

**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Legal Division

San Francisco, California

Date: October 18, 2007

Resolution No. L-351

**RESOLUTION**

**RESOLUTION AUTHORIZING DISCLOSURE OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION CONSUMER PROTECTION AND SAFETY DIVISION'S INVESTIGATION OF THE UNION PACIFIC RAILROAD/HARSCO DERAILMENT THAT OCCURRED ON NOVEMBER 9, 2006, PURSUANT TO A PUBLIC RECORDS ACT REQUEST BY KEITH HAMPTON OF HAMPTON & RAWLINGS**

**BACKGROUND**

A September 4, 2007, e-mail from Keith Hampton of Hampton & Rawlings, seeks disclosure of records concerning the investigation by the California Public Utilities Commission ("Commission") Consumer Protection and Safety Division of the Union Pacific/Harsco derailment that occurred on November 9, 2006. The Commission staff could not make the investigation records public without the formal approval of the full Commission. Pursuant to Commission General Order 66-C, § 3.4, Mr. Hampton's letter is treated as an 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 ("CPRA").<sup>1</sup> The California Constitution, the CPRA, and discovery law favor disclosure of public records. The public has a constitutional right to access most government information.<sup>2</sup> Statutes, court rules, and other authority limiting access to information must be broadly construed if they further the people's right of access, and narrowly construed if they limit the right of access.<sup>3</sup> New statutes, court rules, or other authority that limit the right of access must be

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<sup>1</sup> Cal. Gov't Code § 6250, *et seq.*

<sup>2</sup> Cal. Const. Article I, § 3(b)(1).

<sup>3</sup> Cal. Const. Article I, § 3(b)(2).

adopted with findings demonstrating the interest protected by the limitation and the need to protect that interest.<sup>4</sup>

The CPRA provides that an agency must base a decision to withhold a public record in response to a CPRA request upon the specified exemptions listed in the CPRA, or a showing that, on the facts of a particular case, the public interest in confidentiality clearly outweighs the public interest in disclosure.<sup>5</sup>

The Commission has exercised its discretion under Cal. Pub. Util. Code § 583, and implemented its responsibility under Cal. Gov't Code § 6253.4(a), by adopting guidelines for public access to Commission records. These guidelines are embodied in General Order 66-C. General Order 66-C, § 1.1 provides that Commission records are public, except “as otherwise excluded by this General Order, statute, or other order, decision, or rule”. General Order 66-C § 2.2 precludes Commission staff’s disclosure of “[r]ecords or information of a confidential nature furnished to or obtained by the Commission ... including: (a) Records of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action”. General Order 66-C, § 2.2(a) covers both records provided by utilities in the course of a Commission investigation and investigation records generated by Commission staff.

Because General Order 66-C, § 2.2(a) limits Commission staff’s ability to disclose Commission investigation records in the absence of disclosure during a hearing or a Commission order authorizing disclosure, Commission staff denies most initial requests and subpoenas for investigation records. Commission staff usually informs requestors of the option under General Order 66-C, § 3.4 to appeal to the Commission for disclosure of the records. If an appeal is received, Commission staff prepares a draft resolution for the Commission consideration.

There is no statute forbidding disclosure of the Commission’s safety investigation records. With certain exceptions for incident reports filed with the Commission, we generally refrain from making most accident investigation records public until staff’s investigation of the incident is complete. Commission staff and management need to be able to engage in confidential deliberations regarding an accident investigation without concern for the litigation interests of plaintiffs or regulated entities.

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<sup>4</sup> *Id.*

<sup>5</sup> The fact that records may fall within a CPRA exemption does not preclude the Commission from authorizing disclosure of the records. Except for records subject to a law prohibiting disclosure, CPRA exemptions are discretionary, rather than mandatory, and the Commission is free to refrain from asserting such exemptions when it finds that disclosure is appropriate. *See* Cal. Gov't Code § 6253 (e); *Black Panthers v. Kehoe* (1974) 42 Cal. App. 3d 645, 656.

The Commission has ordered disclosure of records concerning completed safety incident investigations on numerous occasions.<sup>6</sup> Disclosure of such records 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.<sup>7</sup> Most of these resolutions responded to disclosure requests and/or subpoenas from individuals involved in electric or gas utility accidents or incidents, the families of such individuals, the legal representatives of such individuals or families, or the legal representatives of a defendant, or potential defendant, in litigation related to an accident or incident.

Portions of incident investigation records which include personal information may be subject to disclosure limitations in the Information Practices Act of 1977 (“IPA”).<sup>8</sup> However, the IPA authorizes disclosure of personal information “[p]ursuant to the [CPRA].”<sup>9</sup> The CPRA exempts personal information from mandatory disclosure, where disclosure would constitute an unwarranted invasion of personal privacy.<sup>10</sup> We will authorize disclosure of these investigation records with the exception of any information that requires redaction because its disclosure would constitute an unwarranted invasion of personal privacy, or because it is subject to the attorney-client privilege or another Commission held privilege limiting disclosure.

The Commission has often stated that Cal. Pub. Util. Code § 315, which expressly prohibits the introduction of accident reports filed with the Commission, or orders and recommendations issued by the Commission, “as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property,” offers utilities sufficient protection against injury caused by the release of requested investigation records.

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<sup>6</sup> 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.

<sup>7</sup> See, e.g., Commission Resolutions L-240 *Re San Diego Gas & Electric Company*, rehearing denied in Decision 93-05-020, (1993) 49 P.U.C. 2d 241; L-309 *Re Corona* (December 18, 2003); L-320 *Re Knutson* (August 25, 2005).

<sup>8</sup> Cal. Civ. Code § 1798, *et seq.*

<sup>9</sup> Cal. Civ. Code § 1798.24(g).

<sup>10</sup> Cal. Gov’t Code § 6254(c).

**COMMENTS ON DRAFT RESOLUTION**

The Draft Resolution of the Commission's Legal Division in this matter was mailed to the parties in interest on September 18, 2007, in accordance with Cal. Pub. Util. Code § 311(g). No comments or reply comments were received.

**FINDINGS OF FACT**

1. The Commission received from Keith Hampton of Hampton & Rawlings, an e-mail dated September 4, 2007, which seeks disclosure of the Commission's investigation records concerning the Union Pacific Railroad/Harsco derailment that occurred on November 9, 2006. Access to the records in the Commission's investigation file was denied in the absence of a Commission order authorizing disclosure.
2. The Commission's investigation of this incident is now complete.
3. The public interest favors 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 attorney-client or other privilege.

**CONCLUSIONS OF LAW**

1. The documents in the requested Commission's investigation file and report are public records as defined by Cal. Gov't Code § 6250, *et seq.*
2. The California Constitution favors disclosure of governmental records by, among other things, stating that the people have the right of access to information concerning the conduct of the peoples' business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny. Furthermore, the California Constitution also requires that statutes, court rules, and other authority favoring disclosure be broadly construed, and that statutes, court rules, and other authority limiting disclosure be construed narrowly; and that any new statutes, court rules, or other authority limiting disclosure be supported by findings determining the interest served by keeping information from the public and the need to protect that interest. Cal. Const. Article I, §§ 3(b)(1) and (2).
3. The general policy of the CPRA favors disclosure of records.
4. Justification for withholding a public record in response to a Public Records Act request must be based on specific exemptions in the CPRA or upon a

showing that, on the facts of a particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. *See* Cal. Gov't Code § 6255.

5. The Commission has exercised its discretion under Cal. Pub. Util. Code § 583 to limit Commission staff disclosure of investigation records in the absence of formal action by the Commission or disclosure during the course of a Commission proceeding. General Order 66-C, § 2.2 (a).
6. Cal. Pub. Util. Code § 583 does not limit the Commission 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 the investigation of the Union Pacific Railroad/Harsco derailment that occurred on November 9, 2006, is granted 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.
2. The effective date of this order is today.

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I certify that this Resolution was adopted by the California Public Utilities Commission at its regular meeting of October 18, 2007, and that the following Commissioners approved it:

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PAUL CLANON  
Executive Director