

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

Legal Division

San Francisco, California  
Date: October 29, 2009  
Resolution No. L-386

**RESOLUTION**

**RESOLUTION AUTHORIZING DISCLOSURE OF THE  
CALIFORNIA PUBLIC UTILITIES COMMISSION CONSUMER  
PROTECTION AND SAFETY DIVISION'S RECORDS OF ITS  
INVESTIGATION OF THE DERAILMENT OF SAN FRANCISCO  
MUNICIPAL TRANSIT AGENCY CABLE CAR # 12 THAT  
OCCURRED ON JULY 13, 2008**

**BACKGROUND**

On October 8, 2009, Spencer J. Pahlke of Walkup, Melodia, Kelly & Schoenberger, an attorney representing Alma Del Bosque in litigation regarding the derailment of San Francisco Municipal Transit Agency (SFMTA) Cable Car # 12 that occurred on July 13, 2008, 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 that incident. The Commission's staff could not make the investigation records public without the formal approval of the full Commission. The subpoena is treated as an appeal to the full Commission for the release of the requested records pursuant to Commission General Order (G. O.) 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 records.<sup>1</sup> These guidelines are embodied in G. O. 66-C. G. O. 66-C § 1.1 provides that Commission's records are public, except "as otherwise excluded by this General Order, statute, or other order, decision, or rule." G. O. 66-C § 2.2 precludes Commission staff's

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<sup>1</sup> 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."

disclosure of “Records 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 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 request and subpoenas for investigation records. Section 2.2(a) covers information provided by SFMTA to Commission staff in the course of Commission staff’s investigation, as well as Commission-generated records containing this information. G.O. 66-C § 3.4 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 Mr. Pahlke.

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. § 2017.010).

Cal. Evid. Code § 911 provides that: “Except as otherwise provided by statute: (a) No person has a privilege to refuse to be a witness; (b) No 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. Potentially applicable statutory restrictions on disclosure applicable here include the lawyer-client privilege (Cal. Evid. Code § 950 *et seq.*); attorney work product protection (Cal. Code Civ. Proc. § 2018.010); official information privilege, covering 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, where there is a statutory prohibition against disclosure

other necessity for confidential treatment (Cal. Evid. Code § 1040); and the Information Practices Act of 1977 (“IPA”) (Cal. Civ. Code § 1798, *et seq.*).

Because there is no statute prohibiting disclosure of the Commission’s incident investigation records, the Commission must review subpoenaed investigation records to determine whether one or more potentially relevant privileges apply, and, if so, whether the public’s interests are served by the Commission’s assertion of one or more such privileges. 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.<sup>2</sup>

Viewing the current subpoena for records within the context of these laws and policies, we note that Commission staff has completed its investigation of this incident and closed the incident administratively. Thus, disclosure of investigation records will not 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)).

The Commission maintains incident investigation files by incident numbers linked to the date and type of incident, rather by the name of individuals involved in the incident, and considers any information in the records to “pertain” to the incident, not to the individuals involved in the incident. The “personal information” in the records subpoenaed here primarily consists of references to Ms. Del Bosque, and to SFMTA and Commission staff. The identity of SFMTA and Commission employees, their job titles, contact information, and work-related statements are

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<sup>2</sup> 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.

generally not the type of “personal information” the IPA was designed to protect against inappropriate disclosure. (*See, e.g., Moghadam v. Regents of University of California* (2008) 169 Cal. App.4th 466.)

Cal. Civ. Code § 1798.24(c) authorizes disclosure of personal information to an authorized representative of the person to whom the records pertain, and § 1798.24(k) authorizes disclosure in response to a subpoena if the agency reasonably attempts to notify the individual to whom the record pertains. Since the subpoenaing party represents the interest of Ms. Del Bosque, and service of this resolution constitutes the Commission’s reasonable attempt to provide prior notice that “personal information” will be disclosed, the IPA provides no bar to our disclosure of any personal information in these investigation records.

### **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 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.

### **CONCLUSION**

The Commission’s investigation of the July 13, 2008 cable car derailment incident has been completed. Disclosure of the subpoenaed records at this time would not interfere with that investigation and will be disclosed in response to the subpoena, with the exception of any information which is subject to the Commission’s lawyer-client or other privilege.

### **COMMENTS ON DRAFT RESOLUTION**

The Draft Resolution of the Commission Legal Division in this matter was mailed to the parties in interest on October 19, 2009. No comments were received.

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 a subpoena that requires prompt compliance with discovery deadlines. The comment period is being reduced under this authority.

### **FINDINGS OF FACT**

1. On October 8, 2009, the Commission was served a subpoena on behalf of Alma Del Bosque which seeks disclosure of the Commission investigation records concerning the July 13, 2008 derailment of SFMTA Cable Car # 12.
2. Access to the records in the Commission's investigation files was denied in the absence of a Commission order authorizing disclosure.
3. The Commission's investigation of the incident is now closed; therefore, the disclosure of the Commission investigation records would not compromise the Commission's investigation.
4. The public interest generally favors disclosure of records of completed Commission investigations of incidents, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy or be inconsistent with the provisions of the IPA (Cal. Civ.Code § 1798 *et seq.*), or any information that is subject to the Commission's lawyer-client or other privilege.
5. The subpoenaing party represents the interests of Alma Del Bosque.

### **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 subpoenaed records may include "personal information" as defined in the IPA. (Cal. Civ. Code § 1798.3.)
4. The Commission maintains incident investigation files by incident numbers linked to the date and type of incident, rather by the name of individuals

involved in the incident, and considers any information in the records to “pertain” to the incident, not to the individuals involved in the incident.

5. The service of this resolution provides notice that the Commission intends to respond to a subpoena seeking records pertaining to the incident involving Ms. Del Bosque, and constitutes a reasonable attempt to comply with the notice requirements of Cal. Civ. Code § 1798.24(k).
6. Cal. Civ. Code § 1798.24(k) does not require that notice of the Commission’s intent to comply with the subpoena be provided to individual Commission staff, SFMTA employees, or other individuals identified in the subpoenaed investigation records, since the records do not pertain to those individuals.
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 records concerning its investigation of the July 13, 2008 derailment of San Francisco Municipal Transit Agency Cable Car # 12 will be disclosed in response to the subpoena served on behalf of Alma Del Bosque involved in litigation concerning the incident, with the exception of 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 29, 2009, and that the following Commissioners approved it:

/s/ PAUL CLANON

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PAUL CLANON  
Executive Director

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
TIMOTHY ALAN SIMON  
Commissioners