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Decision 18-04-032 April 26, 2018

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Improve Access to Public Records Pursuant to the California Public Records Act.	Rulemaking 14-11-001 (Filed November 6, 2014)

ORDER DENYING REHEARING OF DECISION (D.) 17-09-023

I. INTRODUCTION

Today's decision disposes of the application for rehearing of Decision (D.) 17-09-023 (or "Decision"),[1] filed by the City of San Bruno ("San Bruno").

D.17-09-023 is a decision issued in Rulemaking (R.) 14-11-001[2] that adopted a new General Order ("GO") 66-D, which was designed to update the Commission's processes for the submission, review, and potential disclosure of information submitted to, and created by, the Commission.[3] As explained in the decision, the objective of GO 66-D was to:

> [E]stablish processes for the Commission to review information submitters' requests for confidential treatment of information submitted to the Commission, the Commission's responses to CPRA requests, and the Commission's

[1] Unless otherwise noted, all citations to Commission decisions issued after 2000 are to the official pdf versions, which are available via the Commission's website at: http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx.

[2] *Order Instituting Rulemaking to Improve Public Access to Public Records Pursuant to the California Public Records Act. – Decision Updating Commission Processes Relating to Potentially Confidential Information* [D.16-08-024] (2016), as modified and affirmed by *Order Instituting Rulemaking to Improve Public Access to Public Records Pursuant to the California Public Records Act. – Order Modifying D.16-08-024 and Denying Rehearing of Modified Decision* [D.17-05-035] (2017).

[3] GO 66-D superseded its predecessor, GO 66-C, effective January 1, 2018.

> determination of whether to release information to the public.[4]

(D.17-09-023, *supra*, at p. 7.)

San Bruno filed a timely application for rehearing of D.17-09-023, challenging the validity of processes set forth in various sections of GO 66-D. In its rehearing application, San Bruno contends that these processes violate their statutory and constitutional rights to access public records. Specifically, they allege that the lack of a fixed time frame for the completion of the resolution process (Section 6.1 of GO 66-D) and rehearing process (Section 6.2 of GO 66-D) violates the following authorities governing open access to public records: (1) Government Code section 6253(b); (2) Government Code section 6253(d); (3) Government Code section 6253.4(b); and (4) section 3 of Article I of the California Constitution.

The California Water Association ("CWA") filed a response to San Bruno's application for rehearing. In its response, CWA improperly raises a new issue not raised in the application for rehearing. Accordingly, we do not consider the response in disposing of San Bruno's application for rehearing.

Having reviewed the allegations of error, we are of the opinion that there is no good cause for rehearing of the challenged decision. Accordingly, the application for rehearing of D.17-09-023 is denied.

II. DISCUSSION

A. The resolution process set forth under GO 66-D, § 6.1 does not violate Government Code section 6253(b).

San Bruno first argues that the resolution process specified in GO 66-D, § 6.1[5] for appeals violates Government Code section 6253(b), which states:

[4] The "CPRA," i.e., the Public Records Act or PRA, is found in Government Code sections 6250 through 6276.48.

[5] GO 66-D, § 6.1 states:

(*footnote continued on the next page*)

> Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

(Gov. Code, § 6253, subd. (b).)

San Bruno claims that, absent a specific completion timeline, the GO 66-D, § 6.1 resolution process is "potentially endless by definition," and is therefore inconsistent with the Commission's duty to make records "promptly available" to the public in accordance with Government Code section 6253(b). (Rhrg. App., at p. 1.) San Bruno states, "[a]n appeals process without any time limit or deadline allows, and ultimately ensures, that the Commission can avoid complying with this section of the Public Records Act." (*Ibid*.) This argument is without merit.

In order to discuss the successful operation of the GO 66-D, § 6.1 resolution process, it is helpful to briefly examine the resolution process established by its predecessor, GO 66-C, § 3.4, adopted in 1974. Under GO 66-C, § 3.4 ("Appeal to Full

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(*footnote continued from the previous page*)

> **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:
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> 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.

Commission"), records requesters could appeal a denial of their request to the full Commission as follows:

> 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.

Notice of appeal triggered the issuance of a draft resolution for public notice and comment,[6] followed by the adoption of a final resolution either granting the appeal, i.e., authorizing disclosure of the requested records, or denying the appeal, i.e., denying disclosure. Notably, nothing in the language of GO 66-C, § 3.4 imposed a time limit on this process. To the contrary, it reserved "sufficient" time for the Commission to act. Yet, the Commission did not abuse its flexibility to thwart public access to records; in reality, the majority of resolutions issued under GO 66-C, § 3.4 actually *authorized* the disclosure of records.[7]

The resolution process adopted under GO 66-D, § 6.1 is similarly open-ended, with one exception that would appear to operate in San Bruno's favor, namely, a 10-day limit on a requester's right to appeal a denial of their request to the Commission for the issuance of a resolution deciding the appeal. (GO 66-D, §§ 5.5, subds. (b) & (d).) However, as explained above, even absent any set time limitations, the Commission's generous disclosure practices under a prior, similarly open resolution

[6] Public Utilities Code section 311(g)(1) provides that resolutions must be served on all parties and subject to at least 30 days public review and comment prior to a Commission vote. This process is still in effect under GO 66-D, § 6.1.

[7] Under GO 66-C, § 3.4, the Commission issued over 250 resolutions authorizing disclosure of public records, and only five denying disclosure. See, e.g., Resolutions L-320 to L-321; L-323; L-324 to L-327; L-400 to L-402; L-412 to L-418; L-429 to L-441; L-450 to L-461; L-468 to L-477; L-493 to L-500; L-516 to L-520; L-529 to L-531; L-533 to L-541; L-556 to L-562 (authorizing disclosure); L-215; L-242; L-246; L-302; L-522 (denying disclosure).

process demonstrates that the Commission will not utilize GO 66-D, § 6.1 to deny "prompt" access to records in violation of Government Code section 6253(b).

Notably absent from San Bruno's argument is any recognition that the phrase "promptly available" in Government Code section 6253(b) is not defined using a time certain. Had the Legislature intended that public agencies, including the Commission, adopt all rules governing the "prompt" access to public records using a definitive time frame, it was free to define this phrase accordingly. However, the Legislature did not. Absent a legislative time limit under Government Code section 6253(b), we are not legally required to adopt an internal time limit under GO 66-D, § 6.1 in order to comply with the statute.[8] As a result, San Bruno's argument to the contrary is rejected.

It appears that by requesting a deadline under GO 66-D, § 6.1, San Bruno is seeking an expedited process for obtaining public records. We have the same goal. In fact, during the OIR, we unambiguously expressed our intent to implement new rules that promote the "*prompt* disclosure of non-confidential documents." (D.16-08-024, *supra*, at p. 2, emphasis added.) However, imposing a time limitation on the resolution process under GO 66-D, § 6.1 will not achieve this effect, where, as discussed above, the flexible resolution processes operating since 1974 have not resulted in the type of unnecessary delays of concern to San Bruno.

During the OIR, we identified the primary source of these delays, namely, information submitters' overstated confidentiality claims, which significantly slow our decisionmaking processes, including the issuance of decisions regarding the disclosability

[8] Our decision not to impose a deadline under GO 66-D, § 6.1 is wholly consistent with our statutory and constitutional authority to create rules regarding our procedures, including the power to establish rules governing access to public records. (Cal. Const., art. 12, § 1 ["Subject to statute and due process, the commission may establish its own procedures."]; Gov. Code, § 6253.4, subd. (a) ["Every agency may adopt regulations stating the procedures to be followed when making its records available in accordance with this section."].) Additionally, we decline to rewrite or add qualifying language to Government Code section 6253(b), when there is no indication on its face that its terms, including the term "promptly," require additional specificity or modification.

of records. In D.16-08-024, we addressed the various burdens stemming from information submitters' current use of confidentiality designations as follows:

> 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.

(D.16-08-024, *supra*, at p. 6, emphasis added.)

In challenging the resolution process, San Bruno also fails to recognize that, in addition to such preventable delays in disclosure, the Commission faces a unique statutory barrier to the release of public records, namely, Public Utilities Code section 583. Section 583 states, in pertinent part, "No information furnished to the commission by a public utility ... 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 such information is guilty of a misdemeanor."

The Commission adopted the resolution process as one of the primary mechanisms for ordering the disclosure of records in compliance with Public Utilities Code section 583. It is through the resolution process that the Commission balances its duty under section 583 to withhold confidential material with its duty under the PRA to

enact rules that promote public access to its records. (See D.17-09-023, *supra*, at p. 14.) San Bruno fails to show that the Commission will utilize the new GO 66-D, § 6.1 resolution process to withhold a disproportionate number of records, or to delay disclosure thereof, in violation of its statutory duties. We find that the resolution process remains a proper use of our authority to adopt rules governing access to public records, the exercise of which has consistently promoted disclosure.

Based on the foregoing, San Bruno's claim that the GO 66-D, § 6.1 resolution process violates the intent of the Legislature to make agency records available to the public, as articulated in Government Code section 6253(b), is without merit and thus, is rejected.

B. The rehearing process set forth in GO 66-D, § 6.2 is not inconsistent with provisions in Government Code section 6253(b).

San Bruno also argues that the lack of a completion deadline for the Commission's rehearing process in GO 66-D, § 6.2 violates the "promptness" requirement of Government Code section 6253(b). This is argument is equally meritless.

GO 66-D, § 6.2 ("Applications for Rehearing") states:

> 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.

GO 66-D, § 6.2 expressly incorporates the statute governing the timing of the Commission's rehearing process, namely, Public Utilities Code section 1731(b)(1), which states, in pertinent part:

> After an order or decision has been made by the commission, a party to the action or proceeding, or a stockholder, bondholder, or other party pecuniarily interested in the public utility affected

> may apply for a rehearing in respect to matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. A cause of action arising out of any order or decision of the commission shall not accrue in any court to any corporation or person unless the corporation or person has filed an application to the commission for a rehearing within 30 days after the date of issuance or within 10 days after the date of issuance in the case of an order issued ... relating to security transactions and the transfer or encumbrance of utility property.

(Pub. Util. Code, § 1731, subd. (b)(1).)[9]

Public Utilities Code section 1731(b)(1) does not impose a specific time limit on the Commission's rehearing process, and, as with the resolution process, we decline to adopt an internal one. In D.17-09-023, we rejected an identical argument in favor of rehearing deadlines made by the Imperial Irrigation District,[10] explaining that, "[t]he time necessary for the Commission's deliberation of an application for rehearing of a CPRA decision is dependent on many factors, including the complexity of the application, the number of legal issues raised, and the scope of the relevant CPRA request (CPRA request[s] range from a request for a single document to a request for thousands of documents), as well as staff resources. Accordingly the review and disposition of

[9] Rule 16.1(a) of the Commission's Rules of Practice and Procedure mirrors the requirements of Public Utilities Code section 1731(b)(1), stating:

> Application for rehearing of a Commission order or decision shall be filed within 30 days after the date the Commission mails the order or decision, or within 10 days of mailing in the case of an order relating to (1) security transactions and the transfer or encumbrance of utility property as described in Public Utilities Code Section 1731(b), or (2) the Department of Water Resources as described in Public Utilities Code Section 1731(c).

[10] Imperial Irrigation District's Comments on the Proposed Decision of Commissioner Picker re Phase 2A Proposed Decision Adopting General Order 66-D and Administrative Processes for Submission and Release of Potentially Confidential Information, filed September 7, 2017, at p. 7 ("If a rehearing process is made a part of this General Order, there should be a definitive, short-set period for its completion. Otherwise, the Commission may abuse the process when it so desires.")

applications of rehearing may take different amounts of time, and thus, it is not appropriate to identify a specific timeframe." (D.17-09-023, *supra*, at p. 47.)

This statement accurately reflects the practicality of the time needed for our consideration and review of an application for rehearing, including performing an independent review of the challenged decision for legal error. San Bruno's claim that we will abuse the rehearing process is simply speculative. There is simply no substantiation that we will abuse the rehearing process established by statute, and incorporated into GO 66-D, § 6.2, to violate our duties under the PRA, including our duty to provide "prompt" access to records under Government Code section 6253(b).

Furthermore, the rehearing process as set forth in GO 66-D, § 6.2 is not inconsistent with the plain language of section 6253(b) of the Government Code. As discussed above, neither Public Utilities Code section 1731(b)(1) nor Government Code section 6253(b) mandates a specific time frame. The lack of a specific time frame does not establish a lack of promptness. Moreover, we decline to read a time frame into the application for rehearing statues in the Public Utilities Code or the PRA statutes in the Government Code.

Based on the foregoing, San Bruno has failed to demonstrate that the rehearing process adopted under GO 66-D, § 6.2 is inconsistent with Government Code section 6253(b). Thus, this argument that the rehearing process in GO 66-D violates this statutory provision has no merit, and is rejected.

C. San Bruno's remaining challenges to the resolution and rehearing processes established under GO 66-D, §§ 6.1 and 6.2 lack merit.

San Bruno also alleges that, absent firm completion timelines, the resolution and rehearing processes set forth in GO 66-D, §§ 6.1 and 6.2 violate the following sections of the PRA and the California Constitution that also require open access to public records:

1. Government Code section 6253(d): Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records.

2. Government Code section 6253.4(b): Guidelines and regulations adopted pursuant to this section shall be consistent with all other sections of this chapter and shall reflect the intention of the Legislature to make the records accessible to the public.
3. Sections 3(b)(1) and 3(b)(2) of Article I of the California Constitution:

   (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 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.

While couched under different legal authorities, San Bruno's argument is the same: that, without time limits, the Commission will utilize the GO 66-D, §§ 6.1 and 6.2 processes to indefinitely delay public access to records. However, as discussed above, San Bruno's theory based on speculation wholly fails in light of our longstanding practices supporting disclosure and our progressive development of rules that will promote public access to records in our possession. Therefore, rehearing on San Bruno's remaining arguments is denied.

III. CONCLUSION

Accordingly, we find that the rehearing application has not established legal error in D.17-09-023. Thus, the application for rehearing is denied.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.17-09-023 is denied.
2. The proceeding, R.14-11-001, remains open for consideration of other matters.

This order is effective today.

Dated April 26, 2018, at San Francisco, California.

MICHAEL PICKER
President
CARLA J. PETERMAN
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
Commissioners