

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: February 13, 2013

Resolution No.: L-436

**RESOLUTION**

**RESOLUTION REGARDING THE DISCLOSURE OF SAFETY-RELATED RECORDS**

In this resolution, the California Public Utilities Commission (CPUC) provides public access to records subject to disclosure under the California Public Records Act (CPRA) (Cal. Gov't. Code § 6250 *et seq.*) by providing the public with more immediate access to records of safety inspections, audits, and investigations.

We will disclose the following categories of routine safety-related records after any appropriate redactions, without requiring a vote of the Commission or an Administrative Law Judge ruling: (1) CPUC-generated reports, summaries, and correspondence regarding completed CPUC safety-related inspections, audits, and investigations; and (2) annual reports that gas operators file with the United States Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA).

Our online safety portal describes the CPUC's safety jurisdiction and inspection, investigation, and enforcement activities, and provides access to a wide range of safety-related records the CPUC receives and/or generates. We will post the above two categories of safety-related records on our online safety portal. Finally, we direct staff to conduct workshops addressing remaining issues regarding disclosure of safety-related records, including (1) the nature and treatment of other types of safety-related records utilities and other regulated entities provide to the Commission, and (2) other issues regarding disclosure of CPUC-generated safety records, as discussed below.

Finally, we intend to open a rulemaking in the near future to address improving the public's access to records that are not exempt under the CPRA or other state or federal law, and the CPUC's ability to process records requests and requests for confidential treatment in an efficient, well-reasoned, and consistent manner. While we have confidence in our authority to adopt rules regarding the public or confidential status of various classes of records utilities provide to us, we will defer broad reforms of our procedures for handling records requests and requests for confidential treatment – including revision of Commission General Order

(G.O.) 66-C – to a future formal proceeding, rather than continue to pursue such reforms through the current resolution.

### **Access to CPUC Records: the California Public Records Act and Commission General Order 66-C**

The California Constitution, the CPRA, and discovery law require that most government records be available to the public. Cal. Pub. Util. Code § 583 states that “[n]o information furnished to the commission by a public utility . . . , except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding.” The CPUC’s records access practices must be consistent with these constitutional and statutory requirements.

The public has a constitutional right to access most government information.<sup>1</sup> The California Constitution states that 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>2</sup> Rules that limit the right of access must be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.<sup>3</sup>

The CPRA requires that public agency records be open to public inspection unless they are exempt from disclosure under the provisions of the CPRA.<sup>4</sup> “Public records” are broadly defined to include all records “relating to the conduct of the

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<sup>1</sup> Cal. Const. Article I, § 3(b)(1): “The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.” *See, e.g., International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328-329.

<sup>2</sup> Cal. Const., Article 1, § 3(b)(2): “A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.” *See, e.g., Sonoma County Employee’s Retirement Assn. v. Superior Court (SCERA)* (2011) 198 Cal.App.4<sup>th</sup> 986, 991-992.

<sup>3</sup> *Id.*

<sup>4</sup> *Roberts v. City of Palmdale* (1993) 5 Cal.4<sup>th</sup> 363, 370: “The Public Records Act, section 6250 *et seq.*, was enacted in 1968 and provides that “every person has a right to inspect any public record, except as hereafter provided.” (§ 6253, subd. (a).) We have explained that the act was adopted “for the explicit purpose of ‘increasing freedom of information’ by giving the public ‘access to information in possession of public agencies.’” (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651 [citation omitted]).”

people’s business”); only records of a purely personal nature fall outside this definition.<sup>5</sup> Since records received by a state regulatory agency from regulated entities relate to the agency’s conduct of the people’s regulatory business, the CPRA definition of public records includes records received by, as well as generated by, the agency.<sup>6</sup>

While mindful of the rights of individuals to privacy, the Legislature has declared that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”<sup>7</sup> 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>8</sup> The CPRA favors disclosure, and CPRA exemptions must be narrowly construed.<sup>9</sup> The fact that a record may fall within a CPRA exemption does not preclude the CPUC from disclosing the record if the CPUC believes disclosure is in the public interest. Unless a record is subject to a law prohibiting disclosure, CPRA exemptions are permissive, not mandatory; they allow nondisclosure but do not prohibit disclosure.<sup>10</sup> The CPRA authorizes state agencies, including the CPUC, to adopt regulations, requires them to adopt written guidelines for access to agency records, and requires that such regulations and guidelines be consistent with the CPRA and reflect the intention of the Legislature to make agency records accessible to the public.<sup>11</sup>

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<sup>5</sup> See, e.g., *Cal. State University v. Superior Court* (2001) 90 Cal.App.4<sup>th</sup> 810, 825.

<sup>6</sup> See Cal. Gov’t Code §§ 6252(e).

<sup>7</sup> Cal. Gov’t. Code § 6250.

<sup>8</sup> Cal. Gov’t. Code § 6255(a): “The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that 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.”

<sup>9</sup> Cal. Const., Article 1, § 3(b)(2), *supra*. See, e.g., *American Civil Liberties Union of Northern California v. Superior Court* (ACLU) (2011) 202 Cal.App.4<sup>th</sup> 55, 67; and *SCERA*, *supra*, 198 Cal.App.4<sup>th</sup> at 991-992.

<sup>10</sup> See, e.g., *CBS, Inc. v. Block*, *supra*, 42 Cal.3d at 652; *ACLU*, *supra*, 202 Cal. App. 4<sup>th</sup> at 67-68 fn. 3; Cal. Gov’t. Code § 6253(e); *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 905-906; *Black Panthers v. Kehoe* (1974) 42 Cal. App. 3d 645, 656; *Re San Diego Gas & Electric Company (SDG&E)* (1993) 49 Cal.P.U.C.2d 241, 242; and D.05-04-030, at 8.

<sup>11</sup> Cal. Gov’t. Code § 6253.4(b): “Guidelines and regulations adopted pursuant to this section shall be consistent with all other sections of this chapter and shall reflect the intention of the Legislature to make the records accessible to the public. ...”

Cal. Pub. Util. Code § 583 states that:

No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor.

The CPUC must harmonize the constitutional and statutory expressions of intent that the public have broad access to state agency records with the Cal. Pub. Util. Code § 583 requirement that our staff refrain from disclosing to the public information furnished by public utilities, subsidiaries or affiliates of public utilities, or corporations with controlling interests in public utilities, unless the information concerns matters specifically required to be open to public inspection by a provision of the Cal. Pub. Util. Code or the Commission or a Commissioner has authorized disclosure.

G.O. 66-C, adopted in 1974 as the CPUC's CPRA-required guidelines regarding access to CPUC records, governs disclosure of CPUC records. G.O. 66-C § 2.2(a) identifies as confidential "records of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action." G.O. 66-C § 2.5 exempts from disclosure: "Personnel records, other than job classification, job specification, or salary range." Records that include an employee's job classification and job specification are not exempt from disclosure under G.O. 66-C.

In the past, application of section 2.2(a) has unnecessarily delayed disclosure of records of completed safety investigations and audits. There are times when records of our investigations and audits can and should remain confidential, such as where disclosure would interfere with our ability to carry out our regulatory and law enforcement responsibilities in an effective and efficient manner. In most cases, however, the disclosure of records of completed CPUC investigations will have no adverse effect on our ability to carry out our responsibilities. We have, accordingly, issued dozens of resolutions authorizing the release of safety-related investigation records. In almost all such resolutions, we reserve our right to redact privileged or personal information when appropriate.

### **Initial Reform Proposals**

In March, 2012, we circulated for public comment an initial Draft Resolution L-436, which explained our concerns that our current records disclosure

regulations (G. O. 66-C) are outdated and somewhat inconsistent with the provisions of the California Public Records Act (CPRA) and other laws and policies favoring timely disclosure of government records. Draft Resolution L-436 set forth proposals for specific reforms of our procedures for handling records requests and subpoenas and requests for confidential treatment; for the creation of records indexes and request for confidential treatment databases that would provide information regarding the availability and location of CPUC records; for the creation of a database of regulated entity confidentiality assertions or requests for confidential treatment and the CPUC's responses to such assertions and requests; and for the creation of a safety information portal on our internet site that would provide access to a number of routine safety records. Draft Resolution L-436 included a proposed G.O. 66-D.

### **COMMENTS ON DRAFT RESOLUTION**

The original Draft Resolution of the CPUC's Legal Division in this matter was mailed to the parties in interest on March 20, 2012, in accordance with Cal. Pub. Util. Code § 311(g). Comments were filed on April 25, 2012, by the California Water Association (CWA), Calpine, the City and County of San Francisco (CCSF), the Cogeneration Association of California (CAC), the Communications Industry Coalition (CIC), the Division of Ratepayer Advocates (DRA), the Independent Energy Producers Association (IEP), Pacific Gas and Electric and Southern California Edison (PG&E/SCE), and San Diego Gas and Electric Company and Southern California Gas Company (SDG&E/SCG).<sup>12</sup>

Draft Resolution L-436 was revised in response to comments, and circulated to the public for a second round of comments. Comments were filed on July 27, 2012, by CWA, CAC, CALTEL, CIC, DRA, PG&E, SCE, The Utility Reform Network (TURN), SDG&E/SCG, and the Clean Coalition.

The Revised Draft Resolution was further revised in response to comments, and circulated for a third round of comments. Comments were submitted on January 11, 2013 by PG&E, TURN, CCSF, CWA, DRA, Coalition of California Utility Employees, Union Pacific, SCE, and SDG&E/SCG, CALTEL, and CIC.<sup>13</sup>

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<sup>12</sup> In response to commenters' recommendations that we hold workshops, we scheduled two days of workshops in June 2012. We held one workshop, on June 19, 2012, but accepted the attendees' consensus that a continuation of the workshop the next day might be unproductive.

<sup>13</sup> We do not summarize here all of the comments received, as much of the comments pertain to issues that we are deferring to a formal rulemaking. We expect to address the issues raised in those comments in that future proceeding.

Many commenters expressed concern that the Revised Draft Resolution's efforts to revise G.O 66-C were more appropriately considered in a formal rulemaking.<sup>14</sup>

At the same time, several parties, including CWA, CIC, and SDG&E/SCG, comment that this Resolution appears to focus on the disclosure of safety-related records, and suggest that we address the disclosure of safety-related records before making broader changes to its records disclosure procedures.<sup>15</sup> In their initial Comments on Draft Resolution L-436, SDG&E/SCG state that:

The Draft Resolution appears designed to primarily address concerns with respect to requests for the Commission's safety-related reports, investigation records and audits. SDG&E and SoCalGas support the Commission's efforts to increase public access to these particular Commission documents. Recognizing that the public release of these Commission reports, records and audits is the foremost priority for the Commission, SDG&E and SoCalGas recommend that the final Resolution L-436 focus on this principal issue.<sup>16</sup>

While there was relatively broad support for the proposal to create a safety information portal and to begin routinely disclosing a variety of routine safety records, and for further refining our policies regarding the disclosure of additional safety records, many commenters consistently expressed opposition to our interpretation of the law and our proposed disclosure reforms.

We have confidence in our authority to adopt rules regarding the public or confidential status of various classes of records furnished by utilities, having previously adopted such rules without challenge to our authority to do so. We also have confidence in our ability to delegate to staff authority to determine whether a particular record falls within a public class of records or a confidential class of records, and whether a request for confidential treatment seeks such treatment for records required to be public by statute or CPUC order. We have previously delegated such authority to staff (G.O. 96-B) , and have survived challenges to our authority to delegate to staff authority to determine whether advice letters must be rejected or suspended because they are inconsistent with statutes, CPUC orders, or CPUC policy (M-4801; D.02-02-049<sup>17</sup>).

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<sup>14</sup> See, e.g., DRA January 11, 2013 Comments at 6; CALTEL January 11, 2013 Comments at 2, 4, 8; SCE January 11, 2013 Comments at 1; CWA April 25, 2012 Comments at 1-3, 9; CIC April 25, 2012 Comments at 19; TURN's July 27, 2012 Comments at 3-4.

<sup>15</sup> CWA April 25, 2012 Comments at 9; CIC April 25, 2012 Comments at 19; CIC July 27, 2012 Comments at 3, 15; SDG&E/SCG April 25, 2012 Comments at 3-4.

<sup>16</sup> SDG&E/SCG April 25, 2012 Comments at 1-2.

<sup>17</sup> Writ of Review denied, December 2, 2004 (*Southern California Edison v. Public Utilities Commission* (Ct. App.2d Dist., Div. 1, Case No. B157057).

Nonetheless, in light of the three rounds of comments received regarding Draft Resolution L-436 and the first and second revised draft resolutions, we have decided to undertake any broad reforms of our procedures for handling records requests and requests for confidential treatment in a formal rulemaking. We have also decided to follow the recommendations of several commenters that we focus on safety records first.

We anticipate issuing an Order Instituting Rulemaking regarding the development of changes to our procedures regarding records requests and requests for confidential treatment in the near future. We intend to move forward now with certain changes to our policies regarding records relating to regulated entity system safety.

### **Safety First**

#### **1. Disclosure of CPUC-generated Safety Reports, Summaries, and Correspondence**

By authorizing the disclosure of records of CPUC-generated reports, summaries, and correspondence relating to completed safety-related investigations and audits on a routine basis, with any appropriate redactions, we may speed up our responses to records requests and discovery. CPRA exemptions and other legal authority will still permit us to preserve the confidentiality of investigation and audit records, to the extent necessary, where our investigation or audit is not complete and in other circumstances where the need for confidentiality clearly outweighs the public interest that would be served by disclosure.

We agree with CWA, CIC, and SDG&E/SCG that we should focus on safety-related records first. Safety-related records provided by regulated entities, and generated by the CPUC, represent a substantial but relatively distinct subset of the Commission's overall records, and have been the subject of great public interest and numerous records requests and subpoenas.

Most records requests and subpoenas for records the CPUC receives involve some aspect of our safety jurisdiction. The vast majority of our resolutions authorizing disclosure of records are issued in response to those seeking records relating to our investigations of incidents (accidents) involving the facilities and/or operations of electric or gas utilities, railroads, or transit districts.

Most of our resolutions authorizing disclosure are routine. If our investigation is complete, the resolutions authorize disclosure of the records, reserving our right to redact information subject to a CPUC-held privilege against disclosure and/or of information the disclosure of which would constitute an unwarranted invasion of personal privacy. If our investigation is still open, our resolutions usually state that disclosure is authorized once the investigation has been completed.

We see no reason to continue our current practice of addressing such routine requests through individual resolutions regarding the disclosure of records of our investigations of specific safety-related incidents or audits. We will disclose CPUC records of routine CPUC safety-related incident investigations, inspections, and audits, once those investigations, inspections, or audits, are completed, subject to any appropriate redactions. Redactions may include information subject to a statutory prohibition or privilege against disclosure; personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy; and information subject to other CPRA exemptions or laws limiting disclosure the CPUC finds are applicable and in the public interest to assert.

There is no statute forbidding disclosure of the records of safety investigations initiated by the CPUC, although portions of such records may be subject to one or more CPRA exemptions from mandatory disclosure in response to records requests, and to other provisions of law limiting access to such records.<sup>18</sup> When responding to records requests or posting information on the internet, we often refrain from making available to the public detailed maps and schematic diagrams showing the location of specific utility regulator stations, valves, and similar facilities; the numerical element of street addresses included in work papers and other documents associated with the CPUC's investigation and/or a utility's internal audits; and certain utility employee information that may not contribute to an understanding of an incident. Disclosure of detailed schematic diagrams, facility location information, and unnecessary employee information may in some situations create a risk of harm to utility facilities, employees, and the public, without providing significant additional insight into the operations of the utility and the CPUC. Such records, or portions of records, may be exempt from disclosure in response to CPRA requests, pursuant to Cal. Gov't. Code §§ 6254(c), 6254(k), or other CPRA exemptions.

The scope of redactions may vary with the facts of a particular case. The objective reasonableness of privacy expectations varies with the context, as does the sensitivity of utility facility location information, which may be available to the public through other sources.<sup>19</sup> Assertions of the need to redact information alleged to raise security and privacy concerns in a particular context must be

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<sup>18</sup> Cal. Pub. Util. Code § 315 bars the use of accident reports filed with the CPUC, and orders or recommendations of the CPUC, as evidence in actions for damages associated with accidents involving utility facilities and operations, but does not limit disclosure of such records.

<sup>19</sup> See, e.g., *International Federation, supra*, 42 Cal.4<sup>th</sup> at 330-333; *Hill v. National Collegiate Athletic Ass'n*. (NCAA) (1994) 7 Cal.4<sup>th</sup> 1, 35-37: "in addition, customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy." (7 Cal.4<sup>th</sup> at 37). See also, *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4<sup>th</sup> 360, 370-376; *Tom v. City and County of San Francisco* (2004) 120 Cal.App.4<sup>th</sup> 674, 683-684; D.05-04-030 at 11-19; D.94-02-007; and Resolutions L-265, L-272, and L-332, *passim*.

backed by evidence that disclosure would result in problems that are more than merely speculative, since there may be competing interests favoring disclosure.<sup>20</sup>

## 2. Treatment of CPUC-Generated Records Containing Incident Victims and Witnesses

CPUC safety records may include the identity and contact information of incident victims and witnesses. We will redact home addresses and contact information of incident victims and their families, before posting records on the internet, since posting such information would contribute little to the public's understanding of an incident and may compromise a legitimate privacy interest.

Over the years, we have wrestled with the question of whether to redact incident victim and family names and contact information from investigation records disclosed in response to records requests and have taken a variety of approaches to this issue. In Resolution L-265, for example, we responded to a request for ten years of electric incident investigation records by disclosing the reports, with the names of incident victims and witnesses redacted. In response to the requester's subsequent appeal for access to the names and addresses of such individuals, we reviewed *Hill v. NCAA, supra*, and other authority regarding privacy issues, and in Resolution L-272 determined that the public interest in access outweighs our privacy concerns.

At the same time, we admonished the requester to be sensitive regarding privacy interests and the emotional state of incident victims and their families. In Resolution L-332, we responded to a media request for a substantial quantity of gas safety incident records, and records concerning consumer complaints about gas leaks, which again included victim and family information. We authorized disclosure of the requested gas incident investigation records, after redaction of the names, addresses, and telephone numbers of family of deceased individuals, or witnesses not associated with the utility, the Commission, or the injured or deceased individual's employer. We also notified a limited number of complainants of the requester's interest in contacting them to discuss safety issues, so that they could contact the requester if they so desired. We again admonished the requester to be sensitive to privacy concerns.<sup>21</sup>

Most of our resolutions authorizing disclosure of investigation records respond to requests or subpoenas from individuals affected by an incident, the families of those injured or killed in an incident, their legal representatives, or potential parties in litigation associated with such incidents. In these situations, there is little need or point to redacting victim names and other information since their

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<sup>20</sup> See, e.g., *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4<sup>th</sup> 1301.

<sup>21</sup> Resolution L-332 at 21.

families or representatives are the requesting parties, or their information is already known to the utility whose facilities were involved in the incident, and others with clear stakes in incident related claims or litigation. Our disclosure resolutions themselves generally include the names of the individuals affected by an incident.

We believe it may not always be necessary to include certain personal or technical information in documents we choose to post on our internet site, whether or not such information is exempt or privileged from disclosure in response to records requests or discovery. We intend to balance the public interest in safety records with the burdens associated with posting large volumes of records and the desirability of limiting unnecessary access to sensitive infrastructure and personal information.

### 3. Treatment of Other Confidential Information in CPUC-generated Records

In some situations, CPUC generated inspection, audit, and investigation records may include other confidential and/or privileged information. For this reason, we will permit regulated entities to notify us of concerns they may have regarding disclosure of specific information in the records they furnish to us, with the clear understanding that we expect such notifications to be rare exceptions rather than common occurrences, and that we will make the final decisions regarding confidential treatment. The safety-related records workshops will discuss such disclosure issues in more detail.

There are, of course, situations in which an inspection, investigation or audit is not routine, and/or where there is a prospect of enforcement activity. In such situations, a more individualized resolution of disclosure issues may be necessary. For example, where our staff participates in a National Transportation Safety Board (NTSB) investigation of an accident involving utility facilities or is working with law enforcement agencies or other governmental entities, public disclosure of our investigation records and/or of investigation records we receive from such entities may be prohibited by law, and/or restricted by our need to conduct our investigations efficiently and effectively. Public disclosure of such records may be both unlawful and inappropriate.

Various provisions of law, including Cal. Gov't. Code § 6254.5(e), permit us to share information in confidence with other governmental entities, and to receive information in confidence from such entities, without waiving our ability to assert CPRA exemptions as a basis for not providing such information in response to records requests, where the information is shared pursuant to confidentiality

agreements or understandings.<sup>22</sup> Our public disclosure of records subject to such prohibitions and/or confidentiality agreements and understandings would clearly be against the public interest because such disclosures may violate the law, undermine relationships of trust with other governmental entities, and adversely affect our ability to work cooperatively and effectively with such agencies. For these reasons, we stop short of mandating disclosure of records of all CPUC safety-related investigations and audits.

#### 4. Treatment of Records Containing Utility Employee Names

CPUC generated safety inspection, audit, investigation, and citation records and correspondence may include personal information, and such information is likely to be directly relevant to the purpose of the audit. Such CPUC generated documents include the names and addresses of utility employees to whom the correspondence is directed. Such individuals are generally associated with a utility's regulatory affairs office or safety related unit. Utility job titles include directors and managers of utility units responsible for the safety of a utility's facilities and operations. Some of our safety records include the names and contact information for governmental entities such as police departments, fire departments, and coroner's offices involved in investigating a safety incident. CPUC safety records may also include the identity and contact information for utility employees who reported a safety incident, who were interviewed during a safety inspection, audit, or investigation, or are identified as safety information resources.

SDG&E/SCG state that the CPUC should engage in a two-part test regarding the disclosure of utility employee information. First, the CPUC should determine whether the information constitutes "personnel, medical, or similar files," asserting that the evaluation of whether records contain "similar" files can take into account whether disclosure would cause the person to whom the information pertains special embarrassment or disgrace. Second, the CPUC should balance

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<sup>22</sup> Cal. Gov't. Code § 6254.5; "Notwithstanding any other provisions of the law, whenever a state or local agency discloses a public record which is otherwise exempt from this chapter, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law. ... This section, however, shall not apply to disclosures: (a) Made pursuant to the Information Practices Act ... or discovery proceedings. (b) Made through other legal proceedings or as otherwise required by law. (c) Within the scope of disclosure of a statute which limits disclosure of specified writings to certain purposes. ... (e) Made to any governmental agency which agrees to treat the disclosed material as confidential. Only persons authorized in writing by the person in charge of the agency shall be permitted to obtain the information. Any information obtained by the agency shall only be used for purposes which are consistent with existing law...."

privacy concerns against the CPRA's objective of contributing to the public understanding of the operations and activities of the government.<sup>23</sup>

Since utility employees who receive safety-related correspondence from the CPUC, or who submit such correspondence to the CPUC, are involved in activities relating to utility safety as an element of their routine employment responsibilities, and are often in positions with substantial safety management responsibilities, we do not believe such utility employees have an objectively reasonable expectation in the privacy of their identity and job classification or specification. We have reached this conclusion in prior resolutions, including L-265, L-272 and L-332. We note that G.O. 66-C § 2.5 exempts "Personnel records, other than present job classification, job specification, and salary range." Given the express exclusion of personnel information such as job classification and job specification from the personnel records exemption in G.O. 66-C, we do not consider the names, titles, and job specifications of utility employees with regulatory communications or safety responsibilities to be highly sensitive or confidential.<sup>24</sup> However, we will limit our routine internet safety portal disclosure of utility employee personal information at this time to the names, job classifications, job specifications, and work addresses (to the extent identified in correspondence with the CPUC) of utility employees to whom we send CPUC generated safety related correspondence, or from whom we receive correspondence responding to CPUC generated safety related correspondence, and defer to the workshops the issue of routine internet disclosure of other utility employee names and information in CPUC safety records.

We will, of course, continue to review records requests and discovery seeking CPUC safety records, and respond as appropriate.

#### 5. Disclosure of Gas Pipeline Reports Submitted to the PHMSA

Regulated entities subject to our safety jurisdiction are often also subject to the jurisdiction of other state or federal agencies that may require them to file various reports relevant to the jurisdiction of such agencies. Entities may be required by law or regulation to provide the CPUC with a copy of such reports, or may be directed by the CPUC to do so. Often, such documents are public, and are available on the internet site of the other agencies, or in response to CPRA or Freedom of Information Act requests.

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<sup>23</sup> SDG&E/SCG January 11, 2013 Comments at 13-14.

<sup>24</sup> The disclosure of more detailed and sensitive personnel records is another matter. Absent a compelling interest in public disclosure, such information is generally exempt from mandatory disclosure pursuant to Cal. Gov't. Code § 6254 (c).

We are not required to track down records of other agencies in order to provide such records to those who request such records from us. Nonetheless, we may choose to make some such records available on our internet site and/or inform the public where to seek such records.

For example, we receive a number of gas pipeline reports that gas utilities are required to submit to PHMSA, which does not consider them to be confidential. Such reports, or information from such reports, may be available directly from PHMSA. In some cases, however, the California utility data may be included in a somewhat difficult to access database providing similar information from the several hundred other pipeline operators subject to PHMSA's safety jurisdiction. By posting copies of many of these reports on our internet site, or otherwise making such reports available, we may improve the public's understanding of California-specific gas safety issues, and limit the need for individual responses to requests seeking such records.

#### 6. CPUC Safety Information Portal

We have created a safety information portal on our internet site that provides the public with information regarding our safety jurisdiction and our inspections, safety and reliability audits, safety investigations, and safety enforcement activities. As we move forward with the implementation of this resolution and future resolutions and decisions regarding safety records, we will be able to provide the public with a wider range of safety records, and with information regarding records requests and subpoenas seeking safety records, requests for confidential treatment of safety records, and our responses thereto.

We direct Safety and Enforcement Division staff to post the following routine safety-related reports on our internet site at this time, after appropriate redactions:

- (1) CPUC-generated reports, summaries, and correspondence, regarding completed CPUC safety-related inspections, audits, and investigations (with any CPUC initiated or approved redaction of exempt and/or privileged information); and
- (2) annual gas operator reports filed with the United States Department of Transportation Pipeline and Hazardous Materials Administration (PHMSA) pursuant to 49 C.F.R. Part 191.

We intend to post additional records on a routine basis, after exploring disclosure concerns during our planned safety records workshops. The classes of records we intend to review include, but are not limited to:

1. Electric incident reports.

2. Gas incident reports.
3. Communications infrastructure incident reports.
4. Safety-related condition reports required by 49 CFR Part 191 [§§ 191.1, 191.7, 191.23 and 191.25] and G.O. 112-E § 124.1, with any redactions we deem necessary to protect public safety. Redactions may include detailed facility location information, such as the numerical portions of street addresses, maps, drawings, schematic diagrams, and similar information.
5. Proposed installation reports required by 49 CFR Part 191 [§191.11] and/or G.O. 112-E § 125.1, with any redactions we deem necessary to protect public safety. Possible redactions include detailed facility location information, such as the numerical portions of street addresses, maps, drawings, or schematic diagrams, and similar information.
6. Strength testing failure reports required by 49 CFR Part 191 [191.15], and G.O. 112-E § 125.2.
7. Change in maximum allowable operating pressure reports required by G.O. 112-E § 126.

We have already begun to post a variety of safety records involving no confidentiality concerns, such as G.O. 167 audit reports subject to CPUC resolutions authorizing disclosure, G.O. 165 inspection reports, and similar informative material.

#### 7. Safety Records Utilities Provide to the CPUC

A number of utilities distinguish between safety records generated by the CPUC and safety records furnished by the utilities. SDG&E/SCG note that they “support the Draft Resolution’s efforts to streamline the process for publicly disclosing final and complete Commission safety-related reports, Commission records of completed safety-related investigations, and Commission-conducted audits.” PG&E/SCE made similar comments.<sup>25</sup> SDG&E/SCG believe such records should

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<sup>25</sup> PGE/SCE April, 25, 2012 Comments at 5: “PG&E and SCE propose to clarify this statement to provide that the CPUC will disclose its safety-related investigation **reports** on a routine basis. Section 583 does not prohibit the CPUC from disclosing its own documents to the public without a CPUC order. However, the CPUC should not disclose any documents received from a public utility as part of an investigation without following the procedures applicable to all public utility documents.” (Emphasis in original).

not be disclosed until the creator considers them final and has made any redactions they deem appropriate.

Prior to reviewing safety records disclosure matters further in our planned safety records workshops, we will refrain from posting safety records furnished by utilities, unless disclosure has been authorized by a CPUC decision, resolution, order, or ruling; is provided by a utility with a clear written understanding that it may be posted or otherwise disclosed by the CPUC; or is subject to a utility's written acknowledgement that it desires or does not object to the posting of a particular class of safety correspondence or other safety records.

The workshops we direct staff to hold regarding safety-related records will provide us with ideas regarding the scope and nature of the confidential treatment to be generally accorded to certain types of safety-related records, or portions of records. The workshops should consider the best ways to balance competing interests for and against disclosure in individual contexts as well. We believe the public interest would be served by our posting or disclosure of regulated entity incident reports and/or safety inspection, audit, and investigation related correspondence, since this would provide the public with the utilities' views regarding the CPUC's findings, but will refrain from comprehensive posting of such records until after the workshops.

### **Workshops**

While there are many details to be worked out regarding the scope of disclosures, the basic concept of providing greater increased access to safety records appears to have broad support. We direct Safety and Enforcement Division and Legal Division staff to hold one or more workshops to discuss the types of safety-related records furnished by regulated entities that should be made available to the public, the types of records that should be withheld from the public, the rationale for any confidential treatment of safety-related records, the timing of disclosures, the provision of opportunities to respond to initial CPUC audit reports prior to disclosure of CPUC conducted audit records, and similar issues.

Safety-related records workshops may address, among other things, the extent to which critical infrastructure security information should be kept confidential because disclosure could create risks to the utility infrastructure, employees, and the public, and the extent to which CPUC-imposed restrictions on the disclosure of infrastructure information would be inappropriate because such information is already available to the public through the internet, CEQA records, and other sources.

Safety records workshops should also attempt to balance the desirability of limiting public disclosure of personal information regarding utility employees whose information may appear in safety records, and personal information

regarding non-utility individuals identified in incident investigation records, where disclosure may affect privacy interests, against the usefulness of such information in understanding safety-related issues or events. DRA comments that issues regarding disclosure of utility employee training and certification information should be addressed carefully, with no assumption that such potentially relevant and important information should necessarily be treated as confidential.<sup>26</sup> We have discussed safety-related records privacy issues at some depth in a number of resolutions authorizing disclosure of safety-related records, including Resolutions L-265, L-272, and L-332. We will make those Resolutions readily available prior to the safety-related records workshops, so that the parties may better understand how we have responded to such issues in the past.

**Future Rulemaking to Consider Reforms to Procedures Regarding Records Requests and Requests for Confidential Treatment, Including Revision of G.O. 66-C**

As discussed above, we direct our Legal Division and Administrative Law Judge Division to coordinate the development of an Order Instituting Rulemaking regarding modifications to our procedures for providing access to CPUC records, and for processing records requests and requests for confidential treatment outside the scope of formal proceedings and advice letter proceedings.

**FINDINGS OF FACT**

1. The public interest generally favors the disclosure of safety-related reports filed in compliance with federal laws and regulations, to the extent such records are not designated as confidential by the federal laws and regulations or otherwise subject to federal restrictions on disclosure to the public.
2. The public interest generally favors the disclosure of safety-related reports filed in compliance with state laws and regulations, to the extent such records, or portions of such records, are not designated as confidential and subject to a CPRA exemption, privilege, or other limitation on disclosure to the public.
3. In the past, application of section 2.2(a) of G.O. 66-C has unnecessarily delayed disclosure of records of completed safety investigations and audits.
4. Most records requests and subpoenas for records the CPUC receives involve some aspect of our safety jurisdiction. The vast majority of our resolutions authorizing disclosure of records are issued in response to those seeking records relating to our investigations of incidents (accidents) involving the facilities and/or operations of electric or gas utilities, railroads, or transit districts.
5. Most requests and subpoenas for safety records come from individuals injured or otherwise affected by an incident involving regulated entity facilities or

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<sup>26</sup> DRA April 25, 2012 Comments at 7-9.

operations, members of the families of such individuals, legal representatives of such individuals or their families, regulated entities, or others with a direct stake in any claims or litigation associated with such incidents.

6. The annual reports gas operators file with the United States Department of Transportation Pipeline and Hazardous Materials Safety Administration are available to the public.
7. The public interest would be served by the disclosure of and provision of internet public access to routine CPUC safety records in the possession of the CPUC, including, but not limited to: (1) CPUC-generated reports, summaries, and correspondence regarding completed CPUC safety-related inspections, audits, and investigations (with any CPUC initiated or approved redaction of exempt and/or privileged information); and (2) annual gas operator reports filed with the United States Department of Transportation Pipeline and Hazardous Materials Administration (PHMSA) pursuant to 49 C.F.R. Part 191.

### **CONCLUSIONS OF LAW**

1. 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. 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).
2. The general policy of the CPRA, Cal. Gov't. Code § 6250, *et seq.*, favors disclosure of records: "In enacting this chapter, the Legislature, mindful of the rights of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Cal. Gov't. Code § 6250.
3. Cal. Gov't. Code § 6252(e) provides that: "'Public records' includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."
4. Records received by the CPUC from entities it regulates "relate to the conduct of the people's business" of regulating those entities. Thus, they are "public records" as defined by the CPRA.

5. Cal. Gov't. Code § 6254(k) exempts from disclosure, in response to records requests, "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."
6. Cal. Gov't. Code § 6255 provides that: (a) an agency shall justify withholding any record by demonstrating that the record in question is exempt under the express provisions of the CPRA or that on the facts of the particular case, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure, and (b) a response to a written records request that determines that the request is denied, in whole or in part, must be in writing.
7. Cal. Gov't. Code § 6254(c) exempts from mandatory disclosure, in response to records requests, "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."
8. Cal. Pub. Util. Code § 583 states that: "No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor."
9. There is no statute forbidding disclosure of the records of safety investigations initiated by the CPUC under its own authority, although portions of such records may be subject to one or more CPRA exemptions from mandatory disclosure in response to records requests, and to other provisions of law limiting access to such records.
10. There is no statute forbidding disclosure of the records of safety audits or inspections initiated by the CPUC under its own authority.
11. G.O. 66-C § 2.5 exempts from disclosure: "Personnel records, other than job classification, job specification, or salary range." Records that include an employee's job classification and job specification are not exempt from disclosure under G.O.-66.
12. While utility employees, like other individual California citizens, have constitutionally-based privacy interests which include an interest in controlling the disclosure of detailed personal information, the extent of a privacy right is dependent on the circumstances. (*Hill v. National Collegiate Athletic Ass'n.* (1994) 7 Cal.4th 1; *Pioneer Electronics v. Superior Court* (2007) 40 Cal.4th 360; and D.05-04-030.)

**ORDER**

1. We direct CPUC staff to draft for our consideration an Order Instituting Rulemaking (OIR) regarding the development of new procedures for processing records requests, subpoenas, and requests for confidential treatment, including revision of General Order 66-C. The OIR may address, among other things, the creation of (a) a database of information regarding the availability and location of CPUC records; and (b) a database of regulated entity confidentiality assertions or requests for confidential treatment and the CPUC's responses thereto.
2. Staff shall disclose in response to records requests and discovery, and provide internet public access to, the following categories of routine safety-related documents in the possession of the CPUC: (1) CPUC-generated reports, summaries, and correspondence, regarding completed CPUC safety-related inspections, audits, and investigations (with any CPUC initiated or approved redaction of exempt and/or privileged information); and (2) annual gas operator reports filed with the United States Department of Transportation Pipeline and Hazardous Materials Administration (PHMSA) pursuant to 49 C.F.R. Part 191.
3. CPUC staff shall hold workshops addressing remaining issues regarding disclosure of safety-related records, as discussed in this Resolution.
4. 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 \_\_\_\_\_, 2013, and that the following Commissioners approved it:

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PAUL CLANON  
Executive Director