

**Date of Issuance
October 21, 2011**

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California
Date: October 20, 2011
Resolution No.: L-423

RESOLUTION

**RESOLUTION AUTHORIZING DISCLOSURE OF THE
CALIFORNIA PUBLIC UTILITIES COMMISSION
CONSUMER PROTECTION AND SAFETY DIVISION'S
RECORDS OF ITS INVESTIGATION OF AN INJURY
INCIDENT ON SEPTEMBER 17, 2009, AT BALDWIN
AVENUE IN ARCADIA, CALIFORNIA, ONCE THE
INVESTIGATION IS COMPLETE**

BACKGROUND

On September 6, 2011, Second Image National 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 an injury incident on September 17, 2009, at Baldwin Avenue in Arcadia, California. The Commission's staff could not make the investigation records public without the formal approval of the full Commission. Second Image National 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's records.¹ These guidelines are embodied in General Order 66-C. G. O. 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

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".

staff's disclosure of "[r]ecords or information of a confidential nature furnished to or obtained by the Commission...including: (a) [r]ecords of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission 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 Second Image National.

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 prohibiting disclosure of the Commission's incident investigation records. The potentially applicable statutory restrictions on disclosure applicable here relate to "official information" obtained in confidence by a public employee in the course of his/her duties that has not been open or officially disclosed to the public. (Cal. Evid. Code § 1040(a)) and "personal

information” subject to the Information Practices Act of 1977 (“IPA”) (Cal. Civ. Code § 1798, *et seq.*).

OFFICIAL INFORMATION

Because there is no statute prohibiting disclosure of the Commission’s incident investigation records, the official information privilege governing information obtained in confidence by public employees during the course of their duties and not open, or officially disclosed, to the public is not absolute, and the Commission has discretion whether to exercise the privilege. (Cal. Evid. Code § 1040(b)). 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

Viewing the current subpoena for records within the context of these laws and policies, we note that Commission staff has not completed its investigation of this incident. Thus, disclosure of the investigation records would interfere with Commission staff’s ability to complete its incident investigation responsibilities.

PERSONAL INFORMATION

The IPA restricts the maintenance and dissemination of “personal information” maintained in the records of a state agency, and prohibits disclosure of “personal information in a manner that would link the information to the individual to whom it pertains,” except in specified circumstance. (Cal. Civ. Code § 1798.24). The IPA defines “personal information” as:

any information that is maintained by an agency that identifies or describes an individual, including but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual. (Cal. Civ. Code § 1798.3(a)).

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

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.

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 September 16, 2011, in accordance with Cal. Pub. Util. Code § 311(g). No comments were received.

FINDINGS OF FACT

1. The Commission was served a subpoena on September 6, 2011 by Second Image National which seeks disclosure of the Commission investigation records concerning injury incident on September 17, 2009, at Baldwin Avenue in Arcadia, California.
2. Access to the records in the Commission investigation file was denied in the absence of a Commission order authorizing disclosure.
3. The Commission's investigation of the injury incident is still open; therefore, the disclosure of the Commission investigation records would compromise the Commission's investigation.
4. At this time, the public interest does not favor disclosure of the requested Commission's investigation records.
5. Given the Commission's need to conduct its investigation effectively and efficiently, the public interest in non-disclosure of active investigation records outweighs the necessity for public disclosure at this time.
6. Once the investigation is complete, the public interest will favor disclosure with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission lawyer-client or other privilege.

CONCLUSIONS OF LAW

1. Where state evidence laws apply, a government agency's justification for withholding a public record in response to a subpoena or other discovery procedure must generally be based upon statutory prohibition, privilege, or other protection against disclosure. (Cal. Evid. Code § 911).
2. The Commission has, through G.O. 66-C § 2.2(a), limited Commission staff disclosure of investigation records and information in the absence of formal action by the Commission or disclosure during the course of a Commission proceeding. G.O. 66-C does not limit the Commission's ability to order disclosure of records and information.
3. The public interest in disclosure of records concerning the September 17, 2009, injury incident at Baldwin Avenue in Arcadia, California does not outweigh the necessity for disclosure in the interest of justice.
4. The subpoenaed records include "personal information" protected by the IPA. (Cal. Civ. Code § 1798.24(k)).
5. The subpoenaed investigation files do not include documents subject to the Commission lawyer-client, attorney work product, or similar privileges regarding the Commission's deliberations concerning the investigation of the September 17, 2009 injury incident at Baldwin Avenue in Arcadia, California.
6. Cal. Pub. Util. Code § 583 does not limit the Commission's ability to order disclosure of records.
7. Cal. Pub. Util. Code § 315 prohibits the introduction of accident reports filed with the Commission, or orders and recommendations issued by the Commission, "as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property".

ORDER

1. The request for disclosure of the Commission records concerning its investigation of an injury incident on September 17, 2009, at Baldwin Avenue in Arcadia, California, is authorized once the investigation is complete, at which time the Commission staff will release the requested records to Second Image National, located at San Dimas, California, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission's lawyer-client or other privilege.

2. The effective date of this order is today.

I certify that this Resolution was adopted by the California Public Utilities Commission at its regular meeting of October 20, 2011, and that the following Commissioners approved it:

/s/ PAUL CLANON

PAUL CLANON
Executive Director

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
Commissioners