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8-11-15  
02:23 PM

MP6/ek4 8/11/2015

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

Order Instituting Rulemaking to Improve  
Public Access to Public Records Pursuant to  
the California Public Records Act.

Rulemaking 14-11-001  
(Filed November 6, 2014)

**ASSIGNED COMMISSIONER'S SCOPING MEMO AND RULING**

**Summary**

Pursuant to Rule 7.3 of the Commission's Rules of Practice and Procedure,<sup>1</sup> this Scoping Memo and Ruling sets forth the procedural schedule, assigns the presiding officer, identifies the issues to be considered in this proceeding, the need for hearings, and other procedural matters, following the prehearing conference held on March 3, 2015.

**1. Background**

General Order 66-C (GO 66-C), first adopted in 1974, identifies Commission records as public unless they fall within a list of exemptions. However, the general order identifies several exemptions from public disclosure that are inconsistent with the California Public Records Act (CPRA). The general order also does not articulate the process and procedure for obtaining Commission records. Thus, this Order Instituting Rulemaking (OIR or

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<sup>1</sup> All subsequent references to "Rule" or "Rules" are to the Commission's Rules of Practice and Procedure. The full text of the Commission's Rules may be found on the Commission's website at [www.cpuc.ca.gov](http://www.cpuc.ca.gov).

Rulemaking) initiated on November 2014, proposed a revised GO 66-D to replace GO 66-C to cure these deficiencies.

Comments and replies were filed by various parties and a Prehearing Conference (PHC) was held on March 3, 2015. At the PHC, the parties discussed the issues they believed were within the scope of the proceeding. Because there were many issues concerning this proceeding, and because of the various views and positions raised by different parties, almost all the parties were in agreement that workshops were needed in order to obtain more information, discuss key issues more thoroughly, and possibly arrive at a consensus regarding some of the issues and proposed procedures regarding this proceeding. There was much discussion centered on the correct legal interpretation and application of §583 of the Public Utilities Code.

## **2. Scope**

Three issues were presented in the Preliminary Scoping Memo, namely, whether the proposed revised general order complies with the CPRA, whether the proposed order improves access to public records and increases transparency, and what categories of documents the Commission should disclose, in response to a CPRA request, without need for a Commission vote.

Numerous parties filed comments and replies and further discussion was conducted at the PHC on March 3, 2015.

Based on the application, comments and replies from parties, and discussion at the PHC, the scope of issues has been revised and the issues to be addressed in this proceeding are as follows:

1. Are documents submitted to the Commission subject to disclosure unless deemed exempt from disclosure by the PRA or other law?

2. Is the proposed GO 66-D lawful and appropriate?
3. Does the proposed GO 66-D comport with §583 of the Public Utilities Code?
4. Should the Commission provide notice to submitters that their documents are to be disclosed?
5. Is the procedure for resolving public records requests adequate?
6. Should there be a fee waiver?
7. What is the effect of the proposed GO 66-D on documents already submitted to the Commission?
8. Does the proposed GO 66-D improve public access to public records?

On March 23, 2015, Mussey Grade Road Alliance filed a motion for scoping determination whether classification of specific types of utility reports and data supplied to the Commission such as fire safety data, is within the scope of this proceeding, as well as Commission mechanisms for providing public access to data classified as non-confidential. I rule that the scope is limited to those items mentioned above and will not seek to classify specific types of documents and utility reports, such as fire safety data, supplied to the Commission.

### **3. Solicitation of Additional Comments**

Based upon the comments and replies by the different parties, positions and arguments raised, discussion at the PHC, and scope of inquiry, I solicit additional comments on the draft proposal in Attachment A to this ruling.

In addition to the “Proposed Process for Handling Public Records Act Requests” contained in Attachment A, parties shall comment on the legal framework set forth in the draft proposal. If parties dispute the preliminary legal

conclusions reached therein, they shall support their contentions with citations to applicable law and precedent. Parties shall comment on the questions posed at the end of Attachment A.

**4. Schedule**

The following schedule is adopted, and may be revised by the assigned Commissioner or Administrative Law Judge (ALJ) as required to promote the efficient and fair resolution of the rulemaking:

| Event                                   | Date                |
|---|---------------------|
| Scoping Memo Issued                     | August 2015         |
| Comments on Draft Proposal              | August 28, 2015     |
| Reply Comments on Draft Proposal        | September 11, 2015  |
| Workshop                                | October 2015        |
| Opening Briefs Filed                    | December 2015       |
| Reply Briefs Filed                      | December 2015       |
| Projected Issuance of Proposed Decision | 1st quarter of 2016 |
| Projected Final Commission Decision     | 1st quarter of 2016 |

In any event, the Commission intends that this proceeding will be resolved no later than 18 months from the date of this scoping memo.

**5. Categorization, Need for Hearings, Workshop, *Ex Parte* Communications, and Designation of Presiding Officer**

The Commission preliminarily categorized this application as quasi-legislative as defined in Rule 1.3(d) and that this proceeding would not require evidentiary hearings. The parties did not oppose the preliminary categorization. This ruling affirms the preliminary categorization as quasi-legislative.

From comments and replies filed by parties, and from discussion at the PHC, almost all of the parties requested that the Commission schedule workshops to facilitate further discussion of the various issues in this proceeding. The schedule adopted includes a workshop, of which the specific topic and other matters will be set forth in a ruling from either the assigned ALJ or assigned Commissioner.

In light of the solicitation for comments and replies to the draft proposal attached to this ruling, and the request for workshops to conduct further discussion, I will not disturb the Commission's preliminary determination that hearings are not required.

*Ex Parte* communications are permitted without restriction or reporting requirement, until and unless the Commission changes the category of the proceeding

Pursuant to Rule 13.2(c) Commissioner Michael Picker shall be the Presiding Officer in this proceeding.

## **6. Service List**

The official service list for this proceeding is available on the Commission's web page. Parties should confirm that their information on the service list is correct, and serve notice of any errors on the Commission's Process Office, the service list, and the assigned ALJ. Prior to serving any document, each party must ensure that it is using the most up-to-date service list. The list on the Commission's website meets that definition. Any person interested in participating in this proceeding who is unfamiliar with the Commission's procedures or who has questions about them should contact the Public Advisor's Office in San Francisco, at (415) 703-2074 or (866) 849-8390, or e-mail [public.advisor@cpuc.ca.gov](mailto:public.advisor@cpuc.ca.gov). The TTY number is (866) 836-7825.

## **7. Addition to Official Service List and Party Status**

Addition to the official service list is governed by Rule 1.9(f) of the Commission's Rules.

Upon request, any person will be added to the "Information Only" category of the official service list, and should do so promptly in order to ensure timely service of comments and other documents and correspondence in the proceeding. (*See* Rule 1.9(f).) The request must be sent to the Process Office by e-mail ([process\\_office@cpuc.ca.gov](mailto:process_office@cpuc.ca.gov)) or letter (Process Office, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, California 94102). Please include the Docket Number of this Rulemaking in the request.

Persons who file responsive comments thereby become parties to the proceeding (*see* Rule 1.4(a)(2)) and will be added to the "Parties" category of the official service list upon such filing. In order to assure service of comments and other documents and correspondence in advance of obtaining party status, persons should promptly request addition to the "Information Only" category as described above; they will be removed from that category upon obtaining party status.

## **8. Subscription Service**

Persons may monitor the proceeding by subscribing to receive electronic copies of documents in this proceeding that are published on the Commission's website. There is no need to be on the official service list in order to use the subscription service. Instructions for enrolling in the subscription service are available on the Commission's website at <http://subscribecpuc.cpuc.ca.gov/>.

## **9. Filing and Service of Comments and Other Documents**

Filing and service of comments and other documents in the proceeding are governed by the rules contained in Article 1 of the Commission's Rules. (*See* particularly Rules 1.5 through 1.10 and 1.13.)

If you have questions about the Commission's filing and service procedures, you may contact the Docket Office.

## **10. Intervenor Compensation**

Any party that expects to claim intervenor compensation for its participation in this Rulemaking must have filed its notice of intent to claim intervenor compensation within 30 days of the filing of reply comments or within 30 days of the prehearing conference held on March 3, 2015. (*See* Rule 17.1(a)(2).)

### **IT IS RULED that:**

1. The revised scope, issues, and schedule for this rulemaking are set forth in the body of this scoping ruling, unless amended by a subsequent ruling by the assigned Commissioner or Administrative Law Judge.

2. The categorization for this proceeding shall be quasi-legislative. The preliminary determination that there is no need for evidentiary hearings, is not changed at this time.

3. The Presiding Officer in this rulemaking is Commissioner Michael Picker.

4. *Ex Parte* communications are allowed per Rule 8.3(a).

5. Parties shall file comments on the draft proposal in Attachment A to this ruling, by August 28, 2015. Parties shall use the legal framework set forth in the draft proposal. If parties dispute the preliminary legal conclusions reached therein, they shall support their contentions with citations to applicable law and precedent. Reply comments shall be due on September 11, 2015.

6. Any party that expects to claim intervenor compensation for its participation in this Rulemaking must have filed its notice of intent to claim intervenor compensation by April 3, 2015.

7. The assigned Commissioner or assigned Administrative Law Judge may revise the schedule, as required to promote the efficient and fair resolution of the rulemaking.

Dated August 11, 2015, at San Francisco, California.

        /s/ MICHAEL PICKER        

Michael Picker  
Assigned Commissioner



## ATTACHMENT A

Draft Proposal – OIR on Public Records Act – R.14-11-001

## Draft Proposal – OIR on Public Records Act – R.14-11-001

Parties shall comment on the following draft proposal, using the legal framework set forth below. If parties dispute the preliminary legal conclusions reached herein, they shall support their contentions with citations to applicable law and precedent. The parties shall comment on whether the draft proposal strikes the correct balance between the legal requirements for openness and the Commission’s need to freely obtain records from those it regulates in order to carry out its constitutional and statutory duties.

### A. Legal Context

For purposes of commenting on this proposal, parties shall assume the following provisions of law apply, and shall tie their comments about how the Commission should handle records submitted by those it regulates to this governing law.

#### 1. *California Constitution*

Under the California Constitution, the Commission is required to broadly construe provisions of the law that would permit public access to records in the Commission’s possession, and narrowly construe provisions that would deny such access.

Article 1, Section 3(b) of the California Constitution provides that California law “shall be broadly construed if it furthers the people’s right of access [to information concerning the conduct of the people’s business], and narrowly construed if it limits the right of access.” Where access to records is limited, the entity imposing such a limit shall make “findings demonstrating the interest protected by the limitation and the need for protecting that interest.”<sup>1</sup>

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<sup>1</sup> Article 1, Section 3(b) of the California Constitution provides:

(b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public

*Footnote continued on next page*

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bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

## 2. *The California Public Records Act*

The Public Records Act, California Government Code Section 6250 *et seq.* ("PRA"), also begins with a strong presumption "that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Cal. Gov. Code § 6250. Nevertheless, the PRA allows an agency to withhold records that fall into one of a series of exemptions.

When the Commission decides to withhold its own records from production under the PRA, the Commission must cite to the applicable statutory exemption, and prove that the claimed exemption applies to the records withheld. If no express statutory exemption applies, the Commission may only withhold records if it can prove that the public interest served by withholding the record clearly outweighs the public interest served by disclosing the record. Cal. Gov. Code § 6255. Staff proposes that when an outside party submits records to the Commission, and the party believes that those records should not be disclosed under the PRA, the outside party – not the Commission – should be required to cite the applicable statutory exemption, and demonstrate why that exemption applies to the records submitted. If no express exemption applies, the Commission will only withhold the record if the party has demonstrated that the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. Government Code 6255(a), discussed below.

The following are some exemptions allowed in the PRA for records in the possession of this Commission. This is not an exhaustive list, but rather those exemptions most often cited by the Commission in response to PRA requests, in the experience of its Legal Division. They appear in Section 6254 (or other state and federal statutes incorporated by reference in Government Code Section 6254(k)), and cover the following categories of records:

- (a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those

records clearly outweighs the public interest in disclosure.

(b) Records pertaining to pending litigation to which the public agency is a party . . . until the pending litigation or claim has been finally adjudicated or otherwise settled.

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy....

(e) Geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person....

(k) 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....

(l) Correspondence of and to the Governor or employees of the Governor's office . . . .

(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with the licensing agency to establish his or her personal qualification for the license, certificate, or permit applied for....

Government Code Section 6254.15 also states:

Nothing in this chapter shall be construed to require the disclosure of records that are any of the following: corporate financial records, corporate proprietary information including trade secrets, and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company in retaining, locating, or expanding a facility within California.

Finally, Government Code Section 6255 provides that an agency that receives a PRA request for records that do not fit within the exemptions listed in Section 6254 (or the provisions cited therein, such as privileges under the Evidence Code) must engage in a balancing test to determine to withhold a record requested in such a request.

6255. (a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

### *3. Public Utilities Code Section 583 and General Order 66-C*

#### **a. Introduction**

The Commission addressed many of the legal issues the parties raise in this proceeding in Rulemaking ("R.") 05-06-040, discussed below. The Commission made clear that decisions in that proceeding struck the correct balance between openness and confidentiality, with due consideration of constitutional and statutory preference for openness, the exemptions in the PRA, and lawful privileges in the Evidence Code and elsewhere. Many of the parties to this current proceeding (R.14-11-001) were also parties to R.05-06-040, and provided comments in that Rulemaking. That Rulemaking resulted in Decision ("D.") 06-06-066, as modified by D.07-05-032, neither of which was challenged in court. Staff sees no need to revisit the long-established and unchallenged legal conclusions in D.06-06-066, as modified by D.07-05-032.

**b. Discussion**

The Commission examined Public Utilities Code Section 583 in R.05-06-040, in light of the Legislature's passage of Senate Bill 1488 (Stats. 2004)<sup>3</sup> after the state emerged from the 2000-01 energy crisis. The statute required the Commission to examine its practice under Section 583 and the PRA, as well as a new energy procurement statute passed after the Legislature ended electric deregulation in light of the crisis.

Section 583 provides:

583. No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, 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. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor.

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<sup>3</sup>SB 1488 provided, in part, the following:

The Public Utilities Commission shall initiate a proceeding to examine its practices under Sections 454.5 and 583 of the Public Utilities Code and the California Public Records Act . . . to ensure that the commission's practices under these laws provide for meaningful public participation and open decision making.

After conducting the examination required by SB 1488, the Commission concluded that Section 583:

... does not require the Commission to afford confidential treatment to data that does not satisfy substantive requirements for such treatment created by other statutes and rules. . . . Section 583 sets forth a process for dealing with claims of confidentiality, and does not contain any substantive rules on what is and is not appropriate for protection. D.06-06-066, as modified by D.07-05-032, *mimeo.* at 27.

The Commission's holding was based on precedent:

As the United States Court of Appeals for the Ninth District noted in *Southern California Edison Company v. Westinghouse Electric Corporation* (9th Cir. 1989) 892 F. 2d 778, 783: "Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities. Rather, the statute provides that such information will be open to the public if the commission so orders, and the commission's authority to issue such orders is unrestricted." Similarly, *In Re Southern California Edison Company [Mohave Coal Plant Accident]*, D.91-12-019, 42 CPUC 2d 298, 300 (1991), states that § 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" but does not limit our broad discretion to determine whether certain information should be disclosed to the public and under what circumstances.<sup>4</sup>

The Commission also found that any party seeking confidential treatment "must accompany its records with a motion establishing the legal and factual basis for confidential treatment."<sup>5</sup> Further,

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<sup>4</sup> D.06-06-066, as modified by D.07-05-032, *mimeo.* at 28-29.

<sup>5</sup> *Id.* at 27.



[i]n determining whether the claims have merit, the Commission does not look to any provision in § 583, because nothing in the statute addresses what types of records should and should not be confidential. Other provisions – the trade secret law, the Evidence Code provisions regarding attorney-client and other privileges, confidentiality statutes such as § 454.5(g), GO 66-C as currently written – provide the substantive theories for asserting confidentiality.<sup>6</sup>

Thus, any party that sought confidential treatment of energy procurement records it submitted to the Commission had to justify that claim based on some law *other than* Section 583. It could cite a PRA exemption, a privilege or confidentiality provision recognized by Public Utilities Code Section 454.5(g), other provisions of state or federal law, or case law. Or it could invoke sections of General Order 66-C, which the Commission proposes to modify in this proceeding to more closely track the Public Records Act. But it was never sufficient for a party simply to claim confidentiality based on a blanket citation to Section 583.

On its face, R.05-06-040 only dealt with records related to energy procurement. However, the Staff proposes that the Commission’s interpretation of Section 583 in R.05-06-040 apply with equal force to *all* records submitted to the Commission, not just those related to energy procurement. Parties shall address this preliminary conclusion in their comments.

## **B. Proposed Process for Submission of Confidential Information**

Concomitant with the Commission’s determination of the appropriate process for improving the public’s access to public records is the need to determine the appropriate process for parties to submit records that such parties (“submitters” or “record submitters”) claim require protection from disclosure. In Staff’s experience, some submitters make overbroad claims of confidentiality, arguing,

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<sup>6</sup> *Id.* at 28.

for example, that all of a document is confidential when only small portions really are. And very often, the only basis given for confidentiality is a blanket citation to Section 583 or GO 66-C, despite the fact that D.06-06-066 specifically disapproved of this practice almost ten years ago.

When a request for such records is submitted to the Commission, the Commission's Legal Division staff must engage in the often burdensome task of parsing each document to determine which discrete portions are truly confidential. Accordingly, overbroad assertions of confidentiality not only shift the submitter's burden of proving confidentiality to the Commission, but also delay the Commission's response to PRA requests.

Moreover, there is an information and knowledge disparity: the parties who submit the records know those records and their contexts better than the Commission's Staff does. Where the Commission's Staff must by default perform the work that the submitters are in the best position to effectively and efficiently perform (that of identifying confidential data and explaining the need for withholding from public disclosure), parties increase the risk that Staff will inadvertently incorrectly classify non-confidential information as confidential, or confidential information as non-confidential.

For these reasons, the burden of identifying confidential information and of explaining the legal basis for confidentiality should rest with the record submitter, so that Legal Division staff can commit its resources to verifying particularized assertions of confidentiality, and responding to PRA requests.

Staff proposes that the following requirements govern the submission of records that a submitter claims are confidential and exempt from disclosure under the PRA. These requirements shall be known as "the burden of establishing confidentiality."

1. Except as set forth below, a party asked for documents (a "record submitter") shall respond to a Commission, Commissioner, Director, or staff request for data as expeditiously as possible, but not more than ten days after receiving the request for data.

2. When a record submitter provides records to the Commission, and asserts that the records are confidential, the record submitter shall not broadly designate a paragraph, page, document, table, chart, file, etc. as confidential, but shall instead:
  - a. Identify the specific portions of a paragraph, page, document, table, chart, file, etc. that are asserted to be confidential;
  - b. Cite with specificity to the PRA exemption or other statutory authority that applies; and
  - c. Explain with specificity the factual and/or analytical bases for requesting such protection.
  
3. In extraordinary cases, the Commission may require documents sooner than ten days after the request; or, due to the volume or complexity of the documents, the record submitter may need more than ten days to meet its burden of establishing confidentiality. In such cases, the record submitter shall:
  - a. Submit, on a provisional basis, documents broadly marked confidential. This initial production will be supplemented as described below.
  - b. After making its initial production, the record submitter shall conclude its review of the records, designate with specificity any confidential information consistent with the requirements here, and submit a supplement that meets the submitter's burden of establishing confidentiality. Supplements are due no more than 24 days after the request for data.
  - c. If a record submitter fails to meet its burden of establishing confidentiality within the 24-day period, the Commission may deem the submitter to have waived its claims of confidentiality and may treat those documents as public.

### **C. Proposed Process for Handling Public Records Act Requests**

In view of the legal authority discussed above, Staff propose the following process for responding to future PRA requests. Parties shall comment on whether they believe this process is appropriate. If they believe that the legal authority discussed above compels a different process, or if some other legal

authority should control, they shall specifically explain their position, with citations to the controlling authority.

This process is generally described in Proposed General Order 66-D which accompanies the order instituting R.14-11-001. (To the extent records are ordered produced in a formal proceeding pursuant to Public Utilities Code Section 583's provision that records may be released on "order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding," the following process will not apply.)

1. By order of the Commission, the Commission's Legal Division may handle Public Records Act requests under delegated authority from the Commission and/or the Commission's General Counsel, and without further involvement of the full Commission, according to the guidelines set forth below.
2. If a party, person, or entity ("record submitter") submits records to the Commission and does not assert that the records are confidential, the Commission may release the records under Section 6253 of the Public Records Act. Legal Division will handle such releases pursuant to delegated authority, and will release records directly to the requestor without involvement of the full Commission.
3. If a record submitter submits records to the Commission and claims the records are confidential, the record submitter shall meet the burden of establishing confidentiality as described above. When responding to a PRA request, if Legal Division determines that a document is responsive but a claim of confidentiality has been asserted, Legal Division will determine whether the record submitter has met its burden of establishing confidentiality. If a record submitter simply marks the documents confidential, or invokes Section 583 or Proposed General Order 66-D, without more, Legal Division may release such records to the requestor as set forth in paragraphs 1 and 2. If the record submitter has tried in good faith to meet its burden of establishing confidentiality, but Legal Division does not believe that the record submitter has in fact met its burden, Legal Division will proceed as described in paragraph 8.

4. If a Public Records Act request seeks records that were submitted to the Commission before it adopted Decision 06-06-066, and the record submitter simply marked the documents confidential, or invoked Section 583 or General Order 66-C, without more, Legal Division will inform the record submitter that it must meet its burden of establishing confidentiality. Legal Division will so inform the record submitter by U.S. Mail and email notification reasonably designed to reach the record submitter (which may involve contacting the person identified as the person authorized by the entity to receive service of process). If the record submitter does not do so within 10 days, the records may be released to the requestor. If the record submitter meets its burden, the process in paragraph 5 will apply.
5. If a record submitter claims the records are confidential and meets its burden of establishing confidentiality, Legal Division will not release the records, and will inform the Public Records Act requestor. In these cases, Legal Division will comply with the Public Records Act by providing the requestor with enough detail about the withheld records so that the requestor broadly understands what is being withheld and why, without disclosing confidential information.
6. If a Public Records Act request is denied in whole or in part, the requestor may appeal to the Commission for reconsideration by submitting a Public Records Request Appeal Form (to be developed in this proceeding), indicating the records being withheld and stating the reasons why these records should be disclosed to them.
7. When a requestor submits a Public Records Request Appeal Form under paragraph 6, Legal Division shall prepare a draft resolution granting or denying the appeal. The draft resolution will be released for public review and comment pursuant to Pub. Util. Code § 311(g) and Rule 14.5 of the Commission's Rules of Practice and Procedure. The Commission shall serve the draft resolution on the requestor and any person whose information would be disclosed if the request is granted (including but not limited to the record submitter), if such person's contact information is

available upon a reasonable and diligent search. The requestor, and any person whose information would be disclosed if the request is granted, may comment on the draft resolution.

8. If a record submitter has tried in good faith to meet its burden of establishing confidentiality under paragraph 3 but Legal Division finds, pursuant to criteria adopted by the Commission and authority delegated to it in a Commission decision, that the record submitter has not in fact met its burden of establishing confidentiality, Legal Division shall give the record submitter an opportunity to further justify its claim. The record submitter shall justify its claim within 10 days, which period may be extended at Legal Division's discretion. If the record submitter does not do so, Legal Division will produce the records if it determines the public interest in disclosure is not clearly outweighed by the public interest in retaining the records as confidential.
9. If the record submitter further justifies its claim in paragraph 8, and Legal Division finds that it has met its burden of establishing confidentiality under GO 66-D or other legal claim of confidentiality, Legal Division will act in accordance with paragraphs 5-7 above.
10. If Legal Division finds that the record submitter has not met its burden of establishing confidentiality, the procedure in paragraph 8 will govern

#### **D. Proposal for Designation of Types of Documents That Are Confidential/Not Confidential**

As part of its effort to develop clear rules and processes in this Rulemaking, the Commission may wish to develop lists of documents for the different industries it regulates, or the functions it performs, that are by default either confidential or not confidential. The default presumption could be overcome with a more specific showing, but such lists might make the job of the Commission and record submitters easier going forward.

For example, the Commission has treated safety investigations as confidential until they are final; after that, as discussed in Resolution L-436, they may be

released upon receipt of a Public Records Act request.<sup>7</sup> Similarly, the matrix attached to Decision 06-06-066 provided default confidential and non-confidential designations for procurement/renewables records.

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<sup>7</sup> The Commission explains its approach to accident investigations in resolutions releasing final investigative material. For example, in Resolution L-438, the Commission explained:

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 an incident investigation

*Footnote continued on next page*

Parties shall comment on

- 1) Whether such a proposal is feasible and/or advisable;
- 2) For parties that have used the matrix that accompanied Decision 06-06-066 in submitting records to the Commission, whether the matrix approach has worked well or poorly, and why;
- 3) Whether they could work together with others in their industry sector to develop such lists, subject to Commission review and approval;
- 4) For safety-related records, whether working with all parties to this proceeding would be preferable to working with parties only in the same industry, with answers to questions 5-6 as well;

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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. 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. 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. (Footnotes omitted.)



- 5) Whether such work would best occur in a workshop at the Commission, through a meet and confer process joined only by parties, or in another fashion; and
- 6) If they are prepared to do so, what types of records they produce to the Commission that should be open to public inspection by default, or confidential by default, as set forth in the matrix accompanying Decision 06-06-066. If certain records are to be presumed confidential, parties should also comment on whether the presumption of confidentiality should expire after a certain time, as was required in D.06-06-066's matrix.

(END OF ATTACHMENT A)