PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California
Date: December 1, 2016
Resolution No. L-514

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 ON MAY 4, 2015 NEAR 4459 GENEVIEVE ST. IN SAN BERNARDINO, CALIFORNIA.

BACKGROUND

On October 1, 2016, Friedrich Seitz served on the California Public Utilities Commission ("Commission") a subpoena seeking disclosure of records concerning the Commission's Safety and Enforcement Division investigation of an electric incident that occurred on May 4, 2015, near 4459 Genevieve St. in San Bernardino, California. 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 California Pub. Utilities (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.[1] These guidelines are embodied in General Order (GO) 66-C. GO 66-C § 1.1 provides that Commission's records are public, except "as otherwise excluded by this GO, statute, or other order, decision, or rule". GO 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

[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."

extent disclosed at a hearing or by formal Commission 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 GO 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 GO 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 GO 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 Friedrich Seitz.

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.

The Commission investigation of the electric incident is complete; therefore, disclosure of investigation records will not interfere with Commission staff's

ability to complete its incident investigation responsibilities. The public interest favors disclosure of the requested Commission's investigation records, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission lawyer-client or other privilege.

TESTIMONY OF COMMISSION STAFF

We strongly discourage litigants from seeking the testimony of Commission staff regarding incident investigations. The provision of such testimony at depositions or trials often greatly interferes with Commission staff's vital work conducting safety inspections and incident investigations, and thus with the Commission's efficient implementation of its regulatory responsibilities, since Commission staff must adjust normal workload to accommodate the often changing schedule of a subpoenaed appearance. Further, litigants frequently inappropriately seek Commission staff testimony regarding legal issues and Commission policy determinations beyond the scope of their knowledge or authority.

COMMENTS ON DRAFT RESOLUTION

The Draft Resolution of the Commission Legal Division in this matter was mailed to the parties in interest on November 1, 2016, in accordance with Cal. Pub. Util. Code § 311(g). Comments were filed on _____. Reply comments were filed on _____.

FINDINGS OF FACT

1. The Commission was served a subpoena on October 1, 2016, by Friedrich Seitz which seeks disclosure of the Commission investigation records concerning an electric incident that occurred on May 4, 2015 near 4459 Genevieve St., San Bernardino, California.

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

3. The Commission investigation of the electric incident is complete; therefore, the public interest favors disclosure of the requested Commission's investigation records, with the exception of any personal information, the disclosure of which would constitute an 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 GO 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. GO 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 May 4, 2015 incident in San Bernardino, California 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 the May 4, 2015 electric incident near 4459 Genevieve St., San Bernardino, California. Such privileged records should not be disclosed in response to the deposition/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 the investigation of an electrical incident that occurred on May 4, 2015 near 4459 Genevieve Street in San Bernardino, California is granted, 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 lawyer-client or other privilege, and/or any information subject to a court order prohibiting or limiting disclosure.

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 December 1, 2016, and that the following Commissioners approved it:

_____
TIMOTHY J. SULLIVAN
Executive Director