

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: August 23, 2012

Resolution No.: L-442

RESOLUTION

RESOLUTION AUTHORIZING DISCLOSURE OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION CONSUMER PROTECTION AND SAFETY DIVISION'S RECORDS OF ITS INVESTIGATION OF A SAN FRANCISCO MUNICIPAL TRANSIT AGENCY INCIDENT THAT OCCURRED ON FEBRUARY 8, 2009 AT THE INTERSECTION OF 2ND AND KING STREETS, IN SAN FRANCISCO, CALIFORNIA

BACKGROUND

On August 6, 2012, San Francisco Legal Support, Inc., served on the California Public Utilities Commission ("Commission") a subpoena seeking disclosure of records concerning the Commission's Consumer Protection and Safety Division investigation of a San Francisco Municipal Transit Agency ("SFMTA") incident that occurred on February 8, 2009, at the intersection of 2nd and King Streets, in San Francisco, California. The Commission's staff could not make the investigation records public without the formal approval of the full Commission. The San Francisco Legal Support, Inc's subpoena is treated as an appeal to the full Commission for the release of the requested records pursuant to Commission General Order 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 records.¹ These guidelines are embodied in General Order 66-C. G. O. 66-C § 1.1 provides that Commission's 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

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."

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 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 the San Francisco Legal Support, Inc.

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. Pro. § 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 has ordered disclosure of records and information concerning completed incident investigations on numerous occasions. The Commission has found that such disclosure will not interfere with the Commission’s investigations, and may lead to discovery of admissible evidence and aid in the resolution of litigation regarding the incident.²

The Commission investigation of the SFMTA incident was completed on June 6, 2011; 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 attorney-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 August 10, 2012 and will be on Commission’s Agenda Meeting on August 23, 2012. Pub. Util. Code § 311 (g)(1) generally requires that proposed resolutions be served on all parties and circulated for public comment at least 30 days before the Commission takes action regarding the draft resolution. Pub. Util. Code § 311 (g)(3) and Rule 14.6 (b) of the Commission’s Rules of Practice and Procedure provide that the Commission may reduce or waive the period for public review and comment regarding decisions authorizing disclosure of documents in the Commission’s possession when such disclosure is pursuant to

² See, e.g. Commission Resolution L-240 *Re San Diego Gas & Electric Company*, rehearing denied in D.93-05-020 (1993), 49 CPUC 2d 241.

a subpoena that requires prompt compliance with discovery deadlines. The comment period is waived under this authority.

FINDINGS OF FACT

1. The Commission was served a subpoena on August 6, 2012 by the San Francisco Legal Support, Inc., which seeks disclosure of the Commission investigation records concerning a SFMTA incident that occurred on February 8, 2009, at the intersection of 2nd and King Streets, in San Francisco, 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 SFMTA incident was completed on June 6, 2011; 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 attorney-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. G.O. 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 February 8, 2009 SFMTA incident at the intersection of 2nd and King Streets, in San Francisco, 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 February 8, 2009 SFMTA incident at the intersection of 2nd and King Streets, in San Francisco, California. Such privileged records should not be disclosed in response to the subpoena /deposition.
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."
8. Cal. Code Civ. Proc. § 2025.40 authorizes any party, deponent, or any other affected person to move for a protective order regarding a deposition.

ORDER

1. The request for disclosure of the Commission records concerning the investigation of a San Francisco Municipal Transit Agency that occurred on February 8, 2009, at the intersection of 2nd and King Streets, in San Francisco, 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 attorney-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 August 23, 2012, and that the following Commissioners approved it:

PAUL CLANON
Executive Director