

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: August 18 2016

Resolution No. L-505

RESOLUTION**RESOLUTION AUTHORIZING DISCLOSURE OF
RECORDS OF THE CALIFORNIA PUBLIC UTILITIES
COMMISSION'S INVESTIGATION OF SOUTHERN
CALIFORNIA GAS COMPANY'S BILLING PRACTICES****BACKGROUND**

On May 25, 2016, the California Public Utilities Commission ("Commission") received a request seeking disclosure of records of the Commission's investigation of Southern California Gas Company's billing practices. On May 20, 2016, the Commission announced its investigation into Southern California Gas Company's billing practices as a result of customer complaints regarding billing issues. The Commission's Consumer Protection and Enforcement Division is engaged in fact-finding regarding this matter. 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.

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 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

¹ Cal. Gov't. Code § 6250, *et seq.*

² Cal. Const. Article I, § 3(b)(1).

³ Cal. Const. Article I, § 3(b)(2).

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, 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.

There is no statute forbidding disclosure of the Commission’s investigation records. With certain exceptions for incident reports filed with the Commission, we generally refrain from making most 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.

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.

The Commission has ordered disclosure of records concerning completed 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 in 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

On May 20, 2016, the Commission announced an investigation into Southern California Gas Company’s billing practices as a result of customer complaints regarding billing. The Commission’s Consumer Protection and Enforcement Division is engaged in fact-finding regarding this matter, and the investigation is still open; therefore, the disclosure of the Commission’s investigation records would compromise the Commission’s investigation. Once the investigation is complete, the Commission will determine whether any information in the file 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 investigation is complete.

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).

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 14, 2016, in accordance with Cal. Pub. Util. Code § 311(g). Comments were filed on July 5, 2016 by Southern California Gas Company (SoCalGas). Reply comments were filed on July 11, 2016, by the Orange County Register (OCR).

SoCalGas Comments

SoCal Gas comments that: 1) SoCalGas supports the need for transparency if the Draft Resolution releases non-confidential records after the investigation is complete, but the Commission should limit disclosure to records within the specific scope of the request [*i.e.*, records pre-dating the request] since a broader authorization would deprive the utility of due process by failing to notify the utility adequately as to what records might be disclosed; 2) the request seeks records that include utility customer information, trade secrets, and corporate proprietary information subject to disclosure prohibitions in Article 1, § 1 of the California Constitution (right to privacy), IPA (*e.g.*, Cal. Civ. Code § 1798.24 (protecting personal information from disclosure)), Cal. Pub. Util. Code § 583, G.O. 66-C §§ 2.1 (excluding from disclosure information made confidential by other laws), and 2.2 (excluding from disclosure records of a confidential nature furnished to the Commission), and other provisions of law; 3) the Gov’t Code § 6254(k) exemption for information made confidential by other law, is mandatory, unlike other exemptions, which are permissive¹²; 4) “certain records and information submitted to the Commission by SoCalGas regarding its billing practices and adjustment processes are confidential proprietary and trade secret information. Disclosure of this information would have an adverse impact on SoCalGas’ operations and allow customers to provide information or selectively

¹² See SoCalGas Comments, p.2, fn. 10: “*Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 656 (Ct. App. 1974) (stating the exemptions are permissive “unless some other statute forbids” disclosure); *Register Div. of Freedom Newspapers, Inc. v. Cty. of Orange*, 158 Cal. App. 3d 893, 906 (Ct. App. 1984) (stating that disclosure was still permitted despite possible exemption “since disclosure [was] not forbidden by any state or federal laws”); Cal. Gov’t Code § 6253(b) (excepting records protected by other laws from Act’s requirements that agencies make records available).”

limit information in order to receive inappropriate billing adjustments. Disclosure may also make it easier for third parties to defraud customers or to misappropriate customer information. Accordingly, such information is properly considered confidential and is exempt and/or excluded from public disclosure.”¹³ ; and 4) the Draft Resolution reserves to the Commission the right to evaluate the public or confidential status of records without offering the utility a similar opportunity to identify records it considers confidential or the public interest in confidentiality, even though its own customer, trade secret, or otherwise proprietary information, is at stake, it is who may be placed at an unfair business disadvantage if its confidential information is disclosed, and it is best able to identify information it believes is confidential and protect the interests of its customers and itself.¹⁴

OCR Reply Comments

The OCR replies that: 1) the intent of the PRA is to provide the public with records and information necessary to allow the public to hold agencies and regulated entities accountable¹⁵; 2) “any purported confidentiality is substantially outweighed by the public interest because the investigation involves billing issues that have affected tens of thousands of ratepayers and may have violated PUC rules imposed on SoCalGas. The Register spoke directly to dozens of affected customers who were incorrectly billed, had not received bills for several months and received usage estimates for four or more straight billing cycles, among other issues. The disclosure of customer information in response is both permissible under the CPRA and important to the public’s understanding of the billing problems and the investigation by the agency charged with protecting ratepayer interests.”¹⁶ ; 3) “the PUC is fully capable of identifying any confidential information and making any legally required redactions on its own” and “is the only entity authorized by state law to do so ... Allowing SoCalGas to review public documents prior to their release and insert itself into the process of determining what the public can and can’t see is unnecessary, unauthorized legally and at odds with the spirit of the CPRA”¹⁷; 4) the Commission should apply any legally justified redactions as narrowly as possible and, describe any redactions and information withheld at SoCalGas’s request individually, and in detail¹⁸; and

¹³ SoCalGas’ Comments, pp. 3-4; p. 4, fn. 17, reads as follows: “See GO 66-C, Section 2.2(b) (excluding the disclosure of information that would put utilities at a business disadvantage); Cal. Gov’t Code §§ 6254(k) (making information made confidential by other law exempt from disclosure under the CPRA), 6276.44; Cal. Evid. Code § 1060 (making trade secrets confidential); Civil Code §3426, *et seq.* (same); and other law.”

¹⁴ SoCal Gas Comments, p. 3.

¹⁵ OCR Reply Comments, p. 1.

¹⁶ OCR Reply Comments, p. 2.

¹⁷ *Id.*

¹⁸ OCR Reply Comments, p. 2.

5) contrary to SoCalGas's assertion, the request's scope encompasses all investigatory documents, a Commission spokeswoman confirmed in writing that it was unnecessary to file any additional requests for the investigation records, and that the whole purpose of the Draft Resolution is to authorize the release of the investigatory document.¹⁹

RESPONSE:

Response to SoCalGas's Comments

Scope of Disclosure

Draft Resolution L-505 follows the standard Commission convention of responding to requests for specific investigation records by authorizing disclosure of all non-privileged or exempt investigation records once the investigation is closed. It would be inefficient for us to address a request for records concerning a specific ongoing investigation by authorizing disclosure of records only through the date of the request and thus require the requester to make follow-up requests for future records relating to the same investigation, which would in turn require follow-up resolutions. The Reply Comments state the requester's interest in all investigation records, not just those pre-dating the initial records request.

Due Process

We believe this Resolution sufficiently notifies the utility that any Commission records associated with the investigation that is the subject of the records request – including records submitted by the utility - may be disclosed to the extent they do not include personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or are subject to one or more Commission-held privileges against disclosure.

If SoCal Gas believes that records it has already submitted to the Commission during this investigation, or that records it submits in the future, contain information subject to the utility's trade secret privilege, or contain other information expressly made confidential by other provisions of law, it should alert us during the course of this investigation, so that we make take its views into consideration when determining which records, or portions of record, to withhold once the investigation is complete. G.O. 96-B (General Rule 9) provides a good example of the type of information utilities are encouraged to provide when seeking confidential treatment of records provided to the Commission.

¹⁹ *Id.*

Customer Information, Trade Secrets, and other Proprietary Information

Customer information

We intend to follow our longstanding policy regarding the disclosure of customer information included in records responsive to records requests. Informal complaint records are routinely disclosed to the public, with the exception of certain personal information such as the customer's name, street address, e-mail address, telephone number, age, social security number, utility account number, and similar information. Such information is exempt from disclosure in response to PRA requests, pursuant to Cal. Gov't. Code § 6254(c), which exempts: "Personnel, medical, and similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."

We note that, while Article 1, § 1 of the California Constitution does provide that all people have certain inalienable rights, include the rights to "pursue and obtain safety, happiness, and privacy," the right to privacy is not absolute, and the extent of the right depends upon the objective reasonableness of expectations of privacy in a specific context, and other factors.²⁰ Similarly, the IPA does not prohibit the disclosure of personal information in response to records requests; indeed, Cal. Civ. Code § 1798.24(g) provides a specific exception for such disclosure. Nor does Pub. Util. Code § 583 bar our disclosure of personal information; as noted in many of our decisions, § 583 provides no substantive barrier to the Commission's disclosure of records.²¹ As noted earlier, however, the PRA itself includes an exemption for personnel, medical and similar records, which we commonly assert as a basis for refraining from providing certain personal information in response to records requests.

Trade secrets and other proprietary information

Information protected by the trade secret privilege can be subject to the Commission's assertion of the Cal. Gov't. Code §6254(k) exemption for: "Records, the disclosure of which is exempted or prohibited by federal or state law, including provisions of the Evidence Code relating to privilege." If SoCalGas believes that records it has already submitted to the Commission during this investigation of its billing practices, or that records it submits in the future, contain trade secrets as defined in Cal. Evid. Code § 1060 and Cal. Civ. Code § 3426, *et seq.*, and explains in detail how specific information meets each statutory

²⁰ See, e.g., *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35-40. See also, *County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal. 4th 905, 926-933; and *Medical Bd. of California v. Chiarottino* (2015) 225 Cal. App. 4th 623, 630-632. See also, Resolution L-272.

²¹ See, e.g., D.06-06-066 at pp. 27-29, as modified by. D.07-05-032.

requirement for trade secret protection, we will take its trade secret assertions into consideration when reviewing records for possible disclosure.

If SoCalGas believes that proprietary information is protected by other laws or regulations, it should let us know, again with a detailed explanation of how the information meets every element needed to support the requested protection.

Records concerning billing practices and adjustment processes

We are somewhat puzzled by SoCalGas's contention that "certain records and information submitted to the Commission . . . regarding its billing practices and adjustment processes are confidential proprietary and trade secret information,"²² given the clearly public nature of SoCalGas tariff provisions setting forth rules governing bill disputes and adjustments. SoCalGas's Gas Rules 14 and 16, which govern the utility's billing practices, are available on our website, through a link to the tariff rules on the SoCalGas website. These tariff rules, approved by the Commission, are one yardstick by which utility compliance with legal requirements may be measured. The utility's responses to informal billing dispute complaints often reference and provide customers with copies of these rules.

We are unsure how the disclosure of tariffed billing policies, or other information relating to the utility's billing practices and adjustment policies, could offer its customers increased opportunities to manipulate the utility to obtain improper adjustments, or offer third parties opportunities to defraud SoCalGas or obtain customer information. We will, however, review any detailed utility arguments to that effect which accompany new records provided by SoCalGas during the course of its investigation, or which seek confidentiality for previously submitted records.

Request for Review Prior to Disclosure

Although we can certainly understand SoCalGas's desire to review Commission records responsive to the OCR's records request before they are disclosed, and to identify the records it believes are confidential, it would be inappropriate for us to provide such an opportunity. First, the PRA expressly provides, in Cal. Gov't. Code § 6253.3, that: "A local or state agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter [the PRA]." Thus, the Commission is not permitted to delegate to a utility the responsibility for determining which agency records are confidential. Second, disclosure of the Commission's investigation records to SoCalGas could potentially risk the very disclosure feared by the utility. *Black Panthers v. Kehoe, supra*, cited by SoCalGas for the proposition that PRA exemptions are permissive, rather than mandatory, except where disclosure is

²² SoCalGas Comments, p. 3.

prohibited by law, also stands for the proposition that a regulatory agency's disclosure of records to a regulated entity generally waives the agency's right to assert PRA exemptions in response to records requests seeking such records.²³

A better way for SoCalGas to express its concerns regarding the possible disclosure of records or information it provides during the course of the investigation is for the utility to clearly identify the records, or portions of records, it believes are confidential, and to provide us with a detailed explanation of the basis for any confidentiality assertions when it provides the documents to us, or, if the records have already been provided during the investigation, as soon as possible thereafter. The official information privilege set forth in Cal. Evid. Code § 1040 provides us with authority to refrain from disclosing records acquired in confidence by our staff, where disclosure is either prohibited by federal or state law, or there is a need for confidentiality that outweighs the necessity for disclosure in the interests of justice, and can serve as a basis for our assertion of the Cal. Gov't. Code § 6254(k) exemption, where appropriate.

We assure SoCalGas that we will carefully review all records responsive to any request for records concerning our investigation of the utility's billing practices, prior to disclosing such investigation records once the investigation is closed.

Response to the OCR's Reply Comments

We agree with OCR that the PRA is intended to ensure members of the public have reasonable access to information that is generated and received by state public agencies, and that the PRA serves as a key tool for holding government officials and entities accountable.²⁴ We also agree that we should not provide SoCalGas an opportunity to pre-review Commission records relating to the billing investigation before we determine which billing investigation records should be disclosed in response to the Register's records request, for the reasons expressed in our response to SoCalGas's Comments. We are capable of, and responsible for, reviewing our own records and determining which records, if any, are exempt from disclosure.

²³ *Black Panthers v. Kehoe*, *supra*, 42 Cal.App.3d at 656-657; *see also*, Cal. Gov't. Code § 6254.5 (codifying the *Black Panthers* nonselective disclosure principle) and *Aardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1185.)

²⁴ Cal. Gov't. Code § 6250 states 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. Const., Art. 1, § 3(b)(1) similarly states that: "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."

We also agree that it is reasonable for us to describe in some detail any records, or portions of records, we may withhold once the billing practices investigation is complete, and to explain adequately the legal basis for any such withholding, and that we should, in accord with the California Constitution and PRA, apply any exemptions from disclosure narrowly.²⁵

FINDINGS OF FACT

1. On May 25, 2016, the California Public Utilities Commission (“Commission”) received a request seeking disclosure of records of the Commission’s Consumer Protection and Enforcement Division’s investigation of Southern California Gas Company’s billing practices.
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 investigation is still open; therefore, the disclosure of the Commission’s investigation records would compromise the Commission’s investigation.
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 investigation 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 investigation is 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, 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 files and reports are public records as defined by Cal. Gov’t. Code § 6250, *et seq.*

²⁵ Cal. Const., Art. 1, § 3(b)(2) states that: “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 also, e.g., Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal. App. 4th 1250, 1262.

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 request for disclosure of the Commission records concerning its investigation of Southern California Gas Company's billing practices is granted, once the investigation is 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, 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 August 18, 2016, and that the following Commissioners approved it:

TIMOTHY J. SULLIVAN
Executive Director