed, the name of these PG&E employees is embedded in Carmel's initial data requests.

Importantly, at no time has PG&E contended that it is unable to locate or speak with any of these three (3) PG&E affiliated individuals. Indeed, PG&E has conducted numerous staff interviews in this matter which included Leslie Banach.⁵ Rather, PG&E in some sort of distorted but calculated effort, tries to characterize its discovery requests as "contention" requests mandating Carmel's further response. This characterization is false and simply an attempt to press for privileged information that PG&E is not entitled to as a matter of law. Contention requests are appropriate when asking a party to offer all facts in support of allegations in its complaint or to support its affirmative defense. (*See Tehachapi-Cummings County Water District v. Superior Court of Kern County* (1968) 267 Cal.App.2d 42, 46.) However, in this administrative proceeding where Carmel is an Intervenor who has asked some specifically focused data requests, PG&E cannot

³ See Exhibit T; p. 1.

⁴ Exhibit B, Request No. 14; emphasis added.

⁵ See I.11-02-016, PG&E's Response to CPSD's Reports: Records Management Within the Gas Transmission Division of PG&E Prior to the Natural Gas Transmission Pipeline Rupture and Fire, San Bruno, California, September 9, 2010 and Report and Testimony of Margaret Felts, Testimony of Witnesses – PG&E Company Expert Report of Maura L. Dunn, MLS, CRM, PMP citing Testimony of Leslie Banach, Director – Information Management Compliance, May 15-16, 2012 at pps.MD-58; MD-66 to MD-68 and MD-C-1; a true and correct copy of which is found at Exhibit V.

transform an Intervenor's discovery request as a portal to full and complete access to the information that the attorneys derived from their own initiative and case strategy.

An examination of the language of the requests belies such a claim. For example, Carmel's Data Request No. 14 provides:

Admit that approximately 2 to 4 days after the March 3 2014 explosion in Carmel, *PG&E employees or agents Kurt Kremptotic and Alfonso Cornejo* contacted PG&E former Director of Information Management Compliance and requested the Carmel job file or a portion thereof.⁶

PG&E in both its motion papers and in its Appendix A critically omits the names of PG&E employees -- Messrs. Kremptotic and Cornejo in a calculated maneuver to distort the issues at play here. At no time does PG&E state that it has attempted to contact Messrs. Kremptotic or Cornejo or offer any other specific delineated efforts to inquire as to its own company's tracking system. Instead, PG&E asserts without any foundational support that it cannot find any evidence "supporting these allegations".⁷ Carmel has not made any allegations by its Data Request Set No. 2, but rather was probing the recordkeeping practices at issue on the Carmel job file. The Data Requests seek to determine how the file was maintained; were any items removed from the job file or added to the job file.⁸ Carmel's attorneys on their own initiative determined it would hold an interview and explore these issues with PG&E's former Director of Information Management Compliance. Now, PG&E improperly asks this Commission to allow it to take a front row seat and listen in on Carmel's litigation strategy and uncover all of the facts that Carmel's attorneys obtained at the interview with Ms. Banach.

Carmel has specifically stated that it did not obtain any documents from Leslie Banach. So the only issue that remains for the Commission's determination is

⁶ *Id.*

⁷ PG&E's Motion to Compel, p. 1.

⁸ PG&E's Data Responses found at Exhibit C, Responses 14-27.

PG&E's ability to obtain the facts that Carmel's retained counsel gleaned from the Banach interview. PG&E is not entitled to this information. They are free to interview and seek their own information from employees – Banach, Kremptotic, and/or Cornejo. However, they are not entitled to have Carmel breach the work product privilege and obtain the relief requested here.

III. THE ATTORNEY WORK PRODUCT PRIVILEGE PRECLUDES THE DISCLOSURE SOUGHT BY PG&E

PG&E's Data Requests Nos. 13 through 23 improperly seek the work product of Carmel's attorneys. These data requests relate to Carmel's prior discovery seeking to learn about the issues at play with PG&E's recordkeeping and various details regarding the Carmel job file. The Carmel job file is in the custody and control of PG&E and now they try to invade the thought process and reasoning of Carmel's attorneys to learn the results derived from Carmel's attorney-led interview of Leslie Banach. These requests attempt to reveal the substance and source of internal discovery conducted by Carmel and betray the very purpose of work product protection. (See Code. Civ. Pro. § 2018.020.) In other words, PG&E attempts to take undue advantage of Carmel's industry and efforts. (Code. Civ. Pro. §§ 2018.020, 2018.040; *Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 133.)

Here, the Commission is not confronted with a situation where PG&E is seeking permissible items for discovery such as: (1) the identity or location of evidentiary matter; (2) information about prospective or potential witnesses, such as their names, phone numbers, addresses, and occupations; or (3) any writing that reflects an attorney's impressions, conclusions, opinions, or theories concerning a non-legal matter, such as non-legal business advice to a client. (See *Watt Indus. v. Superior Court* (1981) 115 Cal.App.3d 802.) Instead, PG&E wants to delve into the thought processes and legal strategies held in their adversary counsel's head. This is not fair game.

The protection afforded an attorney's work product is not absolute in all instances but, instead, receives qualified protection allowing for disclosure in certain circumstances. Carmel has the initial burden of establishing that the matter sought by this motion to compel is within the ambit of attorney-client privilege. The declaration of attorney Britt Strottman establishes that the interview of Leslie Banach was conducted at Meyers Nave's San Francisco law offices and all of the questions asked and areas of inquiry explored were part of Carmel's efforts to prepare for trial and to explore and probe the issues at play.⁹ This should be the end of the inquiry as the unrecorded Banach interview is within the sweet spot of absolutely privileged information. (*See Fireman's Fund Ins. Co. v. Superior Court (Front Gate Plaza, LLC)* (2011) 196 Cal.App.4th 1263, 1277-1281, and *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 814.)

PG&E urges the Commission to treat this issue as one of a potential conditional work product privilege which would mandate that PG&E must meet its burden to justify the disclosure of further information. (*Hickman v. Taylor* (1947) 329 U.S. 495, 512.) In order to meet this standard, PG&E must show that denial of the disclosure will (1) unfairly prejudice the party in preparing their claim or defense or (2) result in an injustice. (Code of Civil Procedure § 2018.030 (b); See also *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 67 and *Hickman v. Taylor* (1947) 329 U.S. 495, 512.) PG&E has not met this burden. In fact, the only offered declaration from attorney Maria Fiala makes no claim as to any need to have Carmel's work product gained at the Banach interview. Nor is any offering made as to any efforts to contact Banach, Kremptotic or Cornejo .

Hickman v. Taylor (1947) 329 U.S. 495 simply does not mandate the result urged by PG&E in this matter. *Hickman* recognizes that:

[A] common law trial is and always should be an adversary proceeding.

Discovery was hardly intended to enable a learned profession to perform its

⁹ Strottman Declaration ¶ 3.

functions wither without wits or on wits borrowed from the adversary.” (*Id.* at 516.)

Here, PG&E asks the Commission to go too far and to allow it to borrow directly from the specific work product of Carmel’s attorneys. PG&E has access to its own employees and can surely inquire as to any and all details that they think are prudent as to the recordkeeping protocol on the Carmel job file. And, as to former employee Banach, PG&E has her bound by a severance agreement and again can ask here whatever they deem important. The omission by PG&E of any discussion of the noted PG&E employees speaks volumes and precludes the requested relief.¹⁰ PG&E cannot be asking Carmel to provide the names and addresses of its own employees. Rather, they appear to want a summary of all the results of efforts to track down information by Carmel’s attorneys as called out in sub-section b of each of the disputed Data Requests.

In *Coito v. Superior Court* (2012) 54 Cal.4th 480, the California Supreme Court held that witness statements obtained through an attorney-directed interview are entitled to work product protection. (*Id.* at 494 [“in light of the origins and developments of the work product privilege in California, we conclude that witness statements obtained as a result of an interview conducted by an attorney, or by an attorney’s agent at the attorney’s behest constitute work product”].) The *Coito* court held that where a witness statement reveals an attorney’s impressions, conclusions, points, or legal research, the statement is entitled to absolute privilege. (*Id.* at 495.) Even where witness statements obtained by an attorney do not reveal the attorney’s thought process, they are nevertheless entitled to qualified work product protection. (*Id.* [“even when an attorney who exercises no selectivity in determining which witnesses to interview...the attorney has expended time and effort in identifying and locating each witness, securing the witness’s willingness to talk, listening to what the witness said, and preserving the witness statements for possible

¹⁰ See Exhibit B, Request 13(c) asking to “identify all persons with knowledge of such facts”.

future use.”].) In other words, writings that contain an attorney’s mental impressions, opinions, conclusions and theories are absolutely protected.

Here, the impressions and inner workings of Carmel’s attorneys have not been reduced to writing and nevertheless, PG&E asks this Commission to force a factual recitation of same by its improper attempt to bootstrap its use of so called contention requests. The work product privilege protection as to Carmel’s attorneys’ opinions, conclusions, theories applies even when not reduced to writing . (*Fireman’s Fund Ins. Co. v. Superior Court (Front Gate Plaza, LLC)* (2011) 196 Cal.App.4th 1263, 1277-1281 and *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 814.)

Case law establishes that the information that Carmel obtained from its interview with Leslie Banach is entitled to work product protection because it reflects the impressions, analysis, and opinions of Carmel’s attorneys and are thus not discoverable here. (Code Civ. Proc. § 2018.030(b).) Of note, Banach has not been listed as a “witness” in this proceeding by an party. Carmel made the deliberate strategic decision to interview Ms. Banach. PG&E could have done the same and, in fact, could still do so any time on their own initiative. However, PG&E cannot simply try to delve into Carmel’s attorneys inner working process by this motion to compel. The questions posed to the individual Banach, her answers, the follow-up questions all reflect the attorneys’ theories and strategies in this proceeding.

The Commission need not balance the issues at play here since this area is absolutely privileged. Furthermore, PG&E has not met the dictates at play in a conditional setting to warrant disclosure of attorney work product, which requires it establish the interest that this information should be provided, as it otherwise would yield some prejudice or injustice to PG&E. (*See* Code Civ. Procedure § 2018.030(b).) To the contrary, Messrs. Kremptotic and Cornejo are current employees of PG&E while Banach is a former employee of PG&E. If PG&E wants to explore what these individuals know all they need do is contact them in the workplace and ask them any question they desire

about the Carmel job file. Case law has recognized that if these individuals are available to the party then no hardship can be established to warrant a motion to compel. (*See Hickman v. Taylor* (1947) 329 U.S. 495, 506 [acknowledging that concern that potential for a large corporation seeking to shield pertinent facts gathered by large staff of attorneys and claims agents]. PG&E contends that the “public’s interest in disclosure far outweighs any interest Carmel might have in keeping the information secret.”¹¹ On the contrary, this individual is equally available to PG&E and PG&E is free to depose or interview this individual to obtain the facts PG&E seeks. Indeed, this individual is the best source for the information sought in the data requests. Any effort to obtain information known to Ms. Banach through the information obtained, notes, and impressions of an interview with her by Carmel’s attorneys is contrary to legal authority and would improperly invade the attorney work product privilege.

IV. THE OFFICIAL INFORMATION PRIVILEGE OF EVIDENCE CODE § 1040 APPLIES AND PRECLUDES THE DISCLOSURE SOUGHT BY PG&E

Carmel properly asserted the official information privilege found at Evidence Code § 1040 and further advised PG&E during the meet and confer process that Carmel’s Chief of Police, Michael Calhoun, attended the interview of Leslie Banach.¹² Chief Calhoun is Carmel’s Director of Public Safety and has held that position since 2012.¹³ The issues at play in this matter are of utmost importance to Carmel from a public safety aspect and Chief Calhoun participated in this interview in his official capacity in order to protect the safety of the first responders as well as the health and welfare of City residents, business owners and visitors alike.

¹¹ PG&E’s Motion to Compel at p. 10.

¹² Letter from attorney Britt Strottman of Meyers Nave dated December 30, 2015 to attorney Marie Fiala of Sidley Austin found at Exhibit Q, p. 2; par. 2.

¹³ See Prepared Direct Testimony of Police Chief Michael Calhoun on Behalf of Carmel of October 14, 2015 found at Exhibit U, p. 1, lines 15-16.

The privilege for nondisclosure of official information under Evidence Code § 1040 arises when the following prerequisites are met:

1. The public employee has acquired the information in confidence;
2. The public employee acquired the information in the scope of his duties; and
3. The information has not been open or officially disclosed to the public, before the privilege is claimed. (Evidence Code § 1040.)

All of these requisite elements have been met here. Chief Calhoun, in his role as the head of the City's Police Department and as well Director of Public Safety, participated in the interview of Ms. Banach. The information from the Banach interview was obtained in confidence and has not been publicly disclosed. Ms. Banach was a former executive at PG&E charged with the creation of a records database, records management and records retrieval system.¹⁴ Indeed, Ms. Banach has left the employment of PG&E but is apparently constrained by PG&E under a severance agreement from discussing the recordkeeping issues at play in this matter to anyone without a subpoena. It bears noting that this individual is clearly available and accessible to PG&E as a former employee and in fact, is contractually bound to PG&E by a severance agreement. In light of the constraints imposed by PG&E on any disclosures by Ms. Banach it was of the utmost importance that the interview be and remain confidential.¹⁵

Case law establishes that the burden rests with PG&E to make a prima facie showing of plausible justification for the need for information. In order to make this showing PG&E must show how the information affects the preparation of its claim or defense. (*See People v. Superior Court* (1971) 19 Cal.App.3d 522, 530.) PG&E has not

¹⁴ See I.11-02-016, PG&E's Response to CPSD's Reports: Records Management Within the Gas Transmission Division of PG&E Prior to the Natural Gas Transmission Pipeline Rupture and Fire, San Bruno, California, September 9, 2010 and Report and Testimony of Margaret Felts, Testimony of Witnesses – PG&E Company Expert Report of Maura L. Dunn, MLS, CRM, PMP citing Testimony of Leslie Banach, Director – Information Management Compliance, May 15-16, 2012 at pps.MD-58; MD-66 to MD-68 and MD-C-1; a true and correct copy of which is found at Exhibit V.

¹⁵ See Strottman Declaration at ¶ 2.

done so here and cannot. PG&E that has access to its current employees who can provide it with chapter and verse as to the record keeping issues at play here. This information is all within PG&E's own custody, possession and/or control and PG&E has numerous means to obtain such information. (*See Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1129.) This is not a case that mandates an intricate balancing at play between the necessity for preserving confidentiality against the litigant's interest in disclosure. Rather, PG&E has access to its own employees who can offer extensive explanation on its recordkeeping procedures and will clearly fulfill its needs and thus, avoid the need for a showdown on the claim of privilege. (*Id.* at p. 528.)

V. CONCLUSION

Carmel respectfully requests that the Commission deny the motion to compel and not breach the attorney work product privilege held by Carmel.

January 11, 2016

Respectfully Submitted,

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