

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: August 24, 2017

Resolution No.: L-539

RESOLUTION**RESOLUTION AUTHORIZING DISCLOSURE OF COMMISSION RECORDS CONCERNING RAIL CROSSING U.S. DOT 749965G – CPUC XING SCL-1231****BACKGROUND**

The California Public Utilities Commission (“Commission”) received a request seeking disclosure of Commission records concerning rail crossing U.S. DOT 749965G – CPUC Xing SCL-1231, located at Agnew Road, Santa Clara, Santa Clara County, California, Union Pacific Railroad Mile Post 41.6 of the Coast sub (“the crossing”). 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 adopted with findings demonstrating the interest protected by the limitation and the need to protect that interest.⁴

¹ Cal. Gov’t. Code § 6250, *et seq.*

² Cal. Const. Article I, § 3(b)(1).

³ Cal. Const. Article I, § 3(b)(2).

⁴ *Id.*

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 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

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.

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.

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

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.

With the exception of Commission records of: 1) open Commission investigations, 2) material subject to statutory limitations on disclosure¹², 3) the Commission’s lawyer-client, or another Commission held privilege limiting disclosure, and 4) personal information that, if disclosed, would constitute an unwarranted invasion of personal privacy, the public interest favors the disclosure of all current Commission records concerning the crossing, including records of all completed investigations of incidents that occurred at the crossing. Once currently open investigations are closed, the public interest will also favor disclosure of the records associated with those investigations, subject to the guidelines noted above.

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).

¹² See, e.g., 23 U.S.C. § 130; 23 U.S.C. § 409.

The Commission may well receive future records requests and subpoenas seeking Commission records concerning the crossing.

COMMENTS ON DRAFT RESOLUTION

The Draft Resolution was mailed to the parties on July 25, 2017 in accordance with Cal. Pub. Util. Code § 311(g). Comments were filed on _____. Reply comments were filed on _____.

FINDINGS OF FACT

The Commission received a request seeking disclosure of Commission records concerning rail crossing U.S. DOT 749965G – CPUC Xing SCL-1231, located at Agnew Road, Santa Clara, Santa Clara County, California, Union Pacific Railroad Mile Post 41.6 of the Coast sub.

1. Access to the records in the Commission’s investigation files was denied in the absence of a Commission order authorizing disclosure.
2. With the exception of Commission records of: 1) open Commission investigations, 2) material subject to statutory limitations on disclosure, 3) the Commission’s lawyer-client, or another Commission held privilege limiting disclosure, and 4) personal information that, if disclosed, would constitute an unwarranted invasion of personal privacy, the public interest favors the disclosure of all current Commission records concerning the crossing, including records of all completed investigations of incidents that occurred at the crossing. Once currently open investigations are closed, the public interest will also favor disclosure of the records associated with those investigations, subject to the guidelines noted above.
3. The Commission has, upon receipt of records requests or subpoenas seeking such records, routinely authorized disclosure of Commission records concerning a particular rail crossing, 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.
4. The Commission may well receive future records requests and subpoenas seeking Commission records concerning the crossing.
5. The public interest and principles of administrative efficiency favor treating similar records requests and subpoenas in a similar and uniform manner.

CONCLUSIONS OF LAW

1. The documents in the requested Commission's investigation file and report 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 personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy.
6. Cal. Gov't Code § 6254(k) exempts from disclosure 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 all Commission records of all completed Commission investigations of incidents occurring at the crossing is granted, with the exception of portions of the records that include 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 Commission held privilege.
2. The request for disclosure of Commission records concerning all currently open Commission investigations of incidents occurring at the crossing is granted 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, or any information which is subject to the Commission's lawyer-client or other Commission held privilege.
3. The request for disclosure of all current Commission records concerning the crossing that are not associated with investigations is granted, with the exception of portions of the records that include 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 Commission held privilege.
4. The effective date of this order is today.

I certify that the foregoing resolution was adopted by the California Public Utilities Commission at its regular meeting of August 24, 2017 and the following Commissioners approved favorably thereon:

TIMOTHY J. SULLIVAN
Executive Director