

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: April 24, 2008

Resolution No. L-361

RESOLUTION

RESOLUTION AUTHORIZING DISCLOSURE OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION CONSUMER PROTECTION AND SAFETY DIVISION'S RECORDS OF REGARDING INVESTIGATION OF A DECEMBER 4, 2006, ACCIDENT AT A WILMINGTON AVENUE RAILROAD CROSSING IN THE CITY OF CARSON, CALIFORNIA

BACKGROUND

Attorneys for Julissa Millan, plaintiff in a lawsuit against Associated Consolidators Express and other parties, including the California Public Utilities Commission ("Commission"), served on the Commission a set of Special Interrogatories ("Interrogatories") requesting that the Commission answer certain questions regarding a rail crossing on Wilmington Avenue in the City of Carson, California, and the Plaintiff's First Demand for Production of Documents ("Demand") seeking records regarding the rail crossing and the Commission's investigations of a December 4, 2006 accident at the crossing. The Commission is represented in this litigation by the California Attorney General's Office, and has been assisting in the required responses to the Interrogatories and Demand. The Interrogatories have been answered, and most of the requested documents have been provided, with the exception of those subject to the official information privilege set forth in Evidence Code § 1040, the lawyer-client privilege set forth in Evidence Code § 950 *et seq.*, and the attorney work product protections set forth in Code of Civil Procedure § 2018.10 *et seq.*

Pursuant to limitations imposed in General Order 66-C, staff could not make the investigation records public without the formal approval of the full Commission. Plaintiff's Demand is treated as an appeal to the full Commission for the release of the requested records pursuant to General Order 66-C, § 3.4. It was not possible to circulate a draft resolution authorizing the standard degree of disclosure of Commission rail crossing incident investigation records 30 days prior to the initial March 26, 2008 date for compliance with the Demand for Production of

Documents. Acknowledging the need for a timely discovery response, the Attorney General's Office, on behalf of the Commission, informed plaintiff that request for disclosure will be brought to the Commission for its review in April, 2008. In order complete in a timely manner the Commission's compliance with a discovery demand equivalent to a subpoena, it is necessary for the Commission to waive the usual comment period.

DISCUSSION

General Order 66-C

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. 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) [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 regulated entities in the course of a Commission investigation and investigation records generated by our staff.

Because General Order 66-C, § 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 records requests, subpoenas, and other discovery seeking investigation records. Section 2.2(a) covers investigation information provided to our staff, as Commission-generated records containing this information.

Although General Order 66-C, § 2.2(a) requires staff to deny most initial requests seeking Commission investigation records and information, and to object to subpoenas and other discovery efforts until the Commission has authorized disclosure, § 3.4 of the General Order permits those denied access to appeal to the Commission for disclosure. Subpoenas and demands for the production of documents implicitly include such an appeal. This resolution constitutes the Commission's response to the Plaintiff's First Demand for Production Of Documents.

¹ Cal. Pub. Util. Code § 583 states in part: "No information furnished to the [C]ommission by a public utility...shall be open to public inspection or made public except on order of the [C]ommission, or by the [C]ommission or a commissioner in the course of a hearing or proceeding".

Discovery Law

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 accident or incident investigation records, although Pub. Util. Code § 315 provides a clear statutory prohibition against the admissibility of such records as evidence in actions for damages arising from such accidents.

The Commission can and has asserted its lawyer-client, attorney work product, and official information privileges in response to the Demand, but finds it necessary to address further the official information privilege and other issues to the extent the Demand seeks the portions of investigation records we commonly disclose pursuant to formal Commission action regarding records requests and subpoenas seeking records in litigation to which the Commission is not a party.

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 Privilege

Cal. Evid. Code § 1040 provides government agencies with an absolute privilege to refrain from disclosing information obtained in confidence by public employees during the course of their duties and not open, or officially disclosed, to the public prior to the time a claim of privilege is made where disclosure is prohibited by

state or federal law, and a conditional privilege to refrain from disclosing such information where the public interest in nondisclosure outweighs the necessity for disclosure in the interest of justice.

Because there is no statute prohibiting disclosure of the Commission's accident investigation records, the absolute official information privilege in Evid. Code § 1040 (b)(1) does not apply.

The conditional official information privilege in Evid. Code § 1040 (b)(2) requires that we carefully balance interests for and against disclosure of information meeting the definition of official information. We have on numerous occasions authorized disclosure of most records of completed accident/incident investigations to the public in accord with the disclosure-favoring provisions of the California Constitution, Public Records Act, discovery laws, and similar guidance, with the belief that such disclosure serves the public's interest. We have generally 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

In certain situations we refrain from disclosing investigation records, such as where an investigation is still underway, where we are working with other governmental entities with overlapping regulatory or enforcement responsibilities, and/or where documents in an investigation file are subject to the lawyer-client, trade secret, or other privilege or restriction on disclosure. We will continue to exercise our judgment in determining whether the balancing of interests for and against disclosure favors nondisclosure of particular records or information

Information Practices Act

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)).

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.

The “personal information” in the records located in response to this demand for production of documents consists of the names individuals involved in accidents at the Wilmington Avenue crossing, and the names of railroad, city and Commission employees who provided information to or on behalf of the Commission. We do not consider the identity of employees of railroads or cities who sign documents submitted to the Commission during the performance of their work responsibilities to be the type of personal information the IPA is intended to protect. In any event, service of notice regarding this draft resolution provides reasonable notice that such “personal information” may be disclosed. (*See* Cal. Civ. Code § 1798.24(k)).

Public Utilities Code § 315

Pub. Util. Code § 315 states in relevant part that: “Neither the order or recommendation of the commission nor any accident report filed with the commission shall be admitted as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property.”

We have made clear in numerous Commission decisions and resolutions addressing accident and incident investigation records disclosure issues that Pub. Util. Code 315 prohibits their admissibility as evidence in actions for damages, although it does not bar disclosure of accident reports and investigation records.

Summary

Reviewing the current Demand for documents within the context of the above discussion of applicable laws and policies, we find that disclosure of the records in the Commission’s possession that are responsive to this Demand will not interfere with Commission staff’s ability to perform its safety responsibilities, to the extent disclosure covers only the portions of investigations records the Commission may through a resolution or other order choose to disclose. We authorize staff and the Attorney General’s Office to disclose investigation reports and related records not already provided in response to the Demand to the degree that we generally disclose such records through formal action. We do not authorize disclosure of records or information subject to the Commission’s lawyer-client or work product privileges, and/or other information subject to the official information privilege. Staff will refine disclosure with the assistance of the Attorney General’s Office.

COMMENTS ON DRAFT RESOLUTION

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 (c) (7) 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 subpoena. The Plaintiff's Demand for the Production of Documents is the functional equivalent of a subpoena, and similarly requires prompt compliance with discovery deadlines. The comment period is being waived under this authority.

FINDINGS OF FACT

1. Attorneys for Plaintiff Julissa Millan served on the Commission Interrogatories and a Demand for Production of Documents regarding a Wilmington Avenue rail crossing in the City of Carson that they consider relevant to litigation concerning a December 4, 2006, incident at the crossing. March 28, 2008 was the initial date specified for compliance with the Demand.
2. The Commission has responded to the Interrogatories and Demand, and provided the requested records with the exception of those subject to the lawyer-client privilege, attorney work production protection or official information privilege, and those requiring formal Commission approval for disclosure. The Commission's Response to the Demand stated that the Demand will be brought before the Commission in April, 2008, in order to complete a timely response to the Demand.
3. The Commission is not currently investigating any of the incidents that are the subject of the subpoenaed incident-specific or monthly incident reports listed in the subpoena, and, therefore, the disclosure of these reports would not compromise any Commission investigation.
4. At this time, the public interest favors disclosure of the requested Commission investigation records to the same extent such records would generally be disclosed by formal Commission action if the Commission were not a party to the litigation in which the records are sought.
5. The public interest does not favor disclosure of records subject to the lawyer-client privilege, attorney work production protection, or official information privilege, that are not generally disclosed by the Commission.

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 General Order 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. General Order 66-C does not limit the Commission's ability to order disclosure of records and information.

3. The public interest in nondisclosure of the records sought in the Demand does not outweigh the necessity for disclosure in the interest of justice, to the extent the Demand seeks records that are generally provided after formal Commission action in response to records requests, subpoenas, or other discovery, and are not subject to the Commission's lawyer-client privilege, attorney work product protection, or official information privilege as asserted regarding investigation records.
4. The subpoenaed records include little "personal information" as defined in the Information Practices Act. (Cal. Civ. Code § 1798 et seq.).
5. The service of this draft resolution provides notice that portions of the documents responsive to the Demand that contain personal information may be disclosed through the Commission's compliance with the Demand, and constitutes a reasonable attempt to provide notice in accord with Cal. Civ. Code § 1798.24(k).
6. The Commission should not authorize disclosure of records or information subject to the Commission's lawyer-client, attorney work product, or similar privileges.
7. Cal. Pub. Util. Code § 583 does not limit the Commission's ability to order disclosure of records.
8. 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. Commission staff and the Attorney General's office are granted authorization to disclose in response to the Plaintiff's First Demand for Production of Documents Commission records concerning investigations of automobile and train collisions at the Wilmington Avenue crossing in the City of Carson, 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 attorney-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 April 24, 2008, and that the following Commissioners approved it:

PAUL CLANON
Executive Director