

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

Irvine, California  
Date: October 25, 2012  
Resolution No.: L-443

**RESOLUTION**

**RESOLUTION AUTHORIZING DISCLOSURE OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION CONSUMER PROTECTION AND SAFETY DIVISION'S RECORDS REGARDING INVESTIGATIONS OF TWO JULY 2010 INCIDENTS INVOLVING THE LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY VEHICLES THAT OCCURRED ON LONG BEACH BLVD. AND 16<sup>TH</sup> STREET IN THE CITY OF LONG BEACH AND WASHINGTON BLVD. AND BROADWAY IN THE CITY OF LOS ANGELES, CALIFORNIA**

**BACKGROUND**

The California Public Utilities Commission ("Commission") received a request from Kevin Devlin of the Local 1565 United Transportation Union, representing the train operators on the Los Angeles County Metropolitan Transportation Authority (LACMTA), seeking disclosure of records concerning the Commission Consumer Protection and Safety Division's investigations of two July 2010 incidents involving LACMTA vehicles that occurred on Long Beach Blvd. and 16<sup>th</sup> Street in the City of Long Beach and Washington Blvd. and Broadway in the City of Los Angeles, California.

The Commission staff could not make the investigation records public without the formal approval of the full Commission. Mr. Devlin's letter is treated as an appeal to the full Commission for release of the requested records pursuant to Commission General Order 66-C § 3.4.

**DISCUSSION**

The requested records are "public records" as defined by the California Public Records Act ("CPRA").<sup>1</sup> The California Constitution, the CPRA, and discovery

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<sup>1</sup> Cal. Gov't. Code § 6250, *et seq.*

law favor disclosure of public records. The public has a constitutional right to access most government information.<sup>2</sup> Statutes, court rules, and other authority limiting access to information must be broadly construed if they further the people's right of access, and narrowly construed if they limit the right of access.<sup>3</sup> New statutes, court rules, or other authority that limit the right of access must be adopted with findings demonstrating the interest protected by the limitation and the need to protect that interest.<sup>4</sup>

The CPRA provides that an agency must base a decision to withhold a public record in response to a CPRA request upon the specified exemptions listed in the CPRA, or a showing that, on the facts of a particular case, the public interest in confidentiality clearly outweighs the public interest in disclosure.<sup>5</sup>

The Commission has exercised its discretion under Cal. Pub. Util. Code § 583, and implemented its responsibility under Cal. Gov't. Code § 6253.4(a), by adopting guidelines for public access to Commission records. These guidelines are embodied in General Order 66-C. General Order 66-C § 1.1 provides that Commission records are public, except "as otherwise excluded by this General Order, statute, or other order, decision, or rule." General Order 66-C § 2.2 precludes Commission staff's disclosure of "[r]ecords or information of a confidential nature furnished to or obtained by the Commission ... including: (a) Records of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action." General Order 66-C § 2.2(a) covers both records provided by utilities in the course of a Commission investigation and investigation records generated by Commission staff.

Because General Order 66-C § 2.2(a) limits Commission staff's ability to disclose Commission investigation records in the absence of disclosure during a hearing or a Commission order authorizing disclosure, Commission staff denies most initial requests and subpoenas for investigation records. Commission staff usually informs requestors that their subpoena or public records request will be treated as an appeal under General Order 66-C § 3.4 for disclosure of the records.

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<sup>2</sup> Cal. Const. Article I, § 3(b)(1).

<sup>3</sup> Cal. Const. Article I, § 3(b)(2).

<sup>4</sup> *Id.*

<sup>5</sup> The fact that records may fall within a CPRA exemption does not preclude the Commission from authorizing disclosure of the records. Except for records subject to a law prohibiting disclosure, CPRA exemptions are discretionary, rather than mandatory, and the Commission is free to refrain from asserting such exemptions when it finds that disclosure is appropriate. *See* Cal. Gov't. Code § 6253 (e); *Black Panthers v. Kehoe* (1974) 42 Cal. App. 3d 645, 656.

There is no statute forbidding disclosure of the Commission's safety investigation records. With certain exceptions for incident reports filed with the Commission, we generally refrain from making most accident investigation records public until Commission staff's investigation of the incident is complete. Commission staff and management need to be able to engage in confidential deliberations regarding an incident investigation without concern for the litigation interests of plaintiffs or regulated entities.

The Commission has ordered disclosure of records concerning completed safety incident investigations on numerous occasions.<sup>6</sup> Disclosure of such records does not interfere with its investigations, and may lead to discovery of admissible evidence and aid in the resolution of litigation regarding the accident or incident under investigation.<sup>7</sup> Most of these resolutions responded to disclosure requests and/or subpoenas from individuals involved in electric or gas utility or railroad accidents or incidents, the families of such individuals, the legal representatives of such individuals or families, or the legal representatives of a defendant, or potential defendant, in litigation related to an accident or incident.

Portions of incident investigation records which include personal information may be subject to disclosure limitations in the Information Practices Act of 1977 ("IPA").<sup>8</sup> The IPA authorizes disclosure of personal information "[p]ursuant to the [CPRA]."<sup>9</sup> The CPRA exempts personal information from mandatory disclosure, where disclosure would constitute an unwarranted invasion of personal privacy.<sup>10</sup> Incident investigation records may include information subject to the lawyer-client privilege, official information privilege, or similar disclosure limitations. The CPRA exempts such information from disclosure.<sup>11</sup>

The Commission's investigations of the two incidents in the City of Long Beach and City of Los Angeles are complete; therefore, the public interest favors disclosure of the requested Commission's investigation records, with the exception of any personal information, the disclosure of which would constitute an

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<sup>6</sup> Where appropriate, the Commission has redacted portions of investigation records which contain confidential personal information, the disclosure of which would constitute an unwarranted invasion of privacy, and other exempt or privileged information.

<sup>7</sup> See, e.g., Commission Resolutions L-240 *Re San Diego Gas & Electric Company*, rehearing denied in Decision 93-05-020, (1993) 49 P.U.C. 2d 241; L-309 *Re Corona* (December 18, 2003); L-320 *Re Knutson* (August 25, 2005).

<sup>8</sup> Cal. Civ. Code § 1798, *et seq.*

<sup>9</sup> Cal. Civ. Code § 1798.24(g).

<sup>10</sup> Cal. Gov't. Code § 6254(c).

<sup>11</sup> Cal. Gov't. Code § 6254(k).

unwarranted invasion of personal privacy, or any information which is subject to the Commission's lawyer-client or other privilege.

### **COMMENTS ON DRAFT RESOLUTION**

The Draft Resolution of the Commission's Legal Division in this matter was mailed to the parties in interest on September 17, 2012, in accordance with Cal. Pub. Util. Code § 311(g). Comments were filed on October 15, 2012 by LACMTA

### **LACMTA COMMENTS**

LACMTA states that accident reports submitted to the Commission are confidential, pursuant to Federal Transportation Administration (FTA) guidelines and Commission General Order 164-D. LACMTA quotes FTA Implementation Guidelines Page 70, Jan 2006, as follows:

...reports and records of accident investigations submitted to the oversight agency by the rail transit agency, as well as all materials related to the investigation, should be treated as confidential information, and not released without the concurrence by both the oversight agency and the rail transit agency. § 659.11 of the revised rule clarifies that "a state may withhold an investigation report that may have been prepared or adopted by the oversight agency from being admitted as evidence or used in a civil action for damages resulting from a matter mentioned in the report."

LACMTA also quotes FTA Resource Toolkit, Page 61 Jan 2006, as follows:

Reports and records of accident investigations submitted to the SOA by the RTA, as well as related reports and records produced by both SOA and the RTA, will be treated as confidential information, and will not be released without concurrence by both SOA and the RTA.

Finally, LACMTA quotes the Commission's General Order 164-D, Section 8.4, which states:

No investigation report or recommendation of the Commission, nor any investigation report of an RTA filed with the Commission, shall be admissible as evidence in any action for damages based on or arising out of matters covered therein, pursuant to Public Utilities Code section 315.

LACMTA notes that, under Cal. Gov't. Code § 6254(k), records are exempt from disclosure to the public if the record is exempted or prohibited pursuant to state or federal law, and asserts that the sections previously cited indicate that the federal government and Commission intend that accident reports submitted by rail transit agencies are intended to be treated as confidential.

LACMTA states that reports submitted to the Commission contain the thoughts and impressions of its Corporate Security Department, and are submitted with the clear understanding that the records will be accepted and retained as confidential documents, that confidentiality promotes complete and candid evaluations by the LACMTA, that disclosure would have a chilling effect on LACMTA by creating an atmosphere in which investigators are less than candid when documenting their findings, and that, therefore, the public interest favors confidential treatment of the accident reports. LACMTA notes that Cal. Gov't. Code § 6255 exempts records from disclosure when the public interest in nondisclosure outweighs the public's interest in disclosure.

Finally, LACMTA asserts that its submittal of the accident reports to the Commission does not constitute a waiver of any exemptions under the Public Records Act, since Cal. Gov't. Code § 6254.5(e) states that an agency does not waive exemptions when it submits records to another agency that agrees to treat the records as confidential. LACMTA claims General Order 164 indicates that accident reports are expected to be retained as confidential and, therefore, the submission of the reports to the Commission was not intended to, and does not, constitute a waiver of the rules or statutes regarding confidentiality.

The Commission does not view Cal. Pub. Util. Code § 315, referenced in General Order 164-D § 8.4, as a barrier to disclosure. We have long taken the position that while § 315 bars the use of accident reports filed with the Commission as evidence in actions for damages resulting from an incident, it does not bar disclosure of such reports. *See, e.g.,* Commission Resolution L-240, *Re San Diego Gas & Electric Company*, rehearing denied in D. 93-05-020 (1993) 49 CPUC 2d 241. General Order 164-D § 8.4 is consistent with § 315, in that it does not limit disclosure, but acknowledges the limits on the use of accident reports as evidence.

We do notify those seeking accident reports filed with the Commission, and accident investigation records of the Commission, that Cal. Pub. Util. Code § 315 provides that neither the order or recommendation of the Commission, nor any accident report filed with the Commission, shall be admitted as evidence in any action for damages based on or arising from the accident. Our initial response to the union representative included such a notice.

We have not been sympathetic to the argument that those submitting accident reports to the Commission will be less than candid if they know the reports may be disclosed to the public. *See* D.93-05-020, *supra*. We have pointed out our authority to obtain necessary safety records, and noted there are consequences for those who are less than candid with the Commission.

We have, through resolutions similar to this one, authorized disclosure of records of a number of investigations of incidents involving rail transit agencies, including records provided by the transit agencies. We are not aware of previous rail transit agency objections to such resolutions authorizing disclosure on the basis of the 2006 FTA Implementation Guidelines and Toolkit, or Cal. Gov't. Code § 6254.5(e). 49 C.F.R. § 659.11 does provide that states may withhold investigation reports from being admitted as evidence or used in actions for damages, but does not require states to do so. The FTA recognizes that state authority regarding records access may differ. Cal. Pub. Util. Code § 315 and General Order 164-D reflect California's decision to bar only the admission of the orders and recommendations of the Commission, and accident reports filed with the Commission, in actions for damages. We are not aware of any formal nondisclosure agreement executed between LACMTA and the Commission under Cal. Gov't. Code § 6254.5(e), although we agree that this section provides that a governmental agency does not waive its right to assert CPRA exemptions by providing confidential information to another governmental agency which agrees to treat the disclosed material as confidential.

We note that the person who requested these particular accident records is associated with a union representing LACMTA train operators, rather than a law firm involved in accident litigation. In addition to requesting the accident records, he stated his understanding that fatigue played a role in both of the incidents, and asked "If true, what action (if any) did the Commission take on this matter." He asked a series of other questions relating to time off requirements and hours of service issues. Thus, the potential for these particular reports to be used in actions for damages by this requester is limited. Disclosure to one member of the public generally requires disclosure to any other member of the public seeking the same records, however, and it is possible, though somewhat unlikely, that someone else may seek these records. Even if we provide access to the accident reports, Cal. Pub. Util. Code § 315 would preclude their use as evidence in personal injury litigation.

Commission records associated with the two accidents of interest to the requester include a variety of documents. The records regarding accident reports submitted by LACMTA, a police report, a Commission rail transit safety staff rail transit incident summary and review checklist. The RTSS records regarding the other

accident include information based on Commission staff's own observations at one accident site, review of a video at the LACMTA Corporate Safety Office, staff's participation in LACMTA's train operator interview, and staff's attendance at a train vs. vehicle accident reenactment.

We have no reservations regarding the disclosure of our own accident investigation records, and will authorize the disclosure of those records and several notes regarding our interest in modifications to certain hours of service rules that may reduce driver fatigue. We understand LACMTA's advocacy of the FTA preference that rail transit agency accident reports not be disclosed unless both the transit agency and the state oversight agency, here, the Commission, consent to disclosure. We prefer this outcome as well. We also understand that the union representative is free to request the LACMTA reports directly from LACMTA, since that agency also has Public Records Act obligations. Nonetheless, we will follow our standard practice and authorize disclosure of the LACMTA accident reports filed with the Commission as well, since we feel that public disclosure of most safety-related records, subject to the Cal. Pub. Util. Code § 315 limit on use of accident reports as evidence in actions for damages, is in the public interest.

### **FINDINGS OF FACT**

1. The Commission received a request for the disclosure of the Commission's investigation records concerning the investigations of two July 2010 incidents involving LACMTA vehicles that occurred on Long Beach Blvd. and 16<sup>th</sup> Street in the City of Long Beach and Washington Blvd. and Broadway in the City of Los Angeles, California.
2. Access to the records in the Commission's investigation files were denied in the absence of a Commission order authorizing disclosure.
3. The Commission investigations of two July 2010 incidents involving LACMTA vehicles that occurred on Long Beach Blvd. and 16<sup>th</sup> Street in the City of Long Beach and Washington Blvd. and Broadway in the City of Los Angeles, California, have been completed; therefore, the public interest favors disclosure of the requested Commission's investigation records, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission's lawyer-client or other privilege.

**CONCLUSIONS OF LAW**

1. The documents in the requested Commission's investigation file and report are public records as defined by Cal. Gov't. Code § 6250, *et seq.*
2. The California Constitution favors disclosure of governmental records by, among other things, stating that the people have the right of access to information concerning the conduct of the peoples' business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny. Furthermore, the California Constitution also requires that statutes, court rules, and other authority favoring disclosure be broadly construed, and that statutes, court rules, and other authority limiting disclosure be construed narrowly; and that any new statutes, court rules, or other authority limiting disclosure be supported by findings determining the interest served by keeping information from the public and the need to protect that interest. Cal. Const. Article I, §§ 3(b)(1) and (2).
3. The general policy of the CPRA favors disclosure of records.
4. Justification for withholding a public record in response to a CPRA request must be based on specific exemptions in the CPRA or upon a showing that, on the facts of a particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. Cal. Gov't. Code § 6255.
5. Cal. Gov't Code § 6254(c) exempts from mandatory disclosure personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy.
6. Cal. Gov't Code § 6254(k) exempts from disclosure records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.
7. The Commission has exercised its discretion under Cal. Pub. Util. Code § 583 to limit Commission staff disclosure of investigation records in the absence of formal action by the Commission or disclosure during the course of a Commission proceeding. General Order 66-C § 2.2 (a).
8. Cal. Pub. Util. Code § 583 does not limit the Commission's ability to order disclosure of records.

**ORDER**

1. The request for disclosure of the Commission records concerning the investigations of two July 2010 incidents involving LACMTA vehicles that

occurred on Long Beach Blvd. and 16<sup>th</sup> Street in the City of Long Beach and Washington Blvd. and Broadway in the City of Los Angeles, California, is granted, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission's lawyer-client or other privilege.

2. The effective date of this order is today.

I certify that this Resolution was adopted by the California Public Utilities Commission at its regular meeting of October 25, 2012, and that the following Commissioners approved it:

/s/ PAUL CLANON

PAUL CLANON

Executive Director

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK J. FERRON

Commissioners