

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: October 16, 2003

Resolution No. L-307

RESOLUTION

RESOLUTION AUTHORIZING DISCLOSURE OF COMMISSION CONSUMER SERVICES DIVISION (UTILITIES SAFETY BRANCH) RECORDS PURSUANT TO PUBLIC RECORDS ACT REQUEST BY RICHARD A. COHN, ESQ., ON BEHALF OF FRANCILENE M. KINCANNON, SEEKING DISCLOSURE OF COMMISSION STAFF INVESTIGATIVE RECORDS RELATING TO THE DEATH OF JOHN A. KINCANNON IN AFTER HE CONTACTED A SOUTHERN CALIFORNIA EDISON ELECTRIC LINE IN SANTA ANA, CALIFORNIA ON AUGUST 10, 2002 (ELECTRIC INCIDENT REPORT (EIR) 20020811-01).

BACKGROUND

On September 23, 2003, Richard A. Cohn of the Law Offices of Aitken, Aitken & Cohn, subpoenaed the Commission requesting the complete records of the CPUC investigation related to the death of Mr. John A. Kincannon after he came in contact with a Southern California Edison Company electric line on August 10, 2002 in Santa Ana, California. Mr. Cohn represents Francilene M. Kincannon, et al. in a claim arising from this incident.

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

Though not admissible in court, the release of these documents may result in early resolution of the matter.

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 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.)

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 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

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).

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.

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 died as a result of contact with an electric line, 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.

The Draft Resolution of the Legal Division in this matter was mailed to the parties in interest on September 30, 2003, in accordance with PU Code § 311(g). No comments were received.

FINDINGS OF FACT

1. On September 23, 2003, Mr. Richard A. Cohn of the Law Offices of Aitken, Aitken & Cohn, subpoenaed the Commission requesting the complete records

of the CPUC investigation relating to the death of Mr. John A. Kincannon in Santa Ana, California on August 10, 2002. Mr. Kincannon died when a tool he was using contacted a Southern California Edison Company electric line. Mr. Richard Cohn represents Ms. Francilene M. Kincannon, et al. in a claim arising from this incident.

2. The information in the requested Commission investigation records concerns the death of Mr. John A. Kincannon, and appears relevant to litigation concerning the incident in which Mr. Kincannon died.
3. The Commission's investigation of the August 10, 2002 death of Mr. Kincannon has been closed, and, therefore the disclosure of the investigation records compiled by the Commission would not compromise the investigation.
4. 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 in Santa Ana, California, on August 10, 2002, when Mr. John A. Kincannon was electrocuted when a tool he was using contacted a Southern California Edison Company electric line, is granted, subject to the redaction of portions of the record that are subject to the Commission's lawyer-client, attorney work product, and similar privileges.
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:

WILLIAM AHERN
Executive Director

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners