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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division **San Francisco, California**
Date: January 10. 2019
Resolution No. L-572

R E S O L U T I O N

RESOLUTION ADDRESSING APPEAL OF LEGAL DIVISION PUBLIC RECORDS OFFICE'S DISPOSITION OF PUBLIC RECORD REQUEST PRA #18-120

SUMMARY

On March 20, 2018, Mr. Michael Aguirre requested records from the California Public Utilities Commission (CPUC or Commission) pursuant to the California Constitution and the Public Records Act (PRA).[1] The request, referenced as PRA #18-120, reads as follows:

> Greetings: On 27 October 2017 the First Appellate District Court issued an order stating "excepting the 16 of these records that were also withheld based on the attorney client privilege." The order also stated in Footnote 1 "Petitioner has not disputed respondent's claim that he waived his request for these 16 documents." We contend in light of the Superior Court ruling that there is probable cause to believe that obstruction of justice occurred in connection with the San Onofre closed plant rate recover [sic] proceedings before the CPUC since October 2015 that the crime fraud exception applies to these 16 writings. We believe attorneys were used to coordinate unlawful ex parte communications amongst and between CPUC and utility company officials regarding the obstruction of justice used to negotiate and implement the unlawful agreement to end the San Onofre closed plant proceedings. Please provide to me under the Public Records Act and the Crime Fraud exception these 16 documents the CPUC has withheld.
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> Further, we contend no such waiver took place and the claimed waiver is a subterfuge for withholding the 16 writings that are evidence of more unlawful behavior by CPUC officials in connection with the San Onofre closed plant rate recovery proceeding. Please provide any records of communication regarding

[1] Cal. Const., Art. 1, § 3; Cal. Gov't. Code § 6250 *et seq*., respectively.

> the claimed "waiver" of production of the 16 writings within and without the CPUC, including any State of California officials. Please include my partner mseverson@amslawyers.com in your response. Thank You, Mike Aguirre.

On March 29, 2018, the Commission's Legal Division Public Records Office (Public Records Office) responded to PRA #18-120 by providing records that responded to the portion of Mr. Aguirre's request that sought records relating to the October 27, 2017 Court of Appeal order which stated, in part, that "Petitioner has not disputed respondent's claim that he waived his request for these 16 documents," with the 16 documents being documents withheld from Mr. Aguirre in response to prior records requests he submitted to the Commission. The March 29, 2018 response letter explained that the 16 requested attorney-client privileged documents are exempt from mandatory disclosure to records requesters, pursuant to Cal. Gov't. Code § 6254(k).[2]

On April 5, 2018, Mr. Aguirre's associate, Ms. Maria Severson, filed an appeal pursuant to General Order (G.O.) 66-D, the Commission's guidelines for access to public records, which reiterated Mr. Aguirre's request for the 16 attorney-client privileged documents. Citing Cal. Evid. Code § 956,[3] Ms. Severson claims that the attorney-client privilege does not apply to these documents because she believes we used our attorneys to commit, or attempt to commit, a crime or fraud.[4]

This resolution addresses Ms. Severson's G.O. 66-D PRA #18-120 Appeal. The Commission finds no merit to Ms. Severson's Cal. Evid. Code § 956 arguments. The PRA does not require us to voluntarily disclose documents subject to our attorney-client privilege simply because a requester asserts that an exception to that privilege applies. However, upon further reflection the Commission has decided to withdraw its prior attorney-client privilege assertions regarding many of the 16 withheld documents, or portions thereof. One document, and portions of documents, remain subject to our attorney-client privilege assertions, and will not be disclosed in response to PRA #18-120 and this Appeal.

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[2] 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."

[3] Cal. Evid. Code § 956(a) states: "There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud."

[4] The April 5, 2018 Appeal does not reference the portion of PRA #18-120 that sought records related to the "waiver" discussion in the October 27, 2017 court order, or the related records provided in the March 29, 2018 response to PRA #18-120. The "waiver" issue will not be addressed in response to the Appeal.

BACKGROUND

The California Constitution and the PRA enshrine the public's right to access information concerning the conduct of the people's business, while recognizing a number of exemptions to the duty to disclose.[5] G.O. 66-D § 5.5(b) provides records requesters an opportunity to appeal to the full Commission if they are initially denied access to Commission records.

Mr. Aguirre's PRA #18-120 stated, in the portion of the request relevant to the Appeal:

> We contend in light of the Superior Court ruling that there is probable cause to believe that obstruction of justice occurred in connection with the San Onofre closed plant rate recover [sic] proceedings before the CPUC since October 2015 that the crime fraud exception applies to these 16 writings. We believe attorneys were used to coordinate unlawful ex parte communications amongst and between CPUC and utility company officials regarding the obstruction of justice used to negotiate and implement the unlawful agreement to end the San Onofre closed plant proceedings. Please provide to me under the Public Records Act and the Crime Fraud exception these 16 documents the CPUC has withheld.

The Commission's Legal Division Public Records Office responded to PRA #18-120 in a letter dated March 29, 2018. The pertinent part of the Public Records Office March 29, 2018 response letter reads as follows:

> In the absence of criminal charges against one or more former or current Commission employees, and an appropriate court order or ruling determining that the attorney-client privilege does not apply to the records you currently request, I respectfully decline to waive the Commission's previously asserted attorney-client privilege (Cal. Evid. Code 954 and attorney work product doctrine claims regarding the 16 documents you request. These documents are subject to the Commission's attorney-client privilege (Cal. Evid. Code § 954) and attorney work product doctrine (Cal. Code Civ. Proc. § 2018.010, *et seq*.), and are thus exempt from disclosure in response to your records request 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."

Ms. Severson's Appeal argues that: 1) "There is no attorney client privilege if the services of the lawyer were sought or obtained to enable or aid anyone to commit

[5] Cal. Const., Art. 1, § 3; Cal. Gov't. Code § 6250, *et seq*., respectively.

or plan to commit a crime or a fraud. Evid. Code § 956;" 2) "The CPUC has already admitted there were at least ten unreported ex parte communications with one or more Commissioners related to the San Onofre cost recovery proceedings No.I.12.10.013;" 3) "If a CPUC attorney, e.g. Frank Lindh, relayed unlawful ex parte communications in order to obstruct justice in the San Onofre cost recovery case (proceeding No. I.12.10.013), or if CPUC attorneys were used to file false rulings or decisions as part of the obstruction of justice of the San Onofre cost proceedings, there is no protections under the privilege;" 4) "A California Superior Court judge has already determined there to be probable cause to believe that the former CPUC President committed the crime of obstruction of justice in connection with CPUC Proceeding No. I.12.10.013;"[6] 5) "The CPUC has a duty to review the 16 writings to determine if they contain ex parte communications related to the San Onofre cost recovery case that are unlawful ex parte communications regarding the San Onofre cost recovery case, including those related to the preparation of false filings by the CPUC in that proceeding." (PRA #18-120 Appeal, pp. 1-2.)

Ms. Severson follows with references to events associated with the San Onofre Nuclear Generating Station (SONGS) which are similar to references in documents previously submitted by Mr. Aguirre and Ms. Severson on numerous occasions, intended to show that former and current Commission employees engaged in improper communications with utility employees and obstructed justice. (PRA #18-120 Appeal, pp. 2-15.)

Ms. Severson also notes that:

> The appeal is filed under protest because CPUC Rule 66-D is unlawful: (1) while placing a 10-day appeal requirement, Rule 66-D does not comply with the time limits of the Public Records Act [Govt Code 6253(c)]; (2) the CPUC then requires a "rehearing" after an appeal; and (3) it does not provide for any independent substantive review of the denial of Public Records Act requests. In this case, Mr. Aguirre will be filing an appeal with the California Appellate Court. (PRA #18-120 Appeal, p. 1.)[7]

Ms. Severson concludes:

> The CPUC must make a factual record that the documents being withheld are in fact proper attorney client privilege records so the matter can be reviewed by the Appellate Court. The CPUC must

[6] This is clarified later as follows: "A Los Angeles Superior Court judge has found there to be probable cause to believe the CPUC officials engaged in obstruction of justice, and based thereon, issued a search warrant for writings related to the San Onofre cost recovery including records from January 31, 2012, involving the San Onofre settlement agreement, and the meeting SCE's Executive Vice President and Michael Peevey in Poland. …." (PRA #18-120 Appeal, p. 9.)

[7] Mr. Aguirre did not file an application for rehearing of the Commission decision adopting G.O. 66-D.

> review the contents of the writings to determine if there were unlawful ex parte communications related to the San Onofre cost recovery case. Please release the 16 writings. (PRA #18-120 Appeal, p. 15.)

DISCUSSION

In a G.O. 66-D § 5.5(d) proceeding addressing an appeal to the Commission of an initial denial by the Public Records Office of access to records sought through a Public Records Act request, we are responsible for determining whether the Public Records Office appropriately denied access to requested records. To the extent the basis for the initial denial of access involved an assertion of a privilege against disclosure, we may determine the propriety of the privilege assertion. Our review may involve a determination of the facts necessary for the assertion of a privilege, and an evaluation of any exceptions that may apply.

Attorney-Client Privilege

In the case of the attorney-client privilege, an assertion of the privilege requires: 1) an attorney-client relationship (Cal. Evid. Code §§ 951, 954); 2) a confidential communication between client and lawyer, as defined in Cal. Evid. Code § 952, during the course of the attorney-client relationship; and 3) a privilege claim by the holder of the privilege, or by a person who is authorized to claim the privilege by the holder of the privilege (Cal. Evid. Code § 954).

Cal. Evid. Code § 952 defines "Confidential Communication Between Client and Lawyer" as follows:

> As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or to those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purposes for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

The only exception to the attorney-client privilege relevant here is the Cal. Evid. Code § 956(a) exception for "Services of Lawyer Obtained to Aid in Commission of Crime or Fraud" which states: "There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud."

As the privilege holder, the Commission bears the burden of proving its right to assert the attorney-client privilege.[8] As the California Supreme Court noted in *Costco Wholesale Corp. v. Superior Court* ("*Costco*") (2009) 47 Cal.4th 725, 733:

> The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. … Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply.[9]

The communications reflected in the documents, or portions of documents, subject to the Commission's current assertion that they are subject to the attorney-client privilege were communications between Commission lawyers, and Commissioners and other Commission employees made in confidence during the course of the Commission's attorney-client relationships. They involve legal consultation and the provision of attorney work product, in the form of legal opinions and advice. The Commission, through its Commissioners and other employees, routinely consults with its lawyers for the purposes of securing confidential legal services or advice. The privileged communications were not with utilities or individuals outside the Commission. The privileged communications did not involve communications between Commission attorneys and utility employees regarding the planning of, or holding of, ex parte meetings, or communications between Commission attorneys and Commissioners or other Commission employees regarding the planning of, or holding of, such meetings. Nor did they involve the filing of false rulings or decisions.

Several of the 16 records are confidential solely because they consist of attachments to confidential communications between Commission lawyers, Commissioners, and other Commission employees, even though they would not, standing alone, be subject to the Commission's attorney-client privilege. Since these documents are an intrinsic element of the overall confidential lawyer-client communications, they are subject to the Commission's attorney-client privilege in this context, even though they are otherwise public:

> The attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication irrespective of whether it includes unprivileged material. As we explained in *Mitchell v. Superior*

[8] The Public Records Office is authorized to assert the Commission's privileges and exemptions from disclosure in response to records requests and subpoenas, as appropriate.

[9] See also, Cal. Evid. Code § 917(a); *Wellpoint Health Networks, Inc. v. Superior Court* ("*Wellpoint*") (1997) 59 Cal.App.4th 110, 123-124.

> *Court* [(1980) 37 Cal.2d 591] 37 Cal.2d at page 600: "[T]he privilege covers the transmission of documents which are available to the public, and not merely information in the sole possession of the attorney or client. In this regard, it is the actual fact of the transmission which merits protection, since discovery of the transmission of specific public documents might very well reveal the transmitter's intended strategy." [Citation omitted.] ... "Neither the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between 'factual' and 'legal' information...." (*Id* at p. 601; See *In Re Jordan* (1974) 12 Cal.3d 575, 580 …) … And, as we have explained, because the privilege protects the *transmission* of information, if the communication is privileged, it does not become unprivileged simply because it contains material that could be discovered by some other means. (*Costco*, *supra*, 47 Cal.4th at pp. 734-735.)

Although the Public Records Office initially asserted that all of the 16 withheld documents were subject to the attorney-client privilege, we have, upon further review, determined that several of the documents, in whole or in part, include communications between Commission employees who either were not Commission lawyers, or who were acting in a role other than as a Commission lawyer, when they communicated with other Commission employees who were either nonlawyers, or Commission lawyers who were not acting in role of a Commission lawyer when the communications occurred. For example, many of the Commission's Administrative Law Judges happen to be lawyers. However, when they are employed by the Commission as Administrative Law Judges, they act as Administrative Law Judges rather than lawyers employed by the Commission to represent the agency, or units of the agency, in administrative or judicial proceedings, or to provide legal consultation and advice. Similarly, Commissioners may themselves be lawyers, but generally act in a different role when employed as Commissioners. At times, Commissioners who are also lawyers can and properly do engage in legal consultation and the provision of legal advice, but their primary function is to act as Commissioners rather than as Commission lawyers.

Commissioners and Administrative Law Judges are entitled to seek legal representation, consultation, and advice from Commission lawyers, and to have confidential communications related to such attorney-client relationships be protected by the Commission's attorney-client privilege and, in appropriate situations, the attorney-work product doctrine. However, not every communication between Commissioners and Administrative Law Judges who happen to be lawyers and other non-lawyer Commission employees is subject to the attorney-client privilege. In limited appropriate circumstances, confidential communications between Commissioners, Administrative Law Judges, and other Commission employees may be confidential on a basis other than the attorney-client privilege, but we need not discuss such situations here.

Similarly, even when a Commission lawyer who is acting as a Commission lawyer is the sender or recipient of a communication, confidential or otherwise, the communication would not automatically fall within the scope of the attorney-client privilege. To be covered by the Commission's attorney-client privilege, a confidential communication must be between a Commission lawyer and a Commission client, made within the scope of an attorney-client relationship, which involves the seeking of, or provision of, legal representation, consultation, and/or advice. And it must not be for the purpose of committing a crime or a fraud.

The 16 documents subject to our prior attorney-client privilege assertions in response to PRA #18-120 may be described as follows:

1. March 20, 2014 e-mail from then Commissioner advisor Charlotte TerKeurst to then Commissioner Michael Picker (currently, President Picker) and then Commissioner legal advisor and attorney Christine Hammond regarding the SONGS proceedings. We are withdrawing our attorney-client privilege assertion for this document.
2. Attachment to the Document 1 communication, initially identified as confidential by virtue of being an attachment to a confidential attorney-client communication. This document is already public. We are withdrawing our attorney-client privilege assertion for this document, since we are withdrawing our attorney-client privilege assertion for Document 1.
3. March 20, 2014 e-mail from then Commissioner Picker (CPUC e-mail address) to his personal e-mail address, forwarding the Document 1 communication and Document 2 attachment to himself. We are withdrawing our attorney-client privilege assertion for this document.
4. Attachment to the Document 1 and Document 3 communications. This is the same document as Document 2, which was initially identified as confidential by virtue of being an attachment to a confidential attorney-client communication. This document is already public. We withdraw our attorney-client privilege assertion for this document, since we are withdrawing our attorney-client privilege assertions for Documents 1, 2, and 3.
5. April 4, 2014 e-mail from then Commissioner legal advisor and attorney Christine Hammond to then Commissioner Picker, and his then advisors Kenneth Koss, Charlotte TerKeurst, and Nicholas Chaset, and Commissioner staff Josephine Emelo regarding the SONGS proceeding. Ms. Hammond's primary role as then Commissioner Picker's legal advisor was to provide legal

consultation and advice to then Commissioner Picker and his other advisors, within her attorney-client relationship with those individuals. Document 5 includes a confidential communication from Ms. Hammond to then Commissioner Picker and his other advisors, which was made within the scope of her attorney-client relationship with those individuals, and which falls within the scope of the Commission's attorney-client privilege because it involves legal consultation and advice. Document 5 also includes an additional communication which is not an intrinsically confidential element of the privileged communication from Ms. Hammond. We withdraw our attorney-client privilege assertion for this document, except with regard to the portion of this document which includes the confidential attorney-client communication from Ms. Hammond.

6. Attachment to the Document 5 communication, initially identified as confidential by virtue of being an attachment to a confidential attorney-client communication. This document is already public. We withdraw our attorney-client privilege assertion for this document, since we are withdrawing the attorney-client privilege assertion for the portion of Document 5 which is associated with this document.

7. August 4, 2014 e-mail from then Commissioner legal advisor and attorney Christine Hammond to then Commissioner Picker, and Commissioner Picker's then advisors Kenneth Koss, Charlotte TerKeurst, and Nicholas Chaset regarding the SONGS proceeding. As noted in the description of Document 5, Ms. Hammond's primary role as then Commissioner Picker's legal advisor was to provide legal consultation and advice to Commissioner Picker and his other advisors, within her attorney-client relationship with those individuals. Document 7 includes a confidential communication from legal advisor and attorney Christine Hammond to Commissioner Picker and his other advisors, which was made within the scope of her attorney-client relationship with those individuals, and which falls within the scope of the Commission's attorney-client privilege because it involves legal consultation and advice. Document 7 also includes additional communications which are not intrinsically confidential elements of the privileged communication from Ms. Hammond, although they are otherwise public. We withdraw our attorney-client privilege assertion for this document, except with regard to the portion of this document which includes the confidential attorney-client communication from Ms. Hammond.

8. Attachment to the Document 7 communications, initially identified as confidential by virtue of being an attachment to a confidential attorney-client communication. This document is already public. We withdraw our attorney-client privilege assertion for this document, since we are withdrawing the attorney-client privilege assertion for the portion of document 7 which is associated with this document.

9. August 4, 2014 e-mails from then Commissioner (currently President) Picker's advisor Kenneth Koss to then Commissioner Picker, then Commissioner legal advisor and attorney Christine Hammond, and Commissioner Picker's then advisors Charlotte TerKeurst and Nicholas Chaset regarding the SONGS proceeding, and email from Ms. Hammond to then Commissioner Picker and his other advisors, Mr. Koss and Mr. Chaset. The confidential communications to and from Ms. Hammond were made during her attorney-client relationship with then Commissioner Picker and his other advisors, and involve legal consultation. Document 9 also includes additional communications which are notan intrinsically confidential element of the privileged communications between Ms. Hammond, then Commissioner Picker, and his other advisors, although they are otherwise public. We withdraw our attorney-client privilege assertion for this document, except with regard to the portion of this document which includes the confidential attorney-client communication with Ms. Hammond.

10. August 14-15, 2014 chain of e-mails between then Commissioner Picker, then Commissioner legal advisor and attorney Christine Hammond, and Commissioner Picker's then advisors Kenneth Koss, Charlotte TerKeurst, and Nicholas Chaset regarding a Sycamore-Penasquitos transmission line proceeding, which marginally reference SONGS. Ms. Hammond's primary role as then Commissioner Picker's legal advisor was to provide legal consultation and advice to Commissioner Picker and his other advisors, within her attorney-client relationship with those individuals. Document 10 includes confidential communications from, and to, legal advisor and attorney Christine Hammond, from, and to, Commissioner Picker and his other advisors, which were made within the scope of her attorney-client relationship with those individuals, and which fall within the scope of the Commission's attorney-client privilege because they involve legal consultation and the provision of legal advice. We

continue to assert our attorney-client privilege for this document.

11. October 30, 2014 e-mail from then Commission attorney and Administrative Law Judge Melanie Darling to then Commission President Michael R. Peevey; then Commissioners Michel Peter Florio, Catherine J.K. Sandoval, and Carla J. Peterman; then Commission Administrative Law Judges Dorothy Duda and Kevin Dudney; and Commission attorney and then Assistant General Counsel, Jason Reiger, regarding the SONGS proceeding. We withdraw our attorney-client privilege assertion for this document.

12. October 30, 2014 e-mail response from then Commission President Peevey to then Commission Administrative Law Judges Melanie Darling, Kevin Dudney, and Dorothy Duda; then Commissioners Michel Peter Florio, Catherine J.K. Sandoval, and Carla J. Peterman; and Commission attorney and then Assistant General Counsel Jason Reiger, regarding the Document 11 communications regarding the SONGS proceeding. We withdraw our attorney-client privilege assertion for this document.

13. October 30, 2014 e-mail from then Commissioner Michel Peter Florio to then Commission President Michael R. Peevey; then Commissioners Catherine J.K. Sandoval and Carla J. Peterman; then Commission Administrative Law Judges Melanie Darling, Kevin Dudney, and Dorothy Duda; and Commission attorney and then Assistant General Counsel Jason Reiger, regarding the Document 11 and Document 12 communications regarding the SONGS proceeding. We withdraw our attorney-client privilege assertion for this document.

14. October 30, 2014 e-mail from then Assistant General Counsel Jason Reiger to then Commission President Michael R. Peevey; then Commissioners Michel Peter Florio, Catherine J.K. Sandoval, and Carla J. Peterman; and then Commission Administrative Law Judges Melanie Darling, Kevin Dudney, and Dorothy Duda regarding the Document 11, Document 12, and Document 13 communications regarding the SONGS proceeding. As an Assistant General Counsel, Mr. Reiger had attorney-client relationships with the Commissioners and other Commission employees, and one of his principal responsibilities was to engage in legal consultation and provide legal advice to these

individuals. His confidential communication in Document 14 was made during the course of his attorney-client relationships with the Commissioners and other Commission employees, provided direct legal consultation and advice, and represents Mr. Rieger's attorney-work product as well. We continue to assert our attorney-client privilege for the confidential communication from Mr. Reiger, but withdraw our attorney-client privilege claim for the remainder of the document.

15. January 3, 2015 e-mail from then Commissioner legal advisor and attorney Christine Hammond to then Commissioner Picker regarding the SONGS proceeding. Document 15 includes a confidential communication from Ms. Hammond to Commissioner Picker and his other advisors, which was made within the scope of her attorney-client relationship with those individuals, and which falls within the scope of the Commission's attorney-client privilege because it involves legal consultation and advice. Document 15 also includes an additional communication which is not an intrinsically confidential element of the privileged communication from Ms. Hammond. We continue to assert our attorney-client privilege for the portion of this document that includes the confidential communication from Ms. Hammond, but withdraw our attorney-client privilege assertion for the remainder of this document.

16. Attachment to the Item 15 communication. Confidential by virtue of being an attachment to a confidential attorney-client communication. We withdraw our attorney-client privilege assertion for this document.

After further review and reflection, we have decided to withdraw our prior attorney-client privilege assertions for Documents 1, 2, 3, 4, 6, 8, 11, 12, 13, and 16 in the above list. These documents include both direct communications, and attachments to communications. The attachments were previously subject to privilege assertions because they were attached to communications subject to previous privilege assertions; once the privilege assertions are withdrawn for the initial communications, there is no longer a basis for asserting that the attachments remain privileged.

While we continue to assert our attorney-client privilege for portions of Documents 5, 7, 9, and 15 which include communications between Commission attorney and then Commissioner Picker's legal advisor Christine Hammond, and then Commissioner Picker and his other then advisors, Kenneth Koss and Nicholas Chaset, made in confidence during the course of their attorney-client relationships for the purposes of obtaining or providing legal consultation and advice, we are withdrawing our assertions of the attorney-client privilege for the remaining portions of those documents, which will be

disclosed with minor redactions to protect the portions of the documents which remain subject to our privilege assertions.

We continue to assert our attorney-client privilege with regard to Document 10, which includes confidential attorney-client communications between former Commissioner Legal Adviser Christine Hammond, and then Commissioner Picker and his other advisors, regarding a Commission proceeding concerning the Sycamore-Penasquitos transmission line. As a legal advisor to a Commissioner, one of Ms. Hammond's principal responsibilities was to provide confidential legal consultation and advice to her Commissioner within the scope of her attorney-client relationship with him and his staff. The communications in Document 10 are subject to our attorney-client privilege.

We will also continue to assert the attorney-client privilege for, and withhold, portions of Document 14 which include a confidential communication from a Commission attorney (then Assistant General Counsel Jason Reiger) to Commissioner clients, made during the course of his attorney-client relationships. As an Assistant General Counsel, one of Mr. Reiger's principal responsibilities was to provide legal consultation and advice to Commissioners and other Commission employees. His communication with the Commissioners provided direct legal consultation and advice, and represents Mr. Rieger's attorney-work product as well.

While we are withdrawing our attorney-client privilege assertion for Document 3, we will disclose that document only after redacting most of then Commissioner Picker's personal email address, to which he sent the document from his work email. The entire content of the communication will be disclosed, as well as a portion of his email address sufficient to identify him as the email recipient. This approach is consistent with Cal. Gov't. Code § 6254.3, which provides in pertinent part that:

> (b)(1) Unless used by the employee to conduct public business, or necessary to identify a person in an otherwise discloseable communication, the personal email address of all employees of a public agency shall not be deemed to be public records and shall not be open to public inspection except …
>
> (2) This subdivision shall not be construed to limit the public's right to access the content of an employee's email that is used to conduct public business, as decided by the California Supreme Court in City of San Jose v. Superior Court (2017) 2 Cal.5th 608

This approach is also consistent with Cal. Gov't. Code § 6254(c), which exempts from mandatory disclosure in response to records requests: "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."

We believe public disclosure of then Commissioner Picker's entire personal email address would constitute an unwarranted invasion of his personal privacy and would shed no additional light on the Commission's conduct of the people's business, given that the entire substance of the communication other than the actual full personal email address is being disclosed. We are aware that, when a government employee uses a personal communication device to conduct the people's business, the communications made with that device which relate to the conduct of the people's business are subject to disclosure, since the content of the communication, rather than the ownership of a communication device, is the controlling factor. However, we believe that by disclosing the communication in full, without the entire personal email address, we serve the interests of both public access to government communications, and the protection of truly personal information from intrusive disclosure.

In short, the only documents remaining subject to our attorney-client privilege assertions are: Document10, and limited portions of Documents 5, 7, 9, 14, and 15. As just noted, we are no longer asserting the attorney-client privilege for Document 3, but will disclose it after making very minor redactions for then Commission Picker's personal email address.

Having established that these remaining attorney-client communications involved confidential communications between Commission lawyers and their clients during the scope of their attorney-client relationships, for the purposes of obtaining or providing legal consultation and advice, we next will explore whether these communications fall with the Cal. Evid. Code § 956(a) exception to the attorney-client privilege, and whether we should voluntarily disclose some or all of the attorney-client privileged documents to Mr. Aguirre, Ms. Severson, and any other member of the public who so requests, thus voluntarily waiving our privilege regarding such documents.

Cal. Evid. Code § 956(a)

Cal. Evid. Code § 956(a) states: "There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud."

The proponent of the Cal. Evid. Code § 956 exception to the attorney-client privilege "bears the burden of proof of the existence of crime or fraud." (*Geilim v. Superior Court* (1991) 234 Cal.App.3d 166, 174.) "To invoke the Evidence Code section 956 exception to the attorney-client privilege, the proponent must make a prima facie showing that the services of the lawyer 'were sought or obtained' to enable or to aid anyone to commit or plan to commit a crime or fraud.'" (*BP Alaska Exploration, Inc. v Superior Court* ("*BP Alaska*") (1988) 199 Cal.App.3d 1240, 1262.) "To trigger the crime-fraud exception, a party must make a prima facie showing that the communication at issue furthered a crime or fraud." (*Freedom Trust v. Chubb Group of Insurance Companies*

(1999) 38 F.Supp.2d 1170, 1171; *State Farm Fire & Casualty. Co*. *v*. Superior Court ("State Farm") (1997) 54 Cal.App.4th 625, 645.) "According to *Nowell v. Superior Court* (1963) 223 Cal.App.2d 652, 657 … mere assertion of fraud is insufficient; there must be a showing the fraud has some foundation in fact." (*BP Alaska, id*.; see also, *Dickerson v. Superior Court* (1982) 135 Cal.App.3d 93, 100.) As noted in *Nowell v. Superior Court*, *supra*, "it would be destructive of the privilege to require disclosure on the mere assertion of opposing counsel." (223 Cal.App.2d at p. 657.)

Although a superior court judge authorized a search warrant for records relating to SONGS, we are not aware of any indictments or criminal litigation resulting from any evidence seized during these searches. The issuance of a search warrant does not prove that the searched individual or entity has committed or attempted to commit a crime or a fraud. Courts have concluded that the showing of probable cause to issue a search warrant does not "rise to the level of a prima facie showing to establish the crime/fraud exception." (*State Farm*, *supra*, 54 Cal.App.4th at p. 645.) "'The procedure for obtaining a search warrant involves an ex parte presentation … requesting the magistrate to issue the warrant based on ' "the probability, and not a prima facie showing, of criminal activity …" …'… [¶] By contrast, in order to establish the crime/fraud exception to the privilege, 'the party opposing the privilege must establish a prima facie case of fraud. [Citation.] [T]he party must also establish a reasonable relationship between the fraud and the attorney-client communication[Citation.]' … It appears, therefore, that the probable cause showing to obtain a search warrant does not satisfy the showing required to establish the crime-fraud exception to the attorney-client privilege.' (*People v. Superior Court* (*Bauman & Rose*) (1995) 37 Cal.App.4th 1757, 1769 …" (*State Compensation Insurance Fund v. Superior Court* ("*SCIF*") (2001) 91 Cal.App.4th 1080, 1090-1091. See also, *People v. Superior Court* (*Laff*) (2001) 25 Cal.4th 703, 719, fn. 6.)

We are aware of no legal requirement that a state agency that has asserted the attorney-client privilege as a basis for finding that certain records are exempt from mandatory disclosure in response to a records request must, when confronted by a requester's accusations that it sought or obtained the services of its lawyers to commit or attempt to commit a crime or a fraud, promptly agree with the accusations and make those privileged records public.

As noted in the Public Records Office March 29, 2018 response letter, if Mr. Aguirre obtains a Court of Appeal order or ruling directing us to provide the 16 attorney-client documents for the Court's review to determine whether they are subject to the Cal. Evid. Code § 956(a) exception to the attorney-client privilege, we will, of course, respond appropriately.[10]

[10] When courts review challenges to attorney-client privilege assertions, they explore arguments regarding whether the privilege was appropriately asserted, but do not generally review the privileged documents themselves; indeed, Cal. Evid. Code § 915 precludes them from doing so, except in unusual circumstances. *Costco*, *supra*, 47 Cal.4th at p. 739, notes that: "because the privilege protects a

Voluntary Waiver

Ms. Severson's request that we voluntarily disclose our attorney-client privileged documents can be viewed as a request that we either concede that we used our lawyers to commit or attempt to commit a crime or a fraud, or disclose our privileged documents in order to prove to a disbelieving requester that we had the right to assert the privilege in the first place. We respectfully decline to waive our properly asserted attorney-client privilege and attorney work product doctrine simply because of Ms. Severson's accusations.

As noted in the Public Records Office response to PRA #18-120, Mr. Aguirre had several opportunities to controvert the statement in Draft Resolution L-522 regarding the waiver of his request for attorney-client privileged records. He did not raise the issue in his application for rehearing of Resolution L-522 or in his petition for writ of review of Resolution L-522 and D.17-08-033, the Commission's decision denying rehearing of Resolution L-522. Instead, in PRA #18-120, Mr. Aguirre seeks the very same 16 documents subject to our prior attorney-client privilege assertions. Our Public Records Office responded to PRA #18-120 by providing records and information concerning the waiver issue, and treated the remainder of PRA #18-120 as a new request for those privileged documents, even though Mr. Aguirre could have timely disputed the waiver issue and sought to have his interest in those documents addressed previously.

Our response grants Ms. Severson's PRA #18-120 Appeal to the extent she requested that we:

> make a factual record that the documents being withheld are in fact proper attorney client privilege records so the matter can be reviewed by the Appellate Court. The CPUC must review the contents of the writings to determine if there were unlawful ex parte communications related to the San Onofre cost recovery case.

As she requested, we reviewed "the contents of the writings to determine if there were unlawful ex parte communications related to the San Onofre cost recovery case." Our review of the withheld records determined that the privileged communications in the records, or portions of records, subject to our current attorney-client privilege assertions

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transmission irrespective of its content, there should be no need to examine the content in order to rule on the claim of privilege. [Citation Omitted]." (Emphasis in original.) (See also, *Southern Cal. Gas Co. v. Public Utilities Com*. (1990) 50 Cal.3d 31, 45, fn. 19.) Nothing in Cal. Evid. Code § 915 "prevents a party claiming a privilege from making an in camera disclosure of the contents of a communication to respond to an argument or tentative decision that the communication is not privileged." (*Costco*, *supra*, 47 Cal.4th at pp. 738-739.) However, public disclosure, in the absence of a judicial ruling that an exception to the privilege applies, would be inappropriate. We note that the crime/fraud exception does not generally apply to attorney work product documents (*SCIF*, *supra*, 91 Cal.App.4th at p. 1091, citing *BP Alaska*, *supra*, 199 Cal.App.3d at p. 1249) and that, in any event, "'in camera inspection is the proper procedure to evaluate the applicability of the work product doctrine to specific documents ….'" (*Id*., 91 Cal.App.4th at pp. 1091-1092, quoting *Wellpoint*, *supra*, 59 Cal.App.4th at p. 121.)

were not sent to or received from utilities or others outside the Commission, and did not involve any effort to establish or facilitate any ex parte communications related to the San Onofre cost recovery proceeding, but were instead confidential communications between Commission lawyers and other Commission employees made during the course of the Commission's attorney-client relationships. We view this as the core of Ms. Severson's PRA #18-120 Appeal.

In all other respects, i.e., to the extent Ms. Severson asks us to: "Please release the 16 writings," Ms. Severson's PRA #18-120 Appeal is granted in part, and denied in part. As we stated above, we will not waive our attorney-client privilege, or any other privilege or exemption, simply because a requestor accuses us of using or seeking to use our lawyers to commit a crime or fraud. Nonetheless, our further document review has persuaded us to withdraw our prior attorney-client privilege assertions for a number of the 16 documents. Our withdrawal of prior privilege assertions will result in the disclosure of most of the documents she seeks, thus, in practical effect, largely granting her request that we "Please release the 16 writings."

COMMENTS ON DRAFT RESOLUTION

The Draft Resolution in this matter was mailed to the interested parties on September 21, 2018 in accordance with Cal. Pub. Util. Code § 311(g). Comments were received From Ms. Severson on October 15, 2018.

Ms. Severson comments that:

> Under California's Constitution Article 1, Section 3, subdivision (b)(l), "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, ... the writings of public official and agencies shall be open to public scrutiny." Such "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Public Records Act, Cal. Gov. Code § 6250.
>
> Although attorney-client privilege, under certain circumstances, may be invoked under the PRA, the "PRA must be construed in 'whichever way will further the people's right of access" to public information. *Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Ca1.5th 282, 292. Moreover, under the PRA, "the fact that parts of a requested document fall within the terms of an exemption does not justify 'withholding the entire document." *Ibid* (citation omitted).

> Additionally, there is no attorney-client privilege tor communications where "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." Evid. Code § 956, subd. (a). (Comments, pp. 2-3.)

She notes that:

> The California Supreme Court has recognized "[t]he party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of the attorney-client relationship." *Costco Wholesale Corp. v. Superior Court* (2009) 47 Ca1.4th 725, 733. Specifically, the attorney-client privilege protects "confidential communications," which is defined as 'information transmitted between a client and his or her lawyer the course of that relationship and in confidence ... and include a legal opinion formed and the advice given by the lawyer in the course of that relationship." Cal. Evid. Code § 952. (Comments, p. 3.)

Ms. Severson states that:

> The Supreme Court has also explained the attorney-client privilege protects confidential communications because "[d]uring active litigation, that information can threaten the confidentiality of legal consultation by revealing legal strategy." *ld.* at p. 298. However, "there may come a point when this very same information **no longer communicates anything privileged**, because it no longer provides any insight into litigation strategy or legal consultation." *Ibid* (emphasis added). The determination of whether privilege applies "turns on content and purpose, not form," accordingly "not every communication between attorney and client is privileged solely because it is confidentially transmitted." *ld.* at p. 295. (Comments, p. 4.)

She goes on to assert that the Draft Resolution does not adequately explain why the withheld communications are privileged, or how the documents "would provide insight into any active litigation strategy or consultation." (Comments, p. 4.) She then states that: "In fact, the CPUC concedes, 'we are not aware of any indictments or criminal litigation resulting from any evidence seized during [the superior court's] searches.'" (Comments, p. 4.)

Next, she repeats the claim she made in her PRA #18-120 Appeal that the Cal. Evid. Code § 956 "crime-fraud exception" to the attorney-client privilege applies to the

withheld records: "Here, the writings are not protected by the attorney-client privilege because the services of a CPUC attorney were sought or obtained to enable or aid CPUC President Peevey and other CPUC officials to commit a crime or a fraud consisting of obstruction of justice and related unlawful acts." (Comments, p. 5.) She then repeats, without adding anything new, her litany of references to Superior Court search warrants, the seizure of computers and other material from former Commission President Peevey's residence, a newspaper article, and a late-filed ex parte meeting notice. She concludes that:

> Here, the entire attorney-client relationship surrounding the defunct San Onofre Nuclear power plant is embarked upon and in furtherance of the unlawful ex parte communications between CPUC and utility officials. See *Bauman & Rose*, *supra*, 37 Cal.App. 4th at p. 1768, n.4 Accordingly, the relationship is permeated by criminal activity. If CPUC officials used attorneys with the intent to abuse the attorney-client relationship, the criminal-fraud exception applies, and the CPUC must release these documents. See *Geilim* v. *Superior Court* (1991) 234 Cal.App.3d 166, 174. (Comments, p. 6.)

Response to Comments

California Constitution, PRA, and Attorney-Client Privilege

Article 1, §3 of the California Constitution and the PRA both broadly favor public disclosure of government records. Statutes and other authority favoring disclosure must be broadly construed, and records, or portions of public records that are responsive to a records request and are not subject to any PRA exemption from disclosure must be provided to a requester if they can be reasonably segregated from records or portions of records that are subject to one or more exemptions from disclosure. We have for many years so stated in numerous resolutions authorizing the disclosure of Commission records associated with safety incident investigations and other matters.

We agree that not every Communication sent or received by a Commission lawyer to a Commissioner or other Commission employee is inherently and automatically subject to the attorney-client privilege. The attorney-client privilege is intended to protect communications between attorneys and clients that involve the seeking or provision of legal representation, consultation, and advice.

We think Ms. Severson goes too far in asserting that *Los Angeles County Board of Supervisors*, *supra*, stands for the proposition that records of communications between lawyers and clients can be subject to the attorney-client privilege only if they relate to "active litigation strategy or consultation," with the implication that the privilege only applies to communications regarding litigation, and, even then, only as long as disclosure

would reveal litigation strategy or consultation while the litigation remains active, since the decision itself affirmatively makes clear that communication in which a lawyer provides legal advice are also covered by the privilege, without restricting the application of the privilege only to legal advice given in a litigation context. (*Los Angeles Bd. Of Supervisors*, *supra*, 2 Cal. 5th at 293.)

Nonetheless, taking to heart the California Supreme Court's reminder of the California Constitution and PRA language clearly favoring broad public access to state government records, and the need to very narrowly construe restrictions on public access to our records, we have taken this opportunity to review once again each document subject to our earlier attorney-client privilege and attorney work product doctrine assertions, and have, upon further reflection, decided to withdraw these assertions with regard to the majority of the 16 documents. The details of our review are discussed previously in this Resolution.

Crime-fraud Exception

Ms. Severson's comments repeat her previous unfounded allegations that the Commission is a corrupt agency that utilizes its lawyers to commit crimes, basing these allegations on the fact that several years ago a search warrant was issued seeking records of former Commission President Michael R. Peevey's communications with utility representatives concerning a proposed settlement in a proceeding associated with SONGS, including records regarding an improper ex parte meeting with a utility representative in 2013 which was not formally reported by the utility until 2015. She argues that we have no right to assert that any communications between Commission staff and Commission lawyers that relate to SONGS can be covered by the Commission's lawyer-client privilege (Comments at p. 6.) At the same time, in her arguments concerning the general scope of the attorney-client privilege, she asserts that the attorney-client privilege can only apply to consultation related to active litigation, and quotes the Draft Resolution language stating that: "we are not aware of any indictments or criminal litigation resulting from any evidence seized during [the superior court's] searches." (Comments, p. 4.)

Her comments present no new facts supporting her allegations regarding our alleged use of our lawyers to commit crime or fraud.

Further, Ms. Severson makes the comprehensive and unfounded assertion that:

> Here, the entire attorney-client relationship surrounding the defunct San Onofre Nuclear power plant is embarked upon and in furtherance of the unlawful ex parte communications between CPUC and utility officials. (Comments, p. 6.)

In essence, she claims, without any evidence, that all communications between Commission lawyers and Commission clients that are in any way associated with SONGS were made in order to further unlawful conduct.

We find no merit to Ms. Severson's crime-fraud exception comments. We continue to disagree with her unfounded claims of corruption or fraud; Ms. Severson has not presented a prima facie case to support her claims. We have reasonably responded to her PRA 18-120 Appeal request that we review the communications and make sure that none related to the planning or holding of any improper ex parte meetings relating to SONGS, and none of the withheld communications involved such activities.

As the Draft Resolution makes clear, crime fraud exception assertions must provide some evidence that a crime or fraud has been committed and that the requested documents have some relationship to the alleged crime or fraud. The Draft Resolution granted the request in Ms. Severson's appeal that the Commission take a look at the records to make sure they did not relate to the holding or planning of ex parte meetings. Ms. Severson's comments add nothing to the facts she previously cited in support of her contention that there is evidence to show that the withheld documents involve our use of our attorneys to commit crime or fraud. She merely repeats her references to search warrants seeking former President Peevey's records, the fact that computers and documents were seized, and the fact that, in 2013, former President Peevey met with a Southern California Edison Vice President in Poland.

We note that her comments also somewhat contrarily state that we "concede" that we are unaware of any litigation or criminal indictments related to the searches of former President Peevey's residence and records and then use the absence of litigation as evidence to argue that there is no longer a basis for our assertion of the attorney-client privilege since disclosure would not reveal legal consultation or advice related to active litigation. (Comments, pp. 4 & 6.)

As stated earlier, we disagree with both her crime fraud accusations and with what her erroneous reading of *Los Angeles County Bd. of Supervisors*, *supra*.

Withdrawal of certain prior privilege assertions

As noted earlier, we have taken this opportunity to review once again each document subject to our earlier attorney-client privilege and attorney work product doctrine assertions, and have, upon further reflection, decided to withdraw these assertions with regard to all, or portions of, most of the 16 documents at issue.

Specifically, we are withdrawing our attorney-client privilege assertions for the documents identified as Documents 1, 2, 3, 4, 6, 8, 11, 12, 13, and 16 in the list on page 7 of this Resolution. We are also withdrawing our privilege claims for Documents 5, 7, 9,

14, and 15, with the exception of small portions of those documents which include attorney-client privileged communications related to the SONGS investigation. In the case of Document 3, we will redact a portion which includes then Commissioner Picker's personal email address for the reasons previously discussed. These redactions are consistent with the constitutional, statutory, and judicial directives and other authority that we interpret broadly when they favor disclosure, and narrowly, when they restrict disclosure; and that we segregate exempt from nonexempt records where possible, applying a surgical scalpel to our records, so that we may provide nonexempt or privileged records to the public.

We are continuing to assert the attorney-client privilege, and to withhold from disclosure, the documents identified as Document 10 in our Documents list. The confidential communications being withheld were between Commission lawyer and then Commissioner Picker's legal advisor, Christine Hammond, and other employees of then Commissioner Picker's office, and related directly to a Sycamore-Penasquitos transmission line proceeding..

Our actions in withdrawing certain prior attorney-client privilege assertions are based on our further review and reflection concerning our prior privilege assertions, and do not in any way constitute a waiver of our privileges with regard to the records that remain subject to our attorney-client privilege assertions, and we continue to find no merit in Ms. Severson's Cal. Evid. Code § 956 crime-fraud exception allegations.

FINDINGS OF FACT

1. PRA #18-120 seeks access to lawyer-client privileged records that are a subset of records Mr. Aguirre previously requested in PRA #1386. In response to PRA #1386, the Commission denied access to these attorney-client privileged documents (see Commission Resolution L-522).

2. In a letter dated March 29, 2018, the Legal Division Public Records Office responded to Mr. Aguirre's PRA #18-120 by providing records and information responsive to the element of the request seeking information concerning Mr. Aguirre's alleged waiver of his request for lawyer-client privileged documents, and denying this new request for the 16 previously withheld attorney-client privileged documents.

3. As noted in the Public Records Office response to PRA #18-120, Mr. Aguirre had several opportunities to controvert the statement in Draft Resolution L-522 regarding the waiver of his request for attorney-client privileged records. He did not raise the issue in his application for rehearing of Resolution L-522 or in his petition for writ of review of Resolution L-522 and D.17-08-033, the Commission's decision denying rehearing of Resolution L-522.

4. The records being withheld consist of confidential communications between Commission lawyers and Commissioners and other Commission staff made during the course of attorney-client relationships between Commission lawyers and other Commission employees, for the purposes of obtaining or providing legal consultation and advice.

5. Several of the 16 withheld documents are public documents that are attached to, and thus part of, confidential attorney-client privileged communications.

6. None of the confidential attorney-client communications associated with the 16 withheld documents were sent to, or received from, utility employees or representatives.

7. None of the confidential communications associated with the 16 withheld documents reference or involve any scheduling of meetings, or attempts to schedule meetings, between current or former Commissioners or other Commission employees and any current or former utility employees or representatives concerning SONGS.

8. The Commission is not aware of any indictments or criminal charges have been initiated against any former or current Commission employee that are based on communications between such individuals and former or current utility employees that relate to SONGS.

9. The Commission is withdrawing its attorney-client privilege claims with respect to many of the 16 withheld documents. Specifically, we are withdrawing our attorney-client privilege assertions for the documents identified as Documents 1, 2, 3, 4, 6, 8, , 11, 12, 13, and 16 in the document list in this Resolution. The Commission continues to assert its attorney-client privilege for portions of Documents 5, 7, 9, 14, and 15 which include confidential attorney-client communications, but is withdrawing its attorney-client privilege claims for the remainder of those documents. Prior to disclosure, the Commission will redact a portion of Document 3 which includes then Commissioner Picker's personal email address. The Commission continues to assert its attorney-client privilege as the basis for withholding Document 10.

CONCLUSIONS OF LAW

1. The general policy of the California Constitution and the PRA favors disclosure of records.
2. The Commission, through its Commissioners and other employees, has the right to communicate in confidence with Commission lawyers for the purposes of seeking legal advice and services, and receiving records reflecting the legal thoughts, advice, and work-product of its lawyers.

3. Records of confidential communications between Commission lawyers and Commissioners and other Commission employees, made during the course of confidential lawyer-client relationships, including portions of, or attachments to, such communications that are already in the hands of, or are available to, the public, are subject to the Commission's attorney-client privilege. Some such communications are also subject to the Commission's official information privilege, and attorney work product doctrine. (Cal. Evid. Code § 1040; Cal. Code. Civ. Proc. § 2018.010, *et seq*.)
4. Records that are subject to the Commission's attorney-client privilege, official information privilege, attorney-work product doctrine, or similar prohibition or exemption from disclosure, are exempt from disclosure in response to PRA 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."
5. Cal. Evid. Code § 956(a), which states that: "There is no privilege under this article if the services of the lawyers were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud," provides a limited exception to the attorney-client privilege that may result in review by a court of competent jurisdiction of attorney-client privilege assertions if a party makes an acceptable prima facie showing that: 1) the party asserting the attorney-client privilege committed or attempted to commit a crime or a fraud; 2) the party used its lawyers to commit or attempt to commit the crime or fraud; and 3) the records to which the party seeks access under the Cal. Evid. Code § 956(a) exception to the attorney-client privilege furthered the commission, or attempted commission, of a crime or fraud.
6. Records of confidential communications between Commission lawyers and Commissioners or other Commission employees that do not involve any scheduling of, or any attempt to schedule, any meeting – whether ex parte or otherwise – between any former or current Commissioner or other Commission employee, and any former or current utility employee or representative, regarding SONGS, do not support an assertion that the Commission committed or attempted to commit a crime or fraud related to SONGS. Nor do such records support an assertion that the Cal. Evid. Code § 956(a) exception to the attorney-client privilege applies to those attorney-client privileged documents.
7. The fact that a court issued a search warrant providing a law enforcement entity with access to a party's records does not constitute a prima facie showing that the party committed or attempted to commit a crime or a fraud, or trigger Cal. Evid. Code § 956(a).
8. The Cal. Evid. Code § 956(a) exception to the attorney-client privilege does not apply to documents that are subject to the attorney work product doctrine set forth in Cal. Code Civ. Proc. § 2018.010, *et seq*.

9. No statute requires a state agency to voluntarily waive its lawyer-client privilege whenever a person requesting records accuses the agency of engaging or using its lawyers to commit a crime or a fraud.

10. Cal. Gov't. Code § 6254.3(b) states in pertinent part that: "(1) Unless used by the employee to conduct public business, or necessary to identify a person in an otherwise discloseable communication, the personal email address of all employees of a public agency shall not be deemed to be public records and shall not be open to public inspection … (2) This subdivision shall not be construed to limit the public's right to access the content of an employee's email that is used to conduct public business, as decided by the California Supreme Court in City of San Jose v. Superior Court (2017) 2 Cal.5th 608."

11. A court with appropriate jurisdiction may in appropriate circumstances issue an order regarding whether records subject to an assertion of the attorney-client privilege are subject to the Cal. Evid. Code § 956(a) exception to the lawyer-client privilege. If such a court issues such an order regarding any of the withheld documents that are the subject of Ms. Severson's PRA #18-120 Appeal, the Commission should and will respond appropriately.

ORDER

1. Ms. Severson's Appeal of the Commission's Public Records Office response to the portion of the PRA #18-120 request seeking 16 attorney-client privileged documents records is granted, to the extent that this Resolution responds to her request that the Commission "make a factual record that the documents being withheld are in fact proper attorney client privilege records so the matter can be reviewed by the Appellate Court, and "review the contents of the writings to determine if there were unlawful ex parte communications related to the SONGS cost recovery case." (PRA #18-120 Appeal, p. 15.)

2. The portion of Ms. Severson's PRA #18-120 Appeal in which she requests that the Commission "Please release the 16 writings" is granted, to the extent we have, upon further reflection, decided to withdraw our prior privilege assertions regarding a number of the 16 withheld documents, or portions of documents, as stated in this Resolution and in Finding of Fact 9. To the extent we continue to assert our attorney-client privilege, and Cal. Gov't. Code § 6254(k), as a basis for withholding other documents, and portions of other documents, previously withheld in response to PRA #18-120, the portion of her PRA #18-120 Appeal in which she requests that we "release the 16 writings" is denied.

3. 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 January 10, 2019, and the following Commissioners approved favorably thereon:

/s/ **ALICE STEBBINS**
ALICE STEBBINS
Executive Director

MICHAEL PICKER
President
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
Commissioners