PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California
Date: October 16, 2003
Resolution No. L-305

# R E S O L U T I O N

RESOLUTION AUTHORIZING DISCLOSURE OF COMMISSION CONSUMER SERVICES DIVISION (UTILITIES SAFETY BRANCH) RECORDS PURSUANT TO PUBLIC RECORDS ACT REQUESTS BY KEVIN DOWNES, ESQ., ON BEHALF OF TED W. PAGE ENTERPRISES, INC., AND ALISON MATHEWS, ESQ., ON BEHALF OF ANDREW M. WORSWICK AND GAIL E. DRAYTON, SEEKING DISCLOSURE OF COMMISSION STAFF INVESTIGATIVE RECORDS RELATING TO THE EXPLOSION THAT OCCURRED ON MARCH 1, 2002 ON PALISADES BEACH ROAD IN THE CITY OF SANTA MONICA (INCIDENT REPORT NO. GIR20020301-01).

## BACKGROUND

On December 1, 2002, Dennis Richens, the President of Concrete Coring Company, wrote to the Commission requesting the complete results of the CPUC investigation related to the fire and explosion that occurred on March 1, 2002 at or around 1319 Palisades Beach Road, Santa Monica California, including all reports generated. The incident was allegedly caused when a private contractor cutting concrete pavement hit a gas line with an electric saw, which ignited a gas fire and caused extensive property damage but no injuries or fatalities. This letter was presumed to be a request pursuant to the California Public Records Act (PRA).

On February 5, 2003, Commission staff counsel wrote to Mr. Richards, regarding this PRA Request, informing him that Commission investigation records could not be released because Public Utilities Code § 583 and General Order 66-C limit staff's disclosure of the accident records at issue in the absence of a Commission order, or disclosure in the course of a formal hearing or proceeding.[1]

[1] Public Utilities Code § 583 states: "No information furnished to the commission by a public utility . . . shall be open to public inspection . . . except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding . . .." PU Code § 583 "assures that staff will not

On April 2, 2003, the Commission received a subpoena for release of all reports, and supporting documents in connection with the Commission investigation of the fire and explosion that occurred on March 1, 2002 at or around 1319 Palisades Beach Road, Santa Monica California. The subpoena was issued by Mr. Kevin Downes, Esq., who represents Ted W. Page Enterprises, Inc., which does business as Concrete Coring Company. Another subpoena, requesting the same records, was issued by Ms. Alison Mathews, Esq., who represents Mr. Andrew M. Worwick and Ms. Gail E. Drayton. This subpoena was received by the Commission on July 14, 2003. Though not admissible in court, the release of these documents may result in early resolution of the matter.

## DISCUSSION

The requested investigation records and reports are "public records" as defined by the California Public Records Act (PRA). (Government Code § 6250 et seq.) The general policy of the PRA favors disclosure of public records, and a justification for withholding a public record in response to a PRA request must be found either among 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. In response to a subpoena for Commission records, a justification for withholding records must be based upon a privilege, since PRA exemptions have no impact on discovery. (Government Code § 6260.) Commission decisions regarding disclosure of public records must be consistent with the PRA and relevant discovery law.

The Commission has exercised its discretion under Public Utilities Code § 583, and implemented its responsibility under Government Code § 6253.4 (a), by adopting guidelines for public access to Commission records (General Order 66-C). These guidelines were adopted in Resolution L-151 "[i]n compliance with the legislative mandate and policy expressed in" the PRA, and are required by Government Code § 6253.4 (b) to be consistent with the PRA and reflect the intention of the Legislature to make agency records accessible to the public. The Commission must implement General Order 66-C, and other Commission regulations or decisions regarding disclosure, in a manner consistent with the PRA and other laws governing disclosure of records and information.

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 (a) provides the most relevant exclusion, for "Records of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action." Safety records excluded from mandatory

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disclose information received from regulated utilities unless that disclosure is in the context of a Commission proceeding or is otherwise ordered by the Commission." (Decision (D.) 91-12-019 (1991) 42 Cal. P.U.C. 2d 298, 300.)

disclosure by § 2.2 (a) are subject to one or more PRA exemptions, Evidence Code privileges, and/or other legal restrictions on disclosure. For example, Evidence Code § 6254 (f) exempts investigatory and security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes;[2] and Government Code § 6254 (k) exempts records, the disclosure of which is prohibited by law, or which are subject to a state or federal privilege against disclosure, including those listed in the Evidence Code. The primary Evidence Code privileges applicable to Commission incident investigation records include the lawyer client privilege (Evidence Code § 950 et seq.), and the official information privilege (Evidence Code § 1040). In some cases, other privileges or other restrictions on disclosure may also apply.

General Order 66-C § 2.2 (a), limits staff's ability to disclose Commission safety investigation records upon receipt of a PRA request or a subpoena in the absence of a Commission order authorizing disclosure or disclosure during the course of a proceeding. For this reason, staff denies most initial PRA requests, and subpoenas, seeking Commission investigation records, notes the General Order 66-C §3.4 option for appealing to the Commission for disclosure of the records, and, if an appeal is received, prepares a draft resolution for the Commission's consideration. Public Utilities Code § 583 does not in any way preclude Commission disclosure of information received from utilities. (See, e.g., *Re Southern California Edison* [Decision (D.) 91012-019] (1991) 42 CPUC 2d 298, 301; see also, *Southern California Edison Company v. Westinghouse Electric Corporation*, 892 Fed. 2d 778, 783 (9th Cir., 1989).) Nor, of course, does General Order 66-C, which in § 3.4 expressly notes the possibility for disclosure in response to an appeal of an initial denial of access to records. General Order 66-C §3.4 states:

> A person wishing to review records, which are not open to public inspection, may write to the Secretary in San Francisco, indicating the records being withheld, and stating the reasons why these records should be disclosed to him. Sufficient time must be allowed for the full Commission to review this request and the applicable records.

[2] Government Code § 6254 (f). Among other things, § 6254 (f) permits agencies to engage in confidential investigative deliberations before initiating formal enforcement proceedings. See, e.g., *Hanie v. Superior Court* (2001) 26 Cal.4th 1061. The Commission enforces safety laws directly and cooperates with law enforcement agencies in investigations that may result in civil or criminal sanctions. (See, e.g., Public Utilities Code §§ 2106-2112.) Commission safety investigations are primarily undertaken to determine: 1) whether a regulated entity has acted unlawfully; 2) what caused an incident; and 3) what steps may be taken to avoid future incidents. To the extent our investigation records are compiled for law enforcement purposes, they are exempt from mandatory disclosure under Government Code § 6254 (f). The Commission is not a traditional law enforcement agency such as a police department, and thus is not subject to the mandatory limited disclosure requirements of Government Code § 6254 (f)(2).

The fact that records may fall within a PRA exemption does not preclude the Commission from authorizing disclosure of the records. With the exception of the exemption for records the disclosure of which is barred 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, except as otherwise prohibited by law. (Government Code §6253 (e); *Black Panthers v. Kehoe* (1974) 42 Cal. App.3d 645, 656.)

Applying the relevant statutes to the facts of this case argues for the disclosure of the requested investigation records. One person suffered electric shock by contact with an electrical utility facility, and disclosure of the investigation records may assist in the settlement of litigation resulting from the accident. (See, Order Denying Rehearing of Resolution L-240 (1993) 49 CPUC 2d 241, 243.)

There are no compelling reasons to withhold the requested information. People who are injured are entitled to pursue discovery regarding the cause of the injury. We have during the past ten years ordered disclosure of records of numerous completed safety investigations, finding that disclosure of such records will not interfere with the Commission's investigations, but may lead to discovery of admissible evidence and aid in the resolution of litigation regarding the accident/incident under investigation. (E.g., Commission Resolutions L-240 *Re San Diego Gas & Electric Company*, rehearing denied in D.90-05-020 (1993) CPUC 2d 241; L-248 *Re Lopez 1* (April 26, 1995); L-249 (August 11, 1995); L-255 *Re Murrillo* (1997); L-257 *Re Johnson* (1997); L-260 *Re Banda* (1997); L-262 *Re Peralta and Boyadjian* (1997); L-263 *Re Schwab* (1997); L-265 *Re Johnson 2* (1998); L-271 *Re City of Pinole* (1998); L-272 *Re Johnson 3* (1998); L-273 *Re Disney* (1998); L-275 *Re Lopez* (1998); L-278 *Re Turner* (1999); L-279 *Re Rodriguez* (1999); L-280 *Re Kimball* (1999); L-286 *Re EBMUD* (1999); L-289 *Re Cornelius* (2000); L-290 *Re Grady Plumbing* (2000); L-291 *Re Morales* (2001); L-292 *Re White* (2001); L-295 *Re Maldonado-Colin* (2001); L-297 *Re Kuno's Grading* (2002); L-298 *Re Wilson* (2002); and L-300 *Re Teegardin* (2002). Most of these resolutions responded to disclosure requests and/or subpoenas from individuals involved in electric or gas utility incidents (accidents), 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/incident.

We have found that Public Utilities 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.

If accident reports filed by utilities with the Commission, or records of an investigation completed by Commission staff, contain any confidential personal information, or other

privileged or exempt information, the redaction of which is permitted by law, such information need not be disclosed. In this specific case, the investigation records appear to contain no information requiring redaction.

The Draft Resolution of the Legal Division in this matter was mailed to the parties in interest on September 16, 2003. In accordance with PU Code § 311(g), the parties have waived their right to a thirty-day notice and comment period. Comments were filed _____ by _____.

## FINDINGS OF FACT

1. On December 1, 2002, Dennis Richens, President of Concrete Coring Company, wrote to the Commission requesting the complete results of the CPUC investigation relating to the fire and explosion that occurred on March 1, 2002 at or around 1319 Palisades Beach Road in Santa Monica, California. The incident was allegedly caused when a private contractor cutting concrete pavement hit a gas line with an electric saw, which ignited a gas fire and caused extensive property damage but no injuries of fatalities.

2. On April 2, 2003, the Commission received a subpoena from Mr. Kevin Downes, Esq., who represents Ted W. Page Enterprises, which does business as Concrete Coring Company, requesting the complete results of the CPUC investigation relating to the fire and explosion that occurred on March 1, 2002 at or around 1319 Palisades Beach Road in Santa Monica, California.

3. On July 14, 2003, the Commission received a subpoena from Ms. Alison Mathews, Esq., who represents Mr. Andrew M. Worswick and Ms. Gail E. Drayton, requesting the complete results of the CPUC investigation relating to the fire and explosion that occurred on March 1, 2002 at or around 1319 Palisades Beach Road in Santa Monica, California.

4. The information in the requested Commission investigation records concerns a fire and explosion that occurred on March 1, 2002 at or around 1319 Palisades Beach Road in Santa Monica, California, and appears relevant to litigation concerning the incident.

5. The Commission's investigation of the fire and explosion has been closed, and, therefore the disclosure of the investigation records compiled by the Commission would not compromise the investigation.

6. The public interest favors disclosure of the requested investigation records.

## CONCLUSIONS OF LAW

1. The material in the requested investigation file and report are public records as defined by Government Code § 6250 et seq.

2. The general policy of the California Public Records Act favors disclosure of records.

3. 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 § 6255.)

4. Justification for withholding a public record in response to a subpoena or other discovery procedure must be based upon a privilege against disclosure, since Public Records Act exemptions have not effect of discovery. (Government Code § 6260.)

5. The Commission has exercised its discretion under Public Utilities Code § 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 § 2.2 (a).)

6. Public Utilities Code § 583 does not limit the Commission's disclosure of records.

## ORDER

1. The request for disclosure of the Commission's records concerning the investigation of an incident that occurred at or around 1319 Palisades Beach Road in Santa Monica, California, on March 1, 2002.

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 October 16, 2003 the following Commissioners approved it:

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WILLIAM AHERN
Executive Director