PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

Los Angeles, California
Date: October 6, 2005
Resolution No. L-322

R E S O L U T I O N

RESOLUTION AUTHORIZING DISCLOSURE OF COMMISSION CONSUMER PROTECTION AND SAFETY DIVISION (UTILITY SAFETY AND RELIABILITY BRANCH) INVESTIGATION RECORDS PURSUANT TO SUBPOENA OF GORDON & REES LLP ON BEHALF OF ASPLUNDH TREE EXPERT CO. SEEKING DISCLOSURE OF COMMISSION RECORDS RELATING TO A MARCH 18, 2003 INCIDENT INVOLVING THE FACILITIES OF SOUTHERN CALIFORNIA EDISON COMPANY IN THE CITY OF MOORPARK, CALIFORNIA. (INCIDENT NO. EIR20030318-02).

BACKGROUND

Attorneys with the law firm of Gordon & Rees LLP, representing Asplundh Tree Expert Co. (Asplundh), issued a subpoena for records of the California Public Utilities Commission (Commission) relating to the Commission's investigation of an incident that occurred on March 18, 2003, when Francisco Menchaque, an employee of Rodeo Farm Labor, was fatally injured in an avocado orchard. An aluminum ladder apparently made contact with the westernmost phase of the three-phase tapline of the Zone 16kV circuit out of Moorpark Substation.

On September 16, 2005, Commission staff advised Gordon & Rees LLP in writing that staff could not disclose the investigative records in the absence of authorization by the Commission. General Order (G.O.) 66-C, the Commission's guideline for public access to Commission records, provides in § 1.1 that Commission 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 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." Section 2.2 (a) covers confidential information provided by Southern California Edison Company to Commission staff in the course of staff's investigation, as well as Commission-generated records containing this information.

Although G.O. 66-C § 2.2(a) requires staff to deny most initial requests seeking Commission investigation records and information, and to object to such subpoenas until the Commission has authorized disclosure, § 3.4 of the G.O. 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 subpoenas served on behalf of Asplundh.

DISCUSSION

The Code of Civil Procedure 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. (Code of Civil Procedure § 2017 (a).)

Evidence 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. (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. 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 duties that has not been open or officially disclosed to the public (Evidence Code § 1040 (a)) and "personal information" pursuant to the Information Practices Act (IPA) (Civil Code § 1798, et seq.).

The records include information provided by Southern California Edison Company related to the incident for which confidential treatment was requested. Because there is no statute prohibiting disclosure of the Commission's incident investigation records, the official information privilege is not absolute, and the Commission has discretion whether to exercise the privilege. (Evidence Code § 1040 (b).) During the past twelve years 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.[1]

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 staff's ability to complete its incident investigation responsibilities.

The IPA is generally intended to restrict disclosure of information that it is not otherwise public that is obtained from "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." (Civil 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, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual.

(Civil Code § 1798.3(a).)

The only "personal information" in the records subpoenaed here consists of references to Francisco Menchaque, the name of an attending physician, the name and address of the owner of property where the incident occurred, the names of Commission staff and other government employees, and the names of regulated entity employees, and statements attributed to these employees. Most of this information is not restricted from disclosure because: (1) it is otherwise public; (2) it does not link the individual with other "personal information" in the records; or (3) by service of this resolution, the Commission made a reasonable attempt pursuant to Civil Code § 1798.24(k) to provide notice that "personal information" will be disclosed. Moreover, because Francisco Menchaque is deceased, there is no surviving right of privacy. Counsel for Asplundh has been advised that, if necessary, "personal information" will be redacted from the records.

We strongly discourage litigants from seeking the testimony of Commission employees regarding incident investigations. The provision of such testimony at depositions or trials often greatly interferes with staff's vital work conducting safety inspections and incident investigations, and thus with the Commission's efficient implementation of its regulatory responsibilities, since staff must adjust normal workload to accommodate the often

[1] *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.

changing schedule of a subpoenaed appearance. Further, litigants frequently inappropriately seek staff testimony regarding legal issues and Commission policy determinations beyond the scope of their knowledge or authority. Here, counsel for Asplundh has agreed that if the Commission records are produced, a custodian of records will not be required to appear for deposition.

COMMENTS ON DRAFT RESOLUTION

Public Utilities Code § 311 (g)(1) generally requires that proposed resolutions be served on all parties and subject to at least 30 days public review and comment before the Commission may vote on them. Section 311 (g)(3) and Rule 77.7 (f)(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 comment period is being waived under this authority.

FINDINGS OF FACT

1. The Commission received a subpoena from the law firm of Gordon & Rees LLP, representing Asplundh, seeking Commission records concerning the investigation of an incident on March 18, 2003 involving Francisco Menchaque and Southern California Edison Company.

2. Commission staff has completed its investigation of this incident and closed the incident administratively. Thus, disclosure of investigation records and information will not interfere with staff's ability to complete its incident investigation responsibilities.

3. The subpoenaed records include "personal information" in the form of references to the names of individuals, including Commission staff and other government employees involved in reporting and investigating the incident, the name and address of the owner of the property where the incident occurred, the name of an attending physician, and the identity of regulated entity employees and their statements related to the incident.

4. The draft resolution was served on counsel for Asplundh, Gordon & Rees LLP, and counsel for Southern California Edison Company.

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

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 a statutory prohibition, privilege, or other protection against disclosure. (Evidence Code § 911.)

2. The Commission has through G.O. 66-C § 2.2 (a) limited 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 public interest in nondisclosure of records concerning Incident EIR20030318-02 does not outweigh the necessity for disclosure in the interest of justice.

4. The subpoenaed records include "personal information" protected by the IPA. (Civil Code § 1798, et seq.)

5. The service of this resolution provides notice that the records include "personal information" related to employees of Southern California Edison Company and constitutes a reasonable attempt to provide notice pursuant to Civil Code § 1798.24(k).

6. The names of Commission staff, other government employees and employees of Southern California Edison Company are not "personal information" restricted from disclosure by the IPA if the information is otherwise public information or does not link the individual to any other "personal information" pertaining to that individual in the records.

7. The IPA does not restrict disclosures of "personal information" related to Francisco Menchaque because his right of privacy does not survive.

ORDER

1. Subject to the redaction of "personal information" of persons other than Francisco Menchaque and Southern California Edison Company employees that (1) is not public information; or (2) links the individual to any other "personal information" pertaining to that individual in the records, the Commission's records concerning

an incident that occurred on March 18, 2003 at Moorpark, California, and the investigation of that incident shall be disclosed in response to the subpoena served on behalf of Asplundh.

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 6, 2005 and that the following Commissioners approved it:

/s/ STEVE LARSON

STEVE LARSON
Executive Director

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
Commissioners

Commissioner John A. Bohn, being necessarily absent, did not participate.