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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 RULING

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ASSIGNED COMMISSIONER'S RULING

Summary

This Assigned Commissioner's Ruling (ruling) proposes a revision to General Order (GO) 66 D to ensure that the Commission's audit, inspection, investigation, and enforcement staff is provided timely access to information. GO 66 D was adopted in D.17-09-023 and went into effect on January 1, 2017. Since GO 66 D went into effect, the Commission staff has experienced delay in obtaining information from regulated entities when performing audits, inspections, investigations, and enforcement. This is unacceptable. Some regulated entities have cited Section 3 of GO 66D for the proposition that the regulated entity will not provide Commission audit, inspection, investigation, and enforcement staff information (especially in the course of an on-site visit), because the regulated entity needs time to review the information for confidentiality and possibly submit a claim of confidentiality before providing information to the Commission. Accordingly, some regulated entities have delayed producing information to Commission staff. The staff proposal attached to this ruling would revise GO 66 D to allow Commission audit, inspection, investigation, and enforcement staff to obtain information immediately and allow the regulated entity 10 days to submit a claim of confidentiality. During the pendency of the 10 days the Commission staff would protect the confidentiality of the information. This ruling also includes proposed corrections for typographical errors in GO 66 D. Both of these revisions are reflected in Attachment A - September 2018 Proposed Revision to General Order 66 D.

Background

This ruling addresses a discrete issue arising when Commission staff requests information from regulated entities in the audit, inspection,

investigation or enforcement context. Audits, inspections, investigations, and enforcement are time-sensitive operations that require immediate access to the information sought. Since the adoption of GO 66 D, Commission staff has experienced delayed responses to requests for information while the regulated entities assess whether to assert the information requested by Commission staff is confidential. The delay of production of information, especially in the context of audits, inspections, investigations, and enforcement, is unacceptable.

The proposed revision to GO 66 D, provided below, balances the Commission's need for immediate access to information, the regulated entities' right to claim confidentiality for certain information, and the public's right to access to information unless there is a statutory exception for the Commission to maintain information confidentially.

Proposed Revision to GO 66 D

This ruling proposes amending GO 66 D to include a new Section 7:

7. Release of Information in Response to an Audit, Inspection, Investigation or Enforcement Operation

(7.1) Scope: This section applies to Information submitted to the Commission in response to an audit, inspection, investigation or enforcement operation performed by the Commission. This section only applies when the Commission invokes the provisions of this section. A regulated entity may not invoke the provisions of this section.

(7.2) Timing of Responses: After a request by the Commission per this section, the information submitters shall produce the information to the Commission without delay.

(7.3) Format of Responses: Responses to the Commission's requests shall be in the native format of the information or upon the Commission's request, the information shall be in a text-searchable PDF format. If the information submitter cannot

comply with this requirement, it must provide justification for the lack of ability to comply.

(7.4) Claim of Confidentiality: Upon submission of information to the Commission, the information submitter shall inform the Commission staff whether the regulated entity makes a preliminary claim of confidentiality. If the regulated entity does assert a preliminary claim of confidentiality, the Commission shall maintain the information confidentially for 10 days. From the date of information submission, the information submitter shall have 10 days to submit a claim of confidentiality per the requirements of Section 3. During that 10 day period, the Commission shall maintain the information confidentially. If no claim of confidentiality is submitted 10 days after submission of information to the Commission, that the Commission may release information to the public without further action, unless the Commission withholds the information per an exemption of the CPRA, per Section 5.2. Rule 1.15 of the Commission's Rules governs calculation of time

In addition to the new Section 7, typographical errors are corrected in the Staff Proposal. Specifically, Section 5.5(b) and Section 5.5(d) contain the same typographical error which cross references Section 6 in the context of the submission of a Public Information Appeal Form. Section 6 addresses resolutions and not the specifics of a Public Information Appeal Form. Thus, the cross reference does not assist the reader in understanding the Commission process. The removal of these cross references is intended to clarify the process and does not alter the Commission process or the public's rights under the California Public Records Act in any way. In addition, there are several minor typographical changes which do not change the meaning of the general order. These changes are reflected in the attached proposed GO 66 D.

Comments on this Ruling

Based on the record of the proceeding to date, this ruling proposes the revisions identified in Appendix A. Parties may present their arguments and positions in comments on the procedures in Appendix A.

IT IS RULED that:

1. Opening Comments to Appendix A are due on October 8, 2018, and Reply Comments are due on October 15, 2018. Each round of comments shall not exceed ten pages.

Dated September 28, 2018, at San Francisco, California.

 /s/ MICHAEL PICKER
Michael Picker
Assigned Commissioner

APPENDIX A

SEPTEMBER 2018 PROPOSED REVISION TO GENERAL ORDER 66 D

APPENDIX A

GENERAL ORDER NO. 66-D (Supersedes General Order No. 66-C)

PROCEDURES FOR (1) SUBMISSION OF INFORMATION TO THE CALIFORNIA PUBLIC UTILITIES COMMISSION WITH CLAIMS OF CONFIDENTIALITY, (2) SUBMISSION OF REQUEST PER THE CALIFORNIA PUBLIC RECORDS ACT, AND (3) THE RELEASE OF ANY INFORMATION BY THE COMMISSION, INCLUDING PURSUANT TO THE CALIFORNIA PUBLIC RECORDS ACT

Adopted _____; Effective _____. Decision _____.

1. Definitions and Acronyms

- (1.1) **“Commission”** includes the Commission; each commissioner; any person employed by the Commission; which includes the Office of Ratepayer Advocates, Safety and Enforcement Division, and Office of Safety Advocate.
- (1.2) **“Confidential Matrices”** is a term describing a Commission determination that specific classifications of information are confidential per Section 3.4 of this GO. The determination is made prior to the submission of such information and applies broadly to a classification of information.
- (1.3) **“CPRA”** is an acronym for California Public Records Act (Section 6250 et seq. of the Government Code).
- (1.4) **“GO”** is an acronym for General Order.
- (1.5) **“Information”** includes but is not limited to, any document, record, account, book, or paper regardless of whether it is in an analog or digital format, which is prepared, owned, used, submitted to or retained by the Commission.
- (1.6) **“Information Submitter”** includes any person or entity submitting information to the Commission.
- (1.7) **“Information Requestor”** includes any person or entity requesting information from the Commission per the CPRA.

- (1.8) **“Modified D.06-06-066”** is a citation to Decision 06-06-066, as modified by D.07-05-032, which addresses confidentiality in the context of energy procurement information.
- (1.9) **“Public Records Office”** is the portion of the Commission Legal Division assigned to process claims of confidentiality and responses to CPRA requests.

2. Statement of Liability For Non-Compliance

- (2.1) Compliance with all Commission Orders is subject to Public Utilities Code Sections 702 and the penalty provisions in the Public Utilities Code including but not limited to, Sections 2107, 2107.5, 2108 2110, 2111, 2112, 2113, and 2114 and Rule 1.1 of the Commission’s Rules. Non-compliance by a person, corporation, and/or organization with this GO may be referred to the Commission’s General Counsel and/or law enforcement for further action.

3. The Submission of Information with a Claim of Confidentiality to the Commission

- (3.1) **Applicability:** This section applies to information submitted to the Commission on or after January 1, 2018. Information submitted between September 25, 2016, and December 31, 2017, is governed by D.16-08-024. Where D.16-08-024 references future decisions in R.14-11-001, this GO shall apply. Information submitted prior to September 25, 2016, is subject to GO 66-C or its predecessors.
- (3.2) **Submission of Information with a Claim of Confidentiality:** An information submitter bears the burden of proving the reasons why the Commission shall withhold any information, or any portion thereof, from the public. To request confidential treatment of information submitted to the Commission, an information submitter must satisfy all of the following requirements:
 - a) If confidential treatment is sought for any portion of information, the information submitter must designate each page, section, or field, or any portion thereof, as confidential. If only a certain portion of information is claimed to be confidential, **then** only that portion rather than the entire submission should be designated as confidential.

- b) Specify the basis for the Commission to provide confidential treatment with specific citation to an applicable provision of the CPRA.

A citation or general marking of confidentiality, such as "GO-66" and/or "Public Utilities Code Section 583" without additional justification of confidentiality does not satisfy the information submitter's burden to establish a basis for confidential treatment by the Commission.

If the information submitter cites Government Code Section 6255(a) (commonly known as the public interest balancing test) as the legal authority for the Commission to withhold the document from public release, then the information submitter must demonstrate with granular specificity on the facts of the particular information why the *public* interest served by not disclosing the record clearly outweighs the *public* interest served by disclosure of the record. A *private* economic interest is an inadequate interest to claim in lieu of a *public* interest. Accordingly, information submitters that cite Section 6255(a) as the basis for the Commission to withhold the document and rest the claim of confidentiality solely on a *private* economic interest will not satisfy the requirements of this Section. To invoke the administrative processes described in Sections 5 and 6, the information submitter must satisfy the requirements of this Section.

If the information submitter cites Government Code Section 6254(k) (which allows information to be withheld when disclosure of it is prohibited by federal or state law), it must also cite the applicable statutory provision and explain why the specific statutory provision applies to the particular information.

An information submitter may not cite Government Code Section 6254(a) as the legal authority to establish a basis for confidential treatment by the Commission, because Section

6254(a) does not apply to any communication between the Commission and a member of the public.

- c) Provide a declaration in support of the legal authority cited in Section 3.2(b) of this GO signed by an officer of the information submitter or by an employee or agent designated by an officer. The officer delegating signing authority to an employee or agent must be identified in the declaration.
- d) Provide a name and email address of the person for the Commission to contact regarding the potential release of information by the Commission per Section 5 of this GO. An information submitter may designate as many as three people by name and email address for all document submissions to the Commission. Failure of the information submitter to monitor and respond to Commission communications to the designated email address(es) does not preclude release of information per Section 5 of this GO. There is no requirement for the Commission staff to contact each name provided. To change the designated email address and contact name, an information submitter shall send a letter to:

Public Records Office, Legal Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

There are limited circumstances when the requirements of this Section do not apply. First, information subject to the requirements of Modified D.06-06-066 is exempted from the requirements of this Section and may continue to be submitted consistent with the requirements of that decision. Second, valid submission of information per Section 3.3 (submission in a formal proceeding) and Section 3.4 (submission consistent with a determination of confidentiality in a decision) of this GO is exempted from the requirements of this Section.

If an information submitter satisfies the requirements in this Section, then the Commission will evaluate the legal authority for the Commission to withhold the document from the public per the

process established in Sections 5 and 6 of this GO. Unless information is submitted in accordance with Section 3.2-3.4, information submitted in non-compliance with this Section, may be released to the public per Section 5.2.

(3.3) Submissions in a Formal Proceeding: The requirements of Section 3.2 of this GO do not apply ~~in~~ when a party in a formal proceeding files information in the docket. To obtain confidential treatment of information to be filed in the docket of a formal proceeding, the information submitter must file a motion pursuant to Rule 11.4 of the Commission's Rules, or comply with a process established by the Administrative Law Judge for that specific proceeding. Please note that advice letters are not part of formal proceedings and thus confidentiality for information in advice letters shall be governed by the process in Section 3.2 or 3.4.

(3.4) Preemptive Determination of Confidentiality in a Decision:

- a) The Commission may adopt confidential matrices which preemptively designate certain information as confidential or public in a decision. Information submitted to the Commission per this Section shall clearly designate the relevant decision adopting the applicable confidential determination. If the information is appropriately identified as being preemptively determined to be confidential, the Commission will not release information in response to a CPRA, unless by order of the Commission. The Commission's *general* determination that a classification of information in a confidential matrix is confidential may only be challenged by filing an Application for Rehearing or a Petition to Modify of the Commission decision adopting the confidential matrix. The Commission's *specific* determination of whether particular information qualifies for confidential treatment per a confidential matrix adopted by the Commission may be challenged per Sections 5.5 and 6.
- b) In addition, in any proceeding in which the Commission issues a decision requiring the submission of information, the Commission may make a determination of whether the

information required by the decision will be treated as public or confidential. In such an instance the Commission will:

- i. Identify the type of information to be submitted, and
- ii. Provide an analysis of the legal authority for the Commission to provide confidential treatment to the specific information.

Information submitted to the Commission per this Section should clearly designate the relevant decision containing the confidential determination. Any party may challenge the confidentiality determination of the decision by filing an Application for Rehearing or Petition to Modify. The determination of confidentiality in a decision governs the release of the information to the public, including in response to a CPRA request. Any determination to treat certain information as confidential is limited to the particular information required to be submitted in that decision and does not constitute a decision of more general applicability made pursuant to Section 3.4(a).

If the Commission has made a determination in another General Order regarding confidentiality, an information submitter may cite that General Order. In such instances the process in Sections 5.5 and 6 will apply.

- (3.5) Confidential Treatment Unavailable for Public Information:** A request for the Commission to provide confidential treatment of information per Sections 3.2 - 3.4 of this GO, which is already public, will not be granted. An information submitter requesting confidential treatment must make reasonable steps to maintain the information confidential~~ity~~ and in the event an information submitter becomes aware that the information is public, the information submitter must so inform the Commission in a timely manner.

4. California Public Records Act Requests

(4.1) Submission of California Public Record Act Requests: A CPRA request for information from the Commission can be made in four ways. First, CPRA requests can be submitted to the Public Records Office, Legal Division, by using the electronic Public Records Request Form available at publicrecords.cpuc.ca.gov/. Second, a request can be submitted by U.S. mail by mailing a request to:

Public Records Office, Legal Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Third, a request can be submitted by email or phone to a Commission employee. And lastly, a request may be submitted in person to the Public Records Office. Before submitting a request, please check to see if the information is available from the Commission's website, <https://publicrecords.cpuc.ca.gov/requests>. The Commission will process a CPRA request per this GO regardless of how it is titled.

(4.2) Fees for Copies: Fees may be assessed consistent with the CPRA. Checks for payment should be made payable to the Public Utilities Commission of the State of California. Information requestors may request fees to be waived when submitting a request.

(4.3) Review of CPRA Requests: Requests will be reviewed and processed by the Public Records Office per Sections 5 and 6 of this GO. The Office will promptly notify the person making the request of the determination of whether the information is disclosable, in accordance with Government Code Section 6253 of the CPRA. If information is withheld, the provisions of Sections 5 and 6 of this GO shall apply.

(4.4) Exemptions to Disclosure Per the CPRA: Information in possession of the Commission is available for public inspection unless deemed to be exempt by the Commission from inspection pursuant to the exemptions in the CPRA (Government Code Sections 6250, et seq., except Section 6254(a) which does not apply to information submitted by regulated entities and the public).

5. Guidelines for the Commission's Release of Information to the Public

- (5.1) Scope:** This section defines when information submitted to the Commission and information created by the Commission may be released to the public, including in response to CPRA requests.

In instances when the Commission receives a subpoena, it will review claims of confidentiality consistent with lawful claims of privileges and applicable law.

(5.2) Release of Information with No Claim of Confidentiality:

Information submitted to the Commission with no claim of confidentiality at all may be released to the public without further action by the Commission, unless the Commission withholds the information per an exemption of the CPRA. This provision applies regardless of the date the information was submitted to the Commission. Information created by the Commission may be released to the public without further action by the Commission, unless the Commission withholds the information per an exemption of the CPRA.

- (5.3) Release of Information with Claims of Confidentiality:** The determination of rules applicable for the release of information submitted to the Commission with a claim of confidentiality will be based on the date of submission to the Commission. Section 5.4 of this GO governs the release of information with a claim of confidentiality submitted prior to January 1, 2018. Section 5.5 of this GO governs the release of information with a claim of confidentiality submitted on or after January 1, 2018.

If the Commission withholds the information created by the Commission per an exemption of the CPRA, then Section 5.5 of this GO will govern the release of information.

(5.4) Information with a Claim of Confidentiality Submitted Prior to the Effective Date of this GO

- a) **Information Submitted per the Requirements of Modified D.06-06-066:** This section applies when the Commission seeks to release information submitted to the Commission as confidential pursuant to the requirements of Modified D.06-06-066 after the effective date of that decision, and that are in compliance with

the requirements of that decision. Such information will only be released, including in response to CPRA requests, after the applicable time period set forth in Modified D.06-06-066. After the expiration of the applicable time period, or if the submission does not comply with the requirements of Modified D.06-06-066, such information may be released by Commission staff.

- b) **Information Submitted Prior to September 25, 2016; not per the Requirements of Modified D.06-06-066:**¹ This section applies when the Commission seeks to release information submitted prior to September 25, 2016, including in a response to a CPRA request, and the document submitter simply marked the information confidential, or invoked Section 583 or General Order 66-C, without more information to substantiate the claim of confidentiality.

If the Commission has received a CPRA request for such information, Legal Division will contact the information submitter and provide them ten days to meet the requirements of Section 3.2 of this GO. An information submitter may request an extension of time of an additional ten days.

If the Commission seeks to release such information in any context other than a CPRA request, Legal Division will contact the information submitter and provide them ten days to meet the requirements of Section 3.2 of this GO. In this instance, the ten days may be extended by Legal Division to fifteen days, if the information submitter requests an extension.

Rule 1.15 of the Commission's Rules governs calculation of time.

- c) **Information submitted between September 25, 2016 and December 31, 2017, not per the requirements of Modified D.06-06-066:** This section applies when the Commission seeks to release information, including in response to a CPRA request,

¹ This section resolves Section 3.2(4) of D.16-08-024, which stated such documents "will only be released subject to a process to be determined in this proceeding or a successor proceeding, consistent with these guidelines."

submitted to the Commission between September 25, 2015, the date established in D.16-08-024 for the implementation of the D.16-08-024 rules, and December 31, 2017, which was not submitted per the requirements of Modified D.06-06-066. Section 3.2 of D.16-08-024 governs the release of such information.

If the information submitter has satisfied the requirements of Section 3.1 of D.16-08-024, and the Commission receives a CPRA request for such a document, then the provisions of Sections 5.5 and 6 of this GO will apply.

If the information submitter fails to satisfy the requirements of Section 3.1 of D.16-08-024, and the Commission receives a CPRA request for such information, then the information may be released.

(5.5) Information Submitted on or after January 1, 2018, with a Claim of Confidentiality and Information Created by the Commission

- a) **Release of Information Submitted on or After January 1, 2018, With a Claim of Confidentiality:** This section applies if an information submitter has satisfied Section 3.2 of this GO, or if the information submitter has met the requirements of a confidentiality matrix established per Section 3.4 of this GO. Before releasing information in response to a CPRA request, or in any other context, Legal Division will determine whether the information submitter has established a lawful basis of confidentiality. If Legal Division finds *the information submitter did establish a lawful basis of confidentiality*, then Legal Division will not release the information, and will proceed as described in Section 5.5(b) of this GO. If Legal Division finds *the information submitter has failed to establish a lawful basis of confidentiality*, Legal Division will proceed as described in Section 5.5(c) of this GO.
- b) **Commission Review of CPRA Request Where a Confidentiality Claim Has Been Found Lawful:** If an information submitter has met the requirements of Section 3.2 of this GO or if the information submitter has met the requirements of a confidentiality matrix established per Section 3.4 of this GO, and Legal Division finds *the information submitter did establish a lawful*

basis of confidentiality, then Legal Division will inform the CPRA requestor and not release the information. In these cases, Legal Division will comply with the CPRA by providing the requestor with enough detail about the withheld information so that the requestor broadly understands what is being withheld and why, without disclosing confidential information. If a CPRA request is denied in whole or in part, the requestor may appeal to the Commission for reconsideration by submitting a Public Information Appeal Form within ten days of receiving notice that a CPRA request has been denied in whole or in part ~~per Section 6~~. The Public Information Appeal Form may state the reasons why the information should be released. Information requesters are encouraged to provide reasons why information should be released. Rule 1.15 of the Commission's Rules governs calculation of time.

If an information requestor submits a Public Information Appeal Form, Legal Division will prepare a draft resolution per the requirements of Section 6.

- c) **Commission Review of Request Where a Confidentiality Claim Has Been Found Unlawful:** If an information submitter has met the requirements of Section 3.2 of this GO or if the information submitter has met the requirements of a confidentiality matrix established per Section 3.4 of this GO, but Legal Division finds *the information submitter has failed to establish a lawful basis of confidentiality*, then Legal Division will submit a draft resolution per Section 6. In these cases, the information submitter receives notice of the resolution and may comment on the draft resolution per Rule 14.5 no later than ten days before the Commission meeting when the draft resolution is first scheduled for consideration. Rule 1.15 of the Commission's Rules governs calculation of time.
- d) **Information Created by the Commission:** If the Commission receives a CPRA request for information created by the Commission, and the Legal Division finds a lawful basis to withhold the information created by the Commission, then Legal Division will inform the CPRA requestor and not release the information. In these cases, Legal Division will comply with the

CPRA by providing the requestor with enough detail about the withheld information so that the requestor broadly understands what is being withheld and why, without disclosing confidential information. If a CPRA request is denied in whole or in part, the requestor may appeal to the Commission for reconsideration by submitting a Public Information Appeal Form within ten days of receiving notice that a CPRA request has been denied in whole or in part ~~per Section 6~~. The Public Information Appeal Form may state the reasons why the information should be released. Information requesters are encouraged to provide reasons why information should be released. Rule 1.15 of the Commission's Rules governs calculation of time. If an information requestor submits a Public Information Appeal Form, Legal Division will prepare a draft resolution per the requirements of Section 6.

6. Resolutions

(6.1) Resolutions: If the Public Records Office, Legal Division, prepares a draft resolution granting or denying, in whole or in part, the CPRA request per Section 5.5(b), (c), or (d), then:

- a) The Commission will serve the draft resolution on both the information submitter and information requestor (except for the scenario identified in Section 5.5(d) where there is not an information submitter, because the Commission created the information).
- b) The Commission will release the draft resolution for public review and comment pursuant to Pub. Util. Code § 311(g) and Rule 14.5 of the Commission's Rules.
- c) The Commission shall not release such information pending the adoption of the resolution provided for in this section.

(6.2) Applications for Rehearing: To challenge a Commission resolution which disposes of the appeal of staff action, a party may file an Application for Rehearing pursuant to Pub. Util. Code § 1731 and Rule 16.1 of the Commission's Rules of Practice and Procedure. Per Pub. Util. Code § 1732, the Application for Rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision to be unlawful and no corporation or person shall in any court urge or rely on any ground not so set forth in the application.

7. Release of Information in Response to an Audit, Investigation or Enforcement Operation

- (7.1) Scope:** This section applies to Information submitted to the Commission in response to an audit, inspection, investigation, or enforcement action performed by the Commission. This section only applies when the Commission invokes the provisions of this section. A regulated entity may not invoke the provisions of this section.
- (7.2) Timing of Responses:** After a request by the Commission per this section, the information submitters shall produce the information to the Commission without delay.
- (7.3) Format of Responses:** Responses to the Commission's requests shall be in the native format of the information or upon the Commission's request, the information shall be in a text-searchable PDF format. If the information submitter cannot comply with this requirement, it must provide justification for the lack of ability to comply.
- (7.4) Claim of Confidentiality:** Upon submission of information to the Commission, the information submitter shall inform the Commission staff whether the regulated entity makes a preliminary claim of confidentiality. If the regulated entity does assert a preliminary claim of confidentiality, the Commission shall maintain the information confidentially for 10 days. From the date of information submission, the information submitter shall have 10 days to submit a claim of confidentiality per the requirements of Section 3. During that 10 day period, the Commission shall maintain the information confidentially. If no

claim of confidentiality is submitted 10 days after submission of information to the Commission, that the Commission may release information to the public without further action, unless the Commission withholds the information per an exemption of the CPRA, per Section 5.2. Rule 1.15 of the Commission's Rules governs calculation of time.

(END OF APPENDIX A)