

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: July 23, 2015

Resolution No. L-473

RESOLUTION

RESOLUTION AUTHORIZING DISCLOSURE OF RECORDS DATED FROM MARCH 29, 2015 TO THE PRESENT RELATED TO THE WESTPARK SUBSTATION IN BAKERSFIELD, CALIFORNIA. THE REQUEST INCLUDES RECORDS FROM THE COMMISSION SAFETY AND ENFORCEMENT DIVISION'S INVESTIGATIONS OF SAFETY-RELATED INCIDENTS THAT OCCURRED FROM MARCH 29, 2015 TO THE PRESENT AT THE WESTPARK SUBSTATION IN BAKERSFIELD, CALIFORNIA, ONCE THE INVESTIGATIONS ARE COMPLETE.

BACKGROUND

The California Public Utilities Commission ("Commission") received a request seeking disclosure of records dated from March 29, 2015 to the present related to the Westpark Substation in Bakersfield, California. The request includes records from the SED investigations of safety-related incidents that occurred from March 29, 2015 to the present at the Westpark Substation. The Commission staff could not make the investigation records public without the formal approval of the full Commission. The request is treated as an appeal to the full Commission for release of the requested records pursuant to Commission General Order (G.O.) 66-C § 3.4. The Commission will grant this request once the Commission's investigation is complete, subject to any applicable privilege or the public interest.

DISCUSSION

The requested records are "public records" as defined by the California Public Records Act ("CPRA").¹ The California Constitution, the CPRA, and discovery law favor disclosure of public records. The public has a constitutional right to

¹ Cal. Gov't. Code § 6250, *et seq.*

access most government information.² 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.³ 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.⁴

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, based on the facts of a particular case, the public interest in confidentiality clearly outweighs the public interest in disclosure.⁵

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 G.O. 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 G.O. 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 G.O. 66-C § 3.4 for disclosure of the records.

² Cal. Const. Article I, § 3(b)(1).

³ Cal. Const. Article I, § 3(b)(2).

⁴ *Id.*

⁵ 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.⁶ 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.⁷ Most of these resolutions responded to disclosure requests and/or subpoenas from individuals involved in electric or gas utility 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 under the Information Practices Act of 1977 ("IPA").⁸ The IPA authorizes disclosure of personal information "[p]ursuant to the [CPRA]."⁹ The CPRA exempts personal information from mandatory disclosure, where disclosure would constitute an unwarranted invasion of personal privacy.¹⁰ 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.¹¹

The Commission's investigations of the incidents are still open; therefore, the disclosure of the Commission's investigation records would compromise the Commission's investigations. Once the investigations are complete, the

⁶ 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.

⁷ 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).

⁸ Cal. Civ. Code § 1798, *et seq.*

⁹ Cal. Civ. Code § 1798.24(g).

¹⁰ Cal. Gov't. Code § 6254(c).

¹¹ Cal. Gov't. Code § 6254(k).

Commission will determine whether any information in the files requires redaction because its disclosure would constitute an unwarranted invasion of personal privacy, or because it is subject to the lawyer-client privilege or another Commission held privilege limiting disclosure. With the exception of such redactions, if any, we will authorize disclosure of these investigation records once the investigations are complete.

The Commission has often stated that Cal. Pub. Util. Code § 315, which expressly prohibits the introduction of accident reports filed with the Commission, or orders and recommendations issued by the Commission, “as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property,” offers utilities sufficient protection against injury caused by the release of requested investigation records.

COMMENTS ON DRAFT RESOLUTION

The Draft Resolution of the Commission’s Legal Division in this matter was mailed to the parties in interest on June 17, 2015, in accordance with Cal. Pub. Util. Code § 311(g). Pacific Gas and Electric Company (PG&E) submitted comments on July 13, 2015. No parties filed reply comments.

P&E supports the Draft Resolution’s proposal to defer disclosure of the Commission’s Westpark Substation investigation records until the SED completes its investigation. However, PG&E requests that certain information should remain confidential, since the incidents are still being investigated by the FBI and the Bakersfield Police Department, and the information, if disclosed, could jeopardize the safety of PG&E’s facilities, operations, employees, and the public.

In support of its request, PG&E cites Resolution L-459, which also addressed a then pending investigation of a safety-related incident at the “Metcalf Substation” in San Jose, California, wherein the Commission recognized the public interest in confidentiality and withheld from disclosure “records or portions of records, that include information that, if disclosed, could jeopardize the safety of regulated entity facilities and operations.” In its comments to Draft Resolution L-459, PG&E gave detailed examples of information that should remain confidential, including the types of security PG&E has in place, protocol for security breaches, and other internal PG&E information that, if released, may be utilized to do harm to PG&E’s electric system and to public and employee safety. In response, the Commission withheld records, or portions thereof, that contained “official information,” as defined in Cal. Evid. Code § 1040(a), i.e., information maintained in confidence by PG&E and provided in confidence to Commission employees during the course of their work for the Commission. Pursuant to the official information privileges provided in Cal. Evid. Code § 1040(b), in conjunction with

Cal. Gov't. Code § 6254(aa) and (k), the Commission withheld information that included, but was not limited to, confidential security protocol documents, the address of PG&E security response facilities, and details of physical and personnel protection of the substation. Here, PG&E asks the Commission to withhold similar information, namely, its types of security and response protocols, to remain “[c]onsistent with past precedent.”

PG&E’s comments conclude with a request that the Commission modify Draft Resolution L-473 to “recognize that certain information contained in the Westpark-related records should be withheld from public disclosure because such information, if disclosed, could be used to do harm to PG&E’s electric system, its employees, and the public.”

No reply comments were received.

The Commission notes that the California Constitution, the CPRA, and Commission policies generally favor disclosure of agency records, that the Commission has on numerous occasions ordered of completed safety investigation records, and that most documents associated with the incident investigation at issue can be disclosed without harm to its facilities, employees, or the public. Additionally, when we decide to withhold certain records or information from the public on the ground that disclosure might aid those intending to harm utility facilities, employees, and/or the public, such decisions should be based on more than mere speculation that information, if disclosed, may be of use to those intending to harm utility facilities, employees, and/or the public through attacks on utility infrastructure.

However, as in Resolution L-459, the Commission agrees with the concept expressed by PG&E that there are certain limited situations in which the public interest is best served by withholding sensitive security information, obtained in confidence by Commission employees, from the public, where the usefulness of the information to potential terrorist or other criminals is beyond the level of mere speculation, and would contribute little to the public understanding of the investigation. While our disclosure of our completed safety investigation records is generally in the public interest, and routinely authorized, we always reserve our right to withhold records, or portions of records, designated as confidential and subject to a CPRA exemption, privilege, or other limitation on disclosure to the public.¹² In our opinion, our disclosure of records, or portions of records, that include information that, if disclosed, could jeopardize the safety of regulated entity facilities and operations, is not in the public interest, and we are entitled to

¹² In practice, we usually withhold few, if any, records, or portions of records.

withhold such records to the extent that they are subject to a CPRA exemption, CPUC-held privilege, or other provision of law or regulation limiting disclosure.

In this case, the investigation of the Westpark Substation incident remains open. Thus, it is not yet possible to identify each document, or portion thereof, that should be withheld on the basis that disclosure could jeopardize the safety of PG&E facilities or operations. However, the Commission agrees with PG&E's general assertion that some information contained in the Westpark-related records should be withheld from public disclosure because such information, if disclosed, could be used to do harm to PG&E's electric system, its employees, and the public. During its review, the Commission will utilize the examples of nondisclosable information and the disclosure principles outlined in Resolution L-459 to assist in identifying what Westpark-related records should be withheld. Such records include, but are not limited to: 1) confidential PG&E security protocol regarding access control alarms that provide detailed information on how PG&E security and law enforcement would respond to these types of intrusion alarms; and 2) a very limited portion of records which cover certain details regarding the physical and personnel protection at the Westpark Substation. These documents, or portions of documents, could, if disclosed, inform malicious individuals or groups as to what protections they would need to overcome. This type of information needs to remain confidential to ensure PG&E substation security is not compromised by intruders.

We emphasize that the majority of records, and portions of records, in the Westpark Substation incident investigation files will be provided in response to the records request. We will keep the withholding of documents, and the redaction of documents, to the minimum we feel is necessary to protect the safety of PG&E's facilities, employees, and the public. The records and the information we intend to withhold in the interest of the security of PG&E's facilities, employees, and the public, was maintained in confidence by PG&E and provided in confidence to Commission employees during the course of their work for the Commission. These records have not been previously made public, or been officially disclosed to the public, by Commission employees. The need to maintain the confidentiality of records and information which would be of use to those intending to harm PG&E facilities, employees, or the public clearly outweighs the necessity for the disclosure of such records and information. The records containing such information are subject to the Commission's assertion of its official information privilege, and thus exempt from disclosure in response to records requests, pursuant to Cal. Gov't. Code § 6254(k), which exempts: "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."

FINDINGS OF FACT

1. The Commission received a request which seeks disclosure of records dated from March 29, 2015 to the present related to the Westpark Substation in Bakersfield, California. The request includes records from the Commission Safety and Enforcement Division's investigations of safety-related incidents that occurred from March 29, 2015 to the present at the Westpark Substation.
2. Access to the records in the Commission's investigation files was denied in the absence of a Commission order authorizing disclosure.
3. The Commission's investigations of the incidents are still open; therefore, the disclosure of the Commission's investigation records would compromise the Commission's investigations.
4. At this time, the public interest does not favor disclosure of the requested Commission's investigation records.
5. Given the Commission's need to conduct its investigations effectively and efficiently, the public interest in non-disclosure of active investigation records outweighs the necessity for public disclosure at this time.
6. Once the investigations are complete, the public interest will favor disclosure with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, any information which is subject to the Commission's lawyer-client or other privilege, including the official information privilege, which applies to certain sensitive security information obtained in confidence by the Commission during the course of SED's investigations..

CONCLUSIONS OF LAW

1. The documents in the requested Commission's investigation files and reports 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 of personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy.
6. Cal. Gov't Code § 6254(k) exempts from disclosure of 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.
9. Cal. Pub. Util. Code § 315 prohibits the introduction of accident reports filed with the Commission, or orders and recommendations issued by the Commission, "as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property."

ORDER

1. The Commission grants the request for disclosure of records dated from March 29, 2015 to the present related to the Westpark Substation in Bakersfield, California. The authorized disclosure includes records from the Commission Safety and Enforcement Division's investigations of safety-related incidents that occurred from March 29, 2015 to the present at the Westpark Substation, once the investigations are complete, at which time the Commission staff will release the requested records, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, any information which is subject to the Commission's lawyer-client or other privilege, including the official information privilege, which applies to certain sensitive security information obtained in confidence by the Commission during the course of SED's investigations

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 July 23, 2015, and that the following Commissioners approved it:

TIMOTHY J. SULLIVAN
Executive Director