

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California  
Date: April 19, 2012  
Resolution No.: L-433

**RESOLUTION**

**RESOLUTION AUTHORIZING DISCLOSURE OF  
RECORDS OF THE CALIFORNIA PUBLIC UTILITIES  
COMMISSION CONSUMER PROTECTION AND SAFETY  
DIVISION'S INVESTIGATION OF SOUTHERN  
CALIFORNIA EDISON COMPANY ELECTRIC LINE  
SPACING IN CAMARILLO/MOORPARK/THOUSAND  
OAKS, CALIFORNIA**

**BACKGROUND**

The California Public Utilities Commission ("Commission") received a request from Vicky Rathje, seeking disclosure of the Commission Consumer Protection and Safety Division's investigation records of Southern California Edison Company (SCE) electric line spacing in Camarillo/Moorpark/Thousand Oaks, California. The Commission staff could not make the investigation records public without the formal approval of the full Commission. Ms. Rathje's letter is treated as an appeal to the full Commission for release of the requested records pursuant to Commission General Order 66-C § 3.4.

**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>

<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).

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.<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 that their subpoena or public records request will be treated as an appeal under General Order 66-C § 3.4 for disclosure of the records.

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 Commission staff’s investigation of the incident is complete. Commission staff and management need to be able to engage in confidential deliberations regarding

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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.

an incident investigation without concern for the litigation interests of plaintiffs or regulated entities.

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> 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> Incident investigation records may include information subject to the lawyer-client privilege, official information privilege, or similar disclosure limitations. The CPRA exempts such information from disclosure.<sup>11</sup>

The Commission investigation of SCE electric line spacing in Camarillo/Moorpark/Thousand Oaks, California, is complete; therefore, the public interest favors disclosure of the requested Commission’s investigation records, 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’s lawyer-client or other privilege.

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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).

<sup>11</sup> Cal. Gov’t. Code § 6254(k).

**COMMENTS ON DRAFT RESOLUTION**

The Draft Resolution of the Commission's Legal Division in this matter was mailed to the parties in interest on March 7, 2012, in accordance with Cal. Pub. Util. Code § 311(g).

SCE filed comments on April 9, 2012. Time Warner Cable (Time Warner) filed comments on April 16, 2012. Vicky and Jesper Rathje filed reply comments on April 16, 2012.

**SCE COMMENTS**

SCE objects to disclosure of the investigation records on the following grounds:

- 1) The records relate to an investigation stemming from the Nightsky Fire which began October 21, 2007. SCE and Time Warner are currently being sued by Vicky and Jesper Rathje for property damage related to the fire. The matter is unresolved, trial is scheduled to commence May 1, 2012, and the period for discovery in that litigation is now closed.
- 2) The records were not subpoenaed pursuant to Cal. Code of Civil Procedure (CCP) Section 1987 and no formal notice of the intent to disclose the subject records was provided to the other party, Time Warner, subject to the investigation. Thus, Time Warner has not been given an opportunity to comment on the draft resolution and the release of potentially protected materials which relate to it.
- 3) The records request from the civil plaintiff, Vicky Rathje, is a blatant attempt to obtain discovery which has now been foreclosed as a matter of law. "This case has been actively litigated for several years and the plaintiffs in this action elected not to obtain records from the Commission in the ordinary course of discovery. No records were sought within the ordinary discovery period and no depositions of Commission investigators were requested."
- 4) Cal. Gov't Code § 6254 lists records which are exempt from disclosure pursuant to the CPRA, and § 6254 (k) "prevents from disclosure records which are 'exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.' In this case, California law, as contained in the above referenced discovery statutes, precludes discovery past the statutory cutoff periods. These statutes were created to provide some finality to discovery and permit a testing of the evidence in a reasonable time-frame. Allowing a civil plaintiff to acquire the subject information at this late date would only serve to prejudice SCE and potentially act to delay the trial."

5) “Lastly, to the extent SCE has provided information to the Commission under the assumption that the materials would remain confidential pursuant to Public Utilities Code Sections 315, 583, and paragraph 2.1 of General Order 66-C, disclosing these materials could have a chilling effect on future investigation fact gathering.”

6) SCE requests that the Commission’s investigations materials remain confidential until the civil action related to the Nightsky fire is completed, and that its responses to data requests or any other communications between SCE and the Commission remain confidential until that time. SCE also asks that Time Warner be given an opportunity to comment as these records potentially relate to them as well.

### **TIME WARNER COMMENTS**

Time Warner echoes SCE’s comments regarding the discovery cutoff periods associated with the property damage litigation instituted by Vicki and Jesper Rathje. Time Warner complains of the lack of notice regarding the Rathje records request and the Commission’s responsive draft resolution. Time Warner further asserts that it believes the records were not subpoenaed pursuant to CCP 1987 and that no notice was given of the intent to disclose these records, and that if Time Warner had not been advised of Ms. Rathje’s efforts by SCE, Time Warner would never have known about this unauthorized request, for which leave of court is required.

Time Warner: “vehemently joins with counsel for Edison in objecting to the release of these records and also asserts objections under Public Utilities Code Sections 315, 583, and paragraph 2.1 of General Order 66-C.”

Time Warner’s lawyer states that: “Given that my client never received notice of Ms. Rathje’s request, I would request at least thirty (30) days to more fully respond and expand upon my points made hereinabove.”

### **RATHJE REPLY COMMENTS**

Ms. Rathje replies with references to judicial decisions noting that: the public has a right to review the government’s conduct of its business (*CBS v. Block* (1986) 42 Cal.3d 646, 654); unless exempted, all public records may be examined by any member of the public, with no greater interest than idle curiosity (*ACLU v. Superior Court* (2011) 202 Cal.App.4th 55, 67; exemptions must be narrowly construed, and the agency bears the burden of proving that an exemption applies (*Id.*); and that the CPRA includes two exception to the general policy of disclosure of public records: (1) materials expressly exempt from disclosure pursuant to

Gov't. Code § 6254; and (2) the “catchall” exemption of § 6255, which allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure. (*Id.*) Rathje argues that neither of these exceptions apply here.

Rathje contends that the Discovery Act provisions cited by SCE do not impose an evidentiary privilege against disclosure, and deal merely with the timing, not the scope, of permissible discovery. Rathje notes that the disclosability of documents under the CPRA is simply unrelated to civil discovery. She states that “A litigant’s right to obtain public records is not limited to those obtainable in civil discovery, but extends to the ‘broader’ categories of documents available under the CPRA” citing *Wilder v. Superior Court* (1998) 66 Cal.App.4th 77.83). She notes that *Wilder* contrasted civil discovery, which is limited to matters relevant to the subject matter of the litigation, to CPRA requests, which can cover anything the person making the request suspects the agency may have in its files.

Rathje claims the discovery cutoff is irrelevant since the availability of documents under the CPRA is unrelated to whether they would be available in litigation, citing *Pullin v. Superior Court* (2000) 81 Cal.App.4th 1161, 1162, 1165, fn4.

Rathje goes on to note that, as the Commission has stated in D.93-05-020, D.91-12-019, and D.06-01-047, § 315, § 583, and General Order 66-C do not present substantive barriers to the Commission’s disclosure of incident investigation records.

Finally, Rathje attacks SCE’s “thinly-veiled threat that ‘disclosing these materials could have a chilling effect on future investigation fact gathering,’” and points out that:

The PUC has rightly condemned such tactics. An electric utility made a similar argument in *Re San Diego Gas and Electric Company*, *supra*, 1993 WL 767174, in which SDG&E opposed disclosure of an accident report on the grounds that “[t]he threat of litigation and public scorn could have a chilling effect on the substance and candor of a utility’s report to the Commission.” (*Id.* at p. 3.) The PUC did not knuckle under. “We shall take this opportunity to remind SDG&E and all public utilities subject to our jurisdiction that they are under a legal obligation to provide the Commission with an accurate report of each accident. (Citations.) Withholding of such information or lack of complete candor with the Commission regarding accidents

would of course result in severe consequences for any public utility. SDG&E's argument in no way provides a basis for withholding the report at issue." (*Ibid.*, *emphasis added.*) (Reply Comments, p. 5.)

Rathje notes that similar arguments have been ejected by the courts as well, citing *CBS, Inc. v. Block, supra*, 42 Cal.3d at p. 653, and *State of California ex rel. Division of Public Safety v Superior Court*, 43 Cal.App.3d 778, 786.

### **RESPONSE TO COMMENTS AND REPLY COMMENTS**

We acknowledge that we might have been clearer as to the scope of the records we propose to release pursuant to Draft Resolution L-433. The records subject to Draft Resolution L-433 concern a staff inquiry regarding line spacing issues in 2011, and SCE's response, rather than the Commission's investigation of the October 21, 2007 Nightsky Fire. It is possible that SCE and Time Warner misunderstand the very limited scope of the records subject to Draft Resolution L-433.

The recent staff inquiry was initiated in response to concerns expressed late last year by the Rathjes about what they perceived as potentially inadequate spacing between SCE conductors and communications lines on towers in Moorpark, California. The Commission's CPSD sent SCE several data requests, to which SCE responded with information derived in part from a power and communication line survey dated November 2011. There are approximately 15 pages of such documents.

When the Commission received Ms. Rathje's most recent records request, staff informed them that the staff could not release the records of staff's investigation initiated in response to their complaint regarding line spacing, since the Commission had not yet authorized disclosure.

The only reason a Commission resolution authorizing disclosure of these particular records was necessary was the fact that the Commission staff involved in the recent line spacing investigation that resulted in the limited number of records at issue here did not consider the records to be associated with the Commission's investigation of the Nightsky Fire.

In response to a prior records request of Ms. Rathje, the staff prepared and circulated for public comment a draft resolution authorizing disclosure of Commission records associated with staff's investigation of the Nightsky Fire. The service list for that draft resolution includes an attorney for Time Warner from the same law firm that now complains of a lack of notice. In December 2009, the

Commission issued Resolution L-387, which authorized disclosure of the records of the Commission's investigation of the Nightsky Fire.

In a letter dated January 4, 2010, Ashley R. Leach, of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, requested: "all public records relative to the above-stated resolution number [L-387] involving a brush fire that occurred on or about October 21, 2007." Ms. Leach stated that: "We represent Time Warner Cable, which was a party to the initial investigation of the subject fire."

On January 12, 2010, Commission staff replied that:

You ask the California Public Utilities Commission (Commission) to provide you with a complete copy of the Commission's file regarding an electrical incident that occurred on October 21, 2007 at 13545 Nightsky Drive, Camarillo, California.

The Commission granted authority to disclose records relating to this incident pursuant to Resolution L-387 at its formal meeting on December 17, 2009. Enclosed please find copy of the documents as well as three CDs responsive to your request.

Ms. Rathje's prior records request, and the Commission's response thereto, resulted in a Commission order authorizing disclosure of the Nightsky Fire investigation records long before any recent discovery cutoff date. The time for commenting on, or objecting to, the Commission's disclosure of its Nightsky Fire investigation records has long since lapsed.

Regarding notice to Time Warner regarding the specific disclosures contemplated in Draft Resolution L-433, we note that Rule 14.2 (c)(2) of our Rules of Practice and Procedure provides that:

A draft resolution disposing of a request for disclosure of documents in the Commission's possession shall be served on (A) the person who requested the disclosure, (B) any Commission regulate about which information protected by Public Utilities Code Section 583 would be disclosed if the request were granted, and (C) any person (whether or not a Commission regulate) who, pursuant to protective order, had submitted information to the Commission, which information would be disclosed if the request were granted.

Ms. Rathje, the person who requested the records at issue, is on the service list, as is SCE, the utility whose data request responses would be disclosed if the requested disclosure is granted. Therefore, Draft Resolution L-433 was properly served in accord with our Rules.

While in retrospect it might have been a good idea to serve Draft Resolution L-433 on Time Warner as well, the absence of such notice did not violate our Rules or deprive Time Warner of an essential opportunity to object to the disclosure of the recent SCE survey records, and the records of associated communications between SCE and Commission staff. The records to be disclosed were not provided to the Commission by Time Warner, and do not relate to Time Warner in any way beyond reflecting the fact that Time Warner lines were present on towers that also held SCE lines.

We do not believe it is necessary to become involved in the details of discovery timing disputes between SCE, Time Warner, and the Rathjes. We have, since at least 1993, distinguished between the disclosability of records, and their admissibility as evidence in litigation. (*See, e.g.*, D.93-05-020 (1993) 49 CPUC 2d 241, 242.)

The fact that a member of the public may be a party in litigation does not preclude him or her from making CPRA requests. (*See, e.g., Wilder v. Superior Court* (1998) 66 Cal.App.4th 477.) The CPRA does not allow limitations on access to a public record based on the purpose for which the record is requested, if the record is otherwise subject to disclosure. (Cal. Gov't. Code § 6257.5.)

Cal. Gov't Code § 6254(k) does not "prevent" disclosures. It does, however, offer an exemption from mandatory disclosure which the Commission often asserts in appropriate circumstances.

As we have stated in numerous resolutions authorizing disclosure of investigation records, Cal. Pub. Util. Code §§ 315 and 583, and General Order 66-C do not limit our disclosure of accident reports or investigation records, although § 315 does limit the admissibility of accident reports filed with the Commission, and orders or recommendations of the Commission, in actions for damages relating to accidents involving regulated utilities. Given our long history of responding to records requests and discovery seeking access to incident reports and investigation records by authorizing disclosure of completed incident investigation records subject to limited redactions of privileged and personal information, any general assumption by SCE that we will now refrain from following our longstanding practice is unrealistic.

We affirm our prior rejection of the “chilling effect” argument made by SCE, for the reasons stated in D.93-05-020, *supra*, and in judicial decisions referenced in the Reply Comments.

### **FINDINGS OF FACT**

1. The Commission received a request for the disclosure of the Commission’s investigation records concerning SCE electric line spacing in Camarillo/Moorpark/Thousand Oaks, California. Access to the records in the Commission’s investigation file was denied in the absence of a Commission order authorizing disclosure.
2. The Commission investigation of SCE electric line spacing in Camarillo/Moorpark/Thousand Oaks, California, has been completed; therefore, the public interest favors disclosure of the requested Commission’s investigation records, 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’s lawyer-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 CPRA 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. Cal. Gov’t. Code § 6255.

- 5. Cal. Gov't Code § 6254(c) exempts from mandatory disclosure personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy.
- 6. Cal. Gov't Code § 6254(k) exempts from disclosure records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.
- 7. 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).
- 8. Cal. Pub. Util. Code § 583 does not limit the Commission's ability to order disclosure of records.

**ORDER**

- 1. The request for disclosure of records concerning the Commission's investigation of Southern California Edison Company electric line spacing in Camarillo/Moorpark/Thousand Oaks, California, 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'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 April 19, 2012 and that the following Commissioners approved it:

/s/      PAUL CLANON  
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 PAUL CLANON  
 Executive Director

MICHAEL R. PEEVEY  
 President  
 TIMOTHY ALAN SIMON  
 MICHEL PETER FLORIO  
 CATHERINE J.K. SANDOVAL  
 MARK J. FERRON  
 Commissioners