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October 14, 2016

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

Long Beach California
Date: October 13, 2016
Resolution No. L-510

R E S O L U T I O N

RESOLUTION AUTHORIZING DISCLOSURE OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION SAFETY AND ENFORCEMENT DIVISION'S RECORDS OF ITS INVESTIGATION OF AN ELECTRICAL INCIDENT THAT OCCURRED AT WARNER DRIVE IN SAN JOSE, CALIFORNIA, ON MAY 21, 2013.

BACKGROUND

On September 6, 2016, Alan J. Jang, attorney for General Insurance Company of America, served on the California Public Utilities Commission ("Commission") a deposition subpoena for personal appearance and production of documents and things concerning the Commission's Safety and Enforcement Division's investigation of an electrical incident that occurred at Warner Drive in San Jose, California, on May 21, 2013. The Commission's staff could not make the investigation records public without the formal approval of the full Commission. This subpoena is treated as an appeal to the full Commission for the release of the requested records pursuant to Commission General Order (G.O.) 66-C, § 3.4.

DISCUSSION

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's records.[1] These guidelines are embodied in General Order (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) [r]ecords of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission

[1] Cal. Pub. Util. Code § 583 states in part: "No information furnished to the commission by a public utility…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."

action". Section 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.

Although G.O. 66-C § 2.2(a) requires Commission staff to deny most initial requests seeking Commission investigation records and information, and to object to such subpoenas until the Commission has authorized disclosure, § 3.4 of the G.O. permits those denied access to appeal to the Commission for disclosure. Subpoenas implicitly include such an appeal. This resolution constitutes the Commission's response to the subpoena served by Alan J. Jang.

The California Code of Civil Procedure ("Cal. Code Civ. Proc.") provides broad discovery rights to those engaged in litigation. Unless limited by an order of the court, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (Cal. Code Civ. Proc. § 2017(a)).

Cal. Evid. Code § 911 provides that: "Except as otherwise provided by statute: (a) [n]o person has a privilege to refuse to be a witness; (b) [n]o person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing; [and] (c) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object or other thing." Thus, as a general rule, where state evidence law applies, a government agency's justification for withholding information in response to a subpoena must be based upon a statutory prohibition, privilege, or other protection against disclosure.

There is no statute generally prohibiting disclosure of the Commission's incident investigation records. However, certain documents within the investigation file are subject to the official information privilege (Cal. Evid. Code § 1040); the lawyer-client privilege (Cal. Evid. Code § 950 *et seq.*); the attorney work product doctrine (Cal. Code Civ. Proc. § 2018.010); and the Information Practices Act of 1977 ("IPA") (Cal. Civ. Code § 1798, *et seq.*). Records subject to one or more of these privileges will not be disclosed.

COMMENTS ON DRAFT RESOLUTION

The Draft Resolution of the Commission's Legal Division in this matter was mailed to the parties in interest on September 13, 2016, in accordance with Cal. Pub. Util. Code § 311(g). Comments were filed onSeptember 29, 2016 by Alan J. Jang with Jang & Associates, LLP. No reply comments were received.

The requester, Jang & Associates LLP, comments that: 1) Pacific Gas & Electric (PG&E) made an untimely report of the incident, which occurred over three years ago; 2) PG&E violated the Commission's reporting protocols established in General Order 95, Section 1; 3) PG&E staff misplaced, lost, or destroyed key evidence demonstrating PG&E's liability for the incident; 4) that the Commission should immediately provide the documents generated as part of its investigation to the extent that the disclosure would not hamper staff's findings; and 5) the immediate release of Commission investigation records is necessary to compel PG&E to follow Commission-generated rules and "discontinue its corporate culture of obstructing the administration of justice."

FINDINGS OF FACT

1. The Commission was served a subpoena on September 6, 2016 by Alan J. Jang, attorney for General Insurance Company of America, which seeks disclosure of the Commission's investigation records concerning an electrical incident that occurred at Warner Drive in San Jose, California, on May 21, 2013.

2. Access to the records in the Commission investigation files was denied in the absence of a Commission order authorizing disclosure.

3. The Commission's investigation of the electrical incident is still open; therefore, the disclosure of the Commission investigation records would compromise the Commission's investigation.

4. At this time, the public interest does not favor disclosure of these requested Commission 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 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 lawyer-client or other privilege.

CONCLUSIONS OF LAW

1. Where state evidence laws apply, a government agency's justification for withholding a public record in response to a subpoena or other discovery procedure must generally be based upon statutory prohibition, privilege, or other protection against disclosure. (Cal. Evid. Code § 911).

2. The Commission has, through G.O. 66-C § 2.2(a), limited Commission staff disclosure of investigation records and information in the absence of formal action by the Commission or disclosure during the course of a Commission proceeding. General Order 66-C does not limit the Commission's ability to order disclosure of records and information.

3. The public interest in nondisclosure of records concerning the electrical incident that occurred at Warner Drive in San Jose, California, on May 21, 2013 does not outweigh the necessity for disclosure in the interest of justice, with the exception of documents subject to one or more Commission privileges against disclosure.

4. The subpoenaed records include "personal information" protected by the IPA. (Cal. Civ. Code § 1798.24(k)).

5. The subpoenaed investigation files include documents subject to the Commission lawyer-client, attorney work product, or similar privileges regarding the Commission's deliberations concerning the investigation of rail incidents in Compton, California. Such privileged records shall not be disclosed in response to the subpoena.

6. Cal. Pub. Util. Code § 583 does not limit the Commission's ability to order disclosure of records.

7. 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 an electrical incident that occurred at Warner Drive in San Jose, California, on May 21, 2013 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 October13, 2016, and that the following Commissioners approved it:

/s/ TIMOTHY J. SULLIVAN

TIMOTHY J. SULLIVAN
Executive Director

MICHAEL PICKER
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
LIANE M. RANDOLPH
Commissioners

Commissioner CARLA J. PETERMAN, being necessarily absent, did not participate.