

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: January 25, 2007

Resolution No. L-340

RESOLUTION**RESOLUTION AUTHORIZING DISCLOSURE OF COMMISSION
CONSUMER PROTECTION AND SAFETY DIVISION
INVESTIGATION RECORDS REGARDING AUGUST 5, 2005,
VEHICLE-TRAIN COLLISION AT HAGLE TREE FARM
PRIVATE HIGHWAY-RAIL CROSSING IN SOMIS,
CALIFORNIA, PURSUANT TO PUBLIC RECORDS ACT
REQUEST BY LAW OFFICES OF BOOTH & KOSKOFF****BACKGROUND**

A July 21, 2006, letter from Michael P. Soresi, Legal Investigator, Law Offices of Booth & Koskoff, seeks disclosure of records concerning the investigation by the California Public Utilities Commission's ("Commission") Consumer Protection and Safety Division of a vehicle-train collision on August 5, 2005, at the Hagle Tree Farm private highway-rail crossing in Somis, California (PUC Crossing No. E-420.08-X, DOT Crossing No. 745884T). Commission staff could not make the Commission's investigation records public without the formal approval of the Commission. Pursuant to Commission General Order 66-C, section 3.4, Mr. Soresi's letter is treated as appeal to the full Commission for release of the requested records.

DISCUSSION

The requested records are "public records" as defined by the California Public Records Act ("PRA").¹ The California Constitution, PRA, and discovery law favor disclosure of public records. The public has a constitutional right to access 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

¹ Cal. Gov't Code § 6250 *et seq.*

² Cal. Const. art. I, § 3(b)(1).

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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

The PRA provides that a an agency must base a decision to withhold a public record in response to a PRA request upon the specified exemptions listed in the Act, 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 Public Utilities Code section 583, and implemented its responsibility under Government Code section 6253.4 (a), by adopting guidelines for public access to Commission records. These guidelines are embodied in General Order 66-C. General Order 66-C, section 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, section 2.2 precludes 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.” 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 General Order 66-C, section 2.2(a) limits staff’s ability to disclose Commission investigation records in the absence of disclosure during a hearing or a Commission order authorizing disclosure, staff denies most initial requests and subpoenas for investigation records. Staff usually informs requesters of the option under General Order 66-C, section 3.4 to appeal to the Commission for disclosure of the records. If an appeal is received, staff prepares a draft resolution for the Commission’s consideration.

There is no statute forbidding disclosure of the Commission’s safety investigation records. During the past twelve years the Commission has ordered disclosure of records concerning completed safety incident investigations on numerous

³ Cal. Const. art. I, § 3(b)(2).

⁴ *Id.*

⁵ The fact that records may fall within a PRA exemption does not preclude the Commission from authorizing disclosure of the records. Except for records which may not be disclosed by law, PRA 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 Government Code § 6253 (e); *Black Panthers v. Kehoe* (1974) 42 Cal. App. 3d 645, 656.

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occasions.⁶ Disclosure does not interfere with its investigations, and may lead to discovery of admissible evidence and aid in the 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 (“IPA”).⁸ However, the IPA authorizes disclosure of personal information “[p]ursuant to the California Public Records Act.”⁹ While the PRA exempts personal information from mandatory disclosure, where disclosure would constitute an unwarranted invasion of personal privacy,¹⁰ no information in the current incident investigation file requires redaction.

The Commission has often stated that Public Utilities Code section 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.

COMMENTS ON DRAFT RESOLUTION:

The Draft Resolution of the Legal Division in this matter was mailed to the parties in interest on December 22, 2006, in accordance with Public Utilities Code section 311(g). Comments were filed on January 11, 2007, by Michael E. Murphy, Sims Law Firm, on behalf of Union Pacific Railroad Company (“Union Pacific”) and National Railroad Passenger Corporation (“Amtrak”). Reply

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.

⁷ See, e.g., Commission Resolutions L-240 *Re San Diego Gas & Electric Company*, rehearing denied in Decision 93-05-020, (1993) 49 CPUC 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).

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comments were filed on January 17, 2007,¹¹ by Roger E. Booth, Law Offices of Booth & Koskoff, the party seeking disclosure of the subject records.

Mr. Murphy states that Union Pacific may have provided documents to the Commission during the course of its investigation and, accordingly, Union Pacific objects to disclosure of the Commission's investigation records pursuant to the attorney-client privilege, work product protection, and California Evidence Code section 1040. Union Pacific and Amtrak also object to the disclosure based on 23 United States Code ("U.S.C.") section 409, because, according to Mr. Murphy, the Commission's investigation was for the purpose of potentially developing railroad-highway crossing improvements that were subsequently implemented using federal-aid funds, thereby making the Commission's records non-discoverable.

Mr. Booth responds that Mr. Murphy failed to specifically identify any purportedly protected documents and, therefore, neither Mr. Booth nor the Commission has any basis for addressing Mr. Murphy's claims of privilege. Mr. Booth notes that, in any event, such documents would have lost their privileged status once they were communicated to the Commission, pursuant to Evidence Code section 912. Mr. Booth also states that Evidence Code section 1040 applies only to official information that a public entity deems privileged and only if disclosure of the information would violate a specific statute or be against the public interest, and the Commission is the arbiter of what information in its files will be deemed confidential, not Union Pacific or Amtrak. Finally, Mr. Booth states that Mr. Murphy's argument regarding 23 U.S.C. section 409 relies on an overly expansive interpretation of that statute that has been rejected by the United States Supreme Court.

Union Pacific and Amtrak's objections to disclosure of the Commission's records based on the attorney-client privilege (California Evidence Code section 954) and attorney work product protection (California Code of Civil Procedure section 2018.010 *et seq.*) are without merit. If Union Pacific or Amtrak indeed had provided attorney-client privileged information or attorney work product to the Commission during the course of its investigation, the railroads, by communicating the information to the Commission, effectively waived the attorney-client privilege and work product protection.

Evidence Code section 912(a) provides:

¹¹ Mr. Booth states that his office did not receive Mr. Murphy's comments until January 16, and, therefore, Mr. Booth was unable to comply with the January 16 deadline for reply comments.

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[T]he right of any person to claim a privilege provided by Section 954 ... is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone.

Though not expressly defined by statute, waiver of work product protection has been found by California courts under the same circumstances as waiver of the attorney-client privilege, such as through disclosure of the protected information to a third party.¹² For example, in *McKesson HBOC, Inc. v. Superior Court*, the Court of Appeal for the First District held that a corporation waived the attorney-client privilege and work product protection for documents that its attorneys prepared because the corporation shared those documents with the government.¹³

Union Pacific and Amtrak's objection to disclosure of the Commission's records based on Evidence Code section 1040 is likewise without merit. Section 1040 grants a public entity a privilege to refuse to disclose official information, where disclosure is prohibited by law, or is against the public interest because there is a need to keep the information confidential that outweighs the necessity for disclosure in the interest of justice.¹⁴ It is a privilege held by the Commission, a public entity, and cannot be asserted by Union Pacific or Amtrak.

Finally, as to Union Pacific and Amtrak's objection to disclosure of the Commission's records based on 23 U.S.C. section 409, we agree that the railroads' reliance on that statute is misplaced and contrary to the U.S. Supreme Court's holding in *Pierce County v. Guillen* (2003) 537 U.S. 129.

Section 409 provides:

[R]eports ... or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to [23 U.S.C. sections 130, 144, and 148,] or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or

¹² See *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal. App. 4th 1229, 1238-39; *Wells Fargo Bank v. Superior Court* (2000) 22 Cal. 4th 201, 214; *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal. App. 3d 1240, 1261.

¹³ See *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal. App. 4th 1229, 1239-40.

¹⁴ Cal. Evid. Code § 1040(b).

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State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports ... or data.

Thus, Section 409 protects information gathered in connection with certain federal safety highway programs from discovery or admission into evidence in lawsuits. Mr. Booth notes that his firm's request for the Commission's records was made pursuant to the Freedom of Information Act¹⁵ and, thus, not discovery. In any event, as discussed above, Public Utilities Code section 315 sufficiently protects Union Pacific and Amtrak by prohibiting the admission of any Commission accident report, or of any related recommendations or orders, as evidence in an action for damages arising out of the subject accident or incident.¹⁶

Moreover, the U.S. Supreme Court recently held, in *Pierce County v. Guillen*, that Section 409 is inapplicable to information compiled or collected for purposes other than to implement a federal-aid funded highway safety improvement project, and held by a government agency not involved in administering the statutes governing federal funding of such projects.¹⁷ That another agency subsequently uses the information for purposes of a federal-aid funded highway safety improvement project does not then trigger Section 409 protection.¹⁸ This distinction is consistent with the Court's recognition that "statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth."¹⁹

Public Utilities Code section 315 mandates:

The commission shall investigate the cause of all accidents occurring within this State upon the property of any public utility or directly or indirectly arising from or connected with its maintenance and operation, resulting in loss of life or injury to person or property and requiring, in the judgment of the commission, investigation by it, and may make such order or recommendation with respect thereto as in its judgment seems just and reasonable.

¹⁵ The Freedom of Information Act applies to federal agencies. However, the Commission is subject to the very similar Public Records Act.

¹⁶ Cal. Pub. Util. Code § 315.

¹⁷ See *Pierce County v. Guillen* (2003) 537 U.S. 129, 145-146.

¹⁸ *Id.* at 144.

¹⁹ *Id.* at 144-145, citing *Baldrige v. Shapiro* (1982) 455 U.S. 345, 360.

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The records at issue here were created by the Commission in accordance with its authority and responsibility under Section 315 to investigate railroad-highway crossing accidents. Section 409 does not bar disclosure of the Commission's records even if, as Mr. Murphy seems to imply, the Ventura County Transportation Commission ("VCTC") has used the Commission's records to obtain federal-aid funds to improve the subject railroad-highway crossing. Nor is Section 409 protection triggered by the Commission's "demanding," as Mr. Murphy argues, that Union Pacific and the VCTC make improvements at the crossing.

Mr. Murphy argues that the public interest does not favor disclosure of the records sought here, because the purpose of Section 409 is to facilitate administrative candor. In rejecting a similar claim by a utility against disclosure because of its purported "chilling effect," the Commission held this argument to provide no basis for withholding the records at issue, and reminded the utility of its legal obligation to provide the Commission with accurate and complete reports of accidents as required by Public Utilities Code section 315.²⁰ Moreover, as discussed above, the California Constitution expressly grants the public a right to access government information, and requires that statutes and other authority limiting the public's right of access be narrowly construed.²¹

Mr. Murphy urges the Commission to follow the lead of the State of North Dakota, which, according to Mr. Murphy, has taken the position that its "open records" law cannot be used to circumvent the prohibitions of 23 U.S.C. section 409. Because we find that Section 409 is inapplicable here, we do not view our disclosure decision as circumventing this section.

FINDINGS OF FACT

1. The Commission received a letter seeking disclosure of Commission investigation records concerning vehicle-train collision that occurred on August 5, 2005, at the Hagle Tree Farm private highway-rail crossing in Somis, California (PUC Crossing No. E-420.08-X, DOT Crossing No. 745884T). Access to the records in the investigation file was denied in the absence of a Commission order authorizing disclosure.

²⁰ See *Re San Diego Gas & Electric Company* (1993) 49 CPUC 2d 241, 243.

²¹ Cal. Const. art. I, § 3(b)(1) and (2).

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2. The Commission's investigation of the August 5, 2005, accident is closed; therefore, the disclosure of the investigation records would not compromise the investigation.
3. The public interest favors disclosure of the requested investigation records.

CONCLUSIONS OF LAW

1. The documents in the requested investigation file and report are public records as defined by Government Code section 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. California Constitution, Article I, § 3 (b) (1) and (2).
3. The general policy of the Public Records Act favors disclosure of records.
4. Justification for withholding a public record in response to a Public Records Act request must be based on specific exemptions in the Public Records Act or upon a showing that, on the facts of a particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. Government Code section 6255.
5. The Commission has exercised its discretion under Public Utilities Code section 583 to limit 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 section 2.2 (a).
6. Public Utilities Code section 583 does not limit the Commission's ability to order disclosure of records.

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7. Public Utilities Code section 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’s records concerning the investigation of a vehicle-train collision on August 5, 2005, at the Hagle Tree Farm private highway-rail crossing in Somis, California, is granted.
2. The effective date of this order is today.

I certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting of January 25, 2007, and that the following Commissioners approved it:

STEVE LARSON
Executive Director