

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

Date: February 10, 2022

Resolution No.: L-614

RESOLUTION**RESOLUTION AUTHORIZING DISCLOSURE OF SAN JOSE WATER COMPANY'S AUDITED FINANCIAL STATEMENTS FOR THE YEARS 2018, 2019, AND 2020****SUMMARY**

On June 24, 2021, the California Public Utilities Commission ("Commission") received a public records request under the California Public Records Act ("CPRA") seeking disclosure of San Jose Water Company's Audited Financial Statements for the years 2018, 2019, and 2020 ("Requested Records"). San Jose Water Company ("SJWC") had submitted to the Commission Audited Financial Statements for those years, though with accompanying confidentiality claims as to their entirety.¹ On July 19, 2021, in the absence of any Commission decision, ruling, or resolution on the Requested Records, Legal Division informed the requester of the claimed confidentiality of the documents. On that same date, the requester appealed the initial denial of the records pursuant to G.O. 66-D Section 5.5. Under these conditions, G.O. 66-D Sections 5.5 and 6 require Legal Division to issue a Resolution addressing the confidentiality claims and a determination regarding the release of the requested records, to be voted on by the full Commission. Here, Legal Division rejects SJWC's claims of confidentiality and requests that the Commission authorize disclosure of San Jose Water Company's Audited Financial Statements for the years ending December 31, 2018, 2019, and 2020.

DISCUSSION**I. Documents at Issue**

SJWC has filed annual audited financial statements to the Commission. These documents include a letter from SJWC's management, and an auditor's report on SJWC's financial information such as annual revenue, expenses, assets, liabilities, and debts. Each year, from 2018 to 2020, these audited financial statements have been accompanied with confidentiality statements as to their entirety.

¹ SJWC Response to Audited Financial Statements 2018 at p. 3; SJWC Response to Audited Financial Statements 2019 at p. 3; SJWC Response to Audited Financial Statements 2020 at p. 3.

The Requested Records are substantially similar to the Annual Reports that SJWC files each year with the Commission, which are publicly available on the Commission’s website. The public Annual Reports also detail SJWC’s financial information such as annual revenue, expenses, assets, liabilities, and debts.

II. Legal Background

Pursuant to California Public Utilities (“PU”) Code Sections 314.5, 314.6, 581, and 584, the CPUC has statutory authority to inspect and audit the books and records of the utilities to ensure that ratepayers’ money is well spent. PU Code Section 314.5 specifies that the CPUC shall inspect and audit the books and records for regulatory and tax purposes at least once every three years for utilities serving over 10,000 customers and at least once every five years for utilities serving 10,000 or fewer customers. PU Code Section 314.6(a) states that “the Commission may conduct financial and performance audits of any entity or program created by any order, decision, motion, settlement, or other action of the Commission.” Finally, the Commission has authority under Cal. Pub. Util. Sections 581 through 591 and General Order 104-A to require public utilities to provide reports as specified by the Commission.

Once records are furnished to the Commission, they are “public records” as defined by the California Public Records Act (“CPRA”).² The California Constitution, the CPRA, and discovery law favor disclosure of public records. The public has constitutional and statutory rights to access most government information.³ Agencies must justify withholding a public record in response to a CPRA request on the basis of specific exemptions in the CPRA or upon a showing that on the facts of the particular case the public interest in nondisclosure clearly outweighs the public interest in disclosure.⁴

² Cal. Gov’t. Code § 6250, *et seq.*

³ See, e.g., *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488, 492: “The California Public Records Act (PRA) establishes a right of public access to government records. “...the PRA was enacted for the purpose of increasing freedom of information by giving members of the public access to records in the possession of state and local agencies.” (*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 290). In enacting the statute in 1968, the Legislature declared this right of access to be “a fundamental and necessary right of every person in this state” (Gov. Code, § 6250)—a declaration ratified by voters who amended the California Constitution in 2004 to secure a “right of access to information concerning the conduct of the people’s business” (Cal. Const., art. I, § 3, subd. (b)(1). (See *Los Angeles County Bd. of Supervisors*, at p. 290.);” *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 166-167: “Given the strong public policy of the people’s right to information concerning the people’s business (Gov. Code § 6250), and the constitutional mandate to construe statutes limiting the right of access narrowly (Cal. Const., art. I, § 3, subd. (b)(2)), ‘all public records are subject to disclosure unless the Legislature has expressly provided to the contrary.’” (*Office of Inspector General v. Superior Court* (2010) 189 Cal.Ap.4th 695, 709, quoting *Williams v. Superior Court* (1993) 5 Cal.4th 337, 346, italics added by the Court of Appeal;” *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 617.

⁴ Cal. Gov’t. Code § 6255(a). The fact that a record may fall within a CPRA exemption does not preclude its disclosure. *Modified Presiding Officer’s Decision Finding the San Francisco*

Subpoenas and other forms of discovery are subject to the California Code of Civil Procedure (“Cal. Code of Civ. Pro.”) and the California Evidence Code (“Cal. Evid. Code”). Discovery laws also favor disclosure.⁵ Statutes, court rules, and other authority limiting access to information must be broadly construed if they further the people’s right of access, and narrowly construed if they limit the right of access.⁶ New statutes, court rules, or other authority that limit the right of access must be adopted with findings demonstrating the interest protected by the limitation and the need to protect that interest.⁷

Additionally, the CPRA contemplates named California agencies adopting particularized guidelines as to their execution of the CPRA.⁸ The Commission has implemented its responsibility under California Government (Cal. Gov’t.) Code Section 6253.4(a), by adopting guidelines for public access to Commission records. These guidelines are embodied in General Order (G.O.) 66-D.

G.O. 66-D Section 5.5 provides that 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. The procedures outlined in G.O. 66-D govern this Resolution.

Municipal Transportation Agency in Contempt, in violation of Rule 1.1 of the Commission’s Rules of Practice and Procedures (“SFMTA”) (2015) Decision (“D.”) 15-08-032, at 18: “CPRA exemptions are permissive rather than mandatory; they allow nondisclosure but do not prohibit disclosure. (CBS, Inc. v. Block (1986) 42 Cal.3d 646, 652; Re San Diego Gas and Electric Company (1993) D.93-05-020). [Footnote: 49 CPUC2d 241, at 242.]” See also, Marken v. Santa Monica-Malibu Unified School District (2012) 202 Cal.App.4th 1250, 1261-1262; Register Div. of Freedom Newspapers, Inc. v. County of Orange (1984) 158 Cal.App.3d 893, 905; Black Panthers v. Kehoe (1974) 42 Cal.App.3d 645, 656; Cal. Gov’t. Code § 6253(e): “Except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter.”; and the penultimate sentence in Cal. Gov’t. Code § 6254: “This section does not prevent any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.”

⁵ Cal. Evid. Code § 911 states that: “Except as otherwise provided by statute: ... (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, ... [and] (c) No person has a privilege that another shall not ... disclose any matter or shall not produce any writing.” Withholding information must generally be based upon a statutory prohibition, privilege, or similar protection against disclosure.

⁶ Cal. Const. Article I, § 3(b)(2).

⁷ *Id.*

⁸ Cal. Gov. Code § 6253.4.

On September 18, 2019, Deputy Director Lucian Filler, Deputy Executive Director, Water and Communications Division, issued a letter⁹ to all Class A water utilities,¹⁰ in which Director Filler outlined the relevant law for these audited financial documents:

“It has been the long-term practice of the Commission to release similar reports to the public upon request. In general, such reports are public records, and if they fail to meet the requirements of G.O. 66-D or the exemptions of the California Public Records Act (California Government Code Sections 6250-6276.48), they are required to be available for public inspection. Even those records which are exempted from public inspection can be made public upon the determination of the Commission that the public interest served by disclosure outweighs the public interest served by not disclosing (California Government Code Section 6255).”

III. SJWC’s Confidentiality Claims

The declarations accompanying the 2018, 2019, and 2020 reports are substantially the same, though the year and identity of the independent registered public accounting firm varies, as does the characterization of the document as an independent auditor’s report or opinion letter.

SJWC confidentiality claims encompass the entirety of the Audited Financial Statements for the years 2018, 2019, and 2020.

SJWC provides a “Description of Information that is Confidential” in each declaration that reads as follows:

This document contains confidential corporate financial records and non-public information regarding San Jose Water Company’s financial condition and results of operations as to which San Jose Water Company derives independent economic value from not being generally known to the public or to other persons who can obtain economic value from [sic] its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The public interest served by not disclosing the information

⁹[http://ftp.cpuc.ca.gov/UtilityAudits/Class_A_Water_Utility_Audits/CPUC%20Directives/Water%20Division%20Letter%20to%20Class%20A%20Water%20Utilities%20Regarding%20Audited%20Financial%20Statements%20and%2010-K%20Reports%20\(09-18-2019\).pdf](http://ftp.cpuc.ca.gov/UtilityAudits/Class_A_Water_Utility_Audits/CPUC%20Directives/Water%20Division%20Letter%20to%20Class%20A%20Water%20Utilities%20Regarding%20Audited%20Financial%20Statements%20and%2010-K%20Reports%20(09-18-2019).pdf)

¹⁰ Class A water utilities are water utilities with 10,000 or more customers.

in this document clearly outweighs the public interest served by disclosure of the information contained.¹¹

As the “Basis for Confidentiality Claim,” each declaration cites:

Cal. Gov. Code §§6254(k), 6254.15, 6255(a); Cal. Evid. Code §§1060, 1061; Cal. Civ Code §3426.1(d); Cal. Pen. Code §499c(a)(9); and Cal Pub. Util. Code §583.¹²

SJWC did include a signed declaration by an officer each year, though they did not identify a contact person as required by G.O. 66-D Section 3.2.

After reviewing SJWC’s confidentiality claims, we determined that each of SJWC’s confidentiality claims fail on two levels. First, the confidentiality claims do not meet the G.O. 66-D Section 3.2 procedural requirements. Second, none of the individual claims are sufficient to establish a lawful basis for confidentiality.

A. Procedural Requirements of G.O. 66-D

The procedural requirements for companies to file confidentiality claims are outlined in G.O. 66-D Section 3.2.

G.O. 66-D Section 3.2 states the information submitter bears the burden of proving the reasons why the Commission shall withhold any information, or any portion thereof, from the public.¹³ To obtain confidential treatment of information submitted to the Commission, all the following conditions must be met:

- (a) the information submitter must designate each page, section, or field, or any portion thereof, 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... (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

¹¹ SJWC Response to Audited Financial Statements 2018 at p. 3; SJWC Response to Audited Financial Statements 2019 at p. 3; SJWC Response to Audited Financial Statements 2020 at p. 3.

¹² 2018, 2019, and 2020 SJW Response to Request for Audited Financial Statements and 10-K Reports.

¹³ General Order 66-D § 3.2.

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.¹⁴

Additionally, on September 18, 2019, Deputy Director Lucian Filler, Deputy Executive Director, Water and Communications Division, issued a letter¹⁵ to all Class A water utilities.¹⁶ In discussing specifically audited financial statements,¹⁷ Director Filler states:

The policy of the California Public Records Act and the practices of this Commission favor making public records readily available to the public. Accordingly, if your company plans to claim confidential status for any information submitted in the company's reports, Commission staff advises that your company shall follow the procedures required in G.O. 66-D, and that any such claim be prominently noted and supported by a detailed explanation of the reasons and facts that substantiate the necessity for confidential treatment. The mere allegation of being placed in an unfair business disadvantage is insufficient to establish it as a fact. Furthermore, data publicly exposed in other contexts (e.g., corporation annual reports, SEC disclosure filings, etc.) should not be claimed to be confidential information when submitted in accordance with the enclosures.¹⁸

SJWC's confidentiality claims for 2018, 2019, and 2020 Audited Financial Reports meet a couple of the requirements of G.O. 66-D Section 3.2, in that they did provide bases to provide confidential treatment with specific citation to applicable provisions of the CPRA, and they provided a declaration signed by an officer in support of the confidential treatment.

However, they do not meet all the minimal requirements of G.O. 66-D Section 3.2. SJWC's confidentiality claims are general markings of confidentiality, without additional

¹⁴ *Id.*

¹⁵ September 18, 2019 Letter to Class A Water Utilities, available at: [ftp://ftp.cpuc.ca.gov/UtilityAudits/Class_A_Water_Utility_Audits/CPUC%20Directives/Water%20Division%20Letter%20to%20Class%20A%20Water%20Utilities%20Regarding%20Audited%20Financial%20Statements%20and%2010-K%20Reports%20\(09-18-2019\).pdf](ftp://ftp.cpuc.ca.gov/UtilityAudits/Class_A_Water_Utility_Audits/CPUC%20Directives/Water%20Division%20Letter%20to%20Class%20A%20Water%20Utilities%20Regarding%20Audited%20Financial%20Statements%20and%2010-K%20Reports%20(09-18-2019).pdf)

¹⁶ Class A water utilities are water utilities with 10,000 or more customers.

¹⁷ September 18, 2019 Letter to Class A Water Utilities at p. 1.

¹⁸ September 18, 2019 Letter to Class A Water Utilities at p. 2.

justification. G.O. 66-D Section 3.2(b) specifically warns that this does not satisfy the information submitter's burden to establish a basis for confidential treatment.¹⁹ SJWC's confidentiality claims are not "supported by a detailed explanation of the reasons and facts that substantiate the necessity for confidential treatment," as required by Director Filler in 2019. No reasons or facts are mentioned in SJWC's confidentiality claims. SJWC simply states conclusions without any legal analysis. This is not sufficient. Additionally, SJWC does not provide a contact person regarding release of documents as required by G.O. 66-D Section 3.2.

G.O. 66-D Section 3.2 states that "information submitted in non-compliance with this section, may be released to the public per Section 5.2. The Requested Records can be released at this point, as the confidentiality claims are not in compliance with the procedural requirements of G.O. 66-D Section 3.2.

We now consider each of the individual confidentiality claims.

B. Cal. Gov't. Code Section 6254(k)

Cal. Gov't. Code Section 6254(k) exempts mandatory disclosure of records that are exempted or prohibited pursuant to federal or state law, including, but not limited to, the provisions of the Evidence Code relating to privilege. Cal. Gov't. Code Section 6254(k) is not an independent exemption, but instead offers an exemption an agency may assert as a basis for withholding information subject to other statutes which prohibit or limit disclosure, including information subject privileges set forth in the Cal. Evid. Code. Thus, if information is subject to the lawyer-client privilege, the official information privilege, or other privilege or similar disclosure limitation, the Commission can withhold such information from disclosure in response to records requests pursuant to its assertion of the Cal. Gov't. Code Section 6254(k) exemption.

In fact, G.O. 66-D explicitly states: "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."

SJWC failed to cite the applicable statutory provisions under Cal. Gov't. Code and explain how the specific statutory provision apply to the audited financial statements.

Upon review, we find that SJWC did not establish a lawful basis to withhold their audited financial statements for the years 2018, 2019, and 2020 under Cal. Gov't. Code Section 6254(k).

¹⁹ G.O. 66-D § 3.2(b): "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."

C. Cal. Gov't. Code Section 6254.15

Cal. Gov't. Code Section 6254.15 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. Except as provided below, incentives offered by state or local government agencies, if any, shall be disclosed upon communication to the agency or the public of a decision to stay, locate, relocate, or expand, by a company, or upon application by that company to a governmental agency for a general plan amendment, rezone, use permit, building permit, or any other permit, whichever occurs first.

The agency shall delete, prior to disclosure to the public, information that is exempt pursuant to this section from any record describing state or local incentives offered by an agency to a private business to retain, locate, relocate, or expand the business within California.

Regulated entities commonly cite Cal. Gov't. Code Section 6254.15 for the proposition that it provides an exemption for all “corporate financial records, corporate proprietary information including trade secrets,” regardless of the purpose such records or information was submitted to a government agency. However, this section must be narrowly construed.²⁰ Additionally, upon reviewing the legislative history of Cal. Gov't. Code Section 6254.15, the Legislature's intent appears to have been to create an exemption focused on efforts of state agencies to encourage businesses to stay, locate, or expand their facilities within California.^{21 22} To narrowly construe the statute, consistent

²⁰ Cal. Const. Art. 1, Sec. (b)(2) states that: “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...”

²¹ See the legislative history of AB 1158, reflected in the Legislative Counsel Digest and Senate and Assembly Committee Analyses of the bill, stating: [AB 1158, 1995 Stats. Ch. 732: Legislative Counsel's Digest; 08/31/95 Assembly Floor Analysis; 07/28/95 Senate Floor Analysis; 07/15/95 Senate Floor Analysis; 07/10/95 Senate Judiciary Committee Analysis; 05/25/95 Assembly Floor Analysis; 04/28/95 Assembly Committee Analysis.]

²² See also Administrative Law, Ch. 29-F, The Rutter Group, December 2020 Update, p. 63: (8) [29.685]. “This provision is intended to encourage businesses to start or expand businesses in California by permitting them to apply for tax or other incentives without fear that the sensitive business information they submit will be made public.”

with the legislative history, would suggest that this exemption should only apply to financial records related to encouraging businesses to stay, locate, or expand their facilities in California. This exemption does not apply in this situation, since SJWC's facilities are already within California.

Additionally, this statute allows permissive disclosure or withholding of financial records. Just because a record falls under a permissive exemption does not mean the Commission is required to withhold it. In fact, many financial documents, such as the Annual Reports, are public.

Summarizing the foregoing analysis, the Annual Reports provide much the same information as these, these documents are not related to expanding facilities in California, and the claimant supplied no additional rationale for why these records should be made confidential. Upon review, we find that SJWC did not establish a lawful basis to withhold their audited financial statements for the years 2018, 2019, and 2020 under Cal. Gov't. Code Section 6254.15.

D. Cal. Gov't. Code § 6255(a)

Cal. Gov't. Section 6255(a), commonly known as the public interest balancing test, is typically cited by agencies, such as the Commission, when withholding records. It sets out the test agencies are to use when withholding records. Cal. Gov't. Code Section 6255(a) states that the agency must either cite to an express provision of the chapter within the CPRA setting out exemptions, or the agency must show that on the facts of the case, the public interest served by not disclosing the records clearly outweighs the public interest served by disclosure of the record. As the Commission stated in D.20-12-021, the Commission may not delegate to another party the authority to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter; the Commission must make the decision.²³ Information submitters may suggest in their G.O. 66-D confidentiality claims that the Commission invoke the public interest balancing test, and may provide a detailed explanation of how the public interest would be served by confidential treatment to support that suggestion.

Additionally, G.O. 66-D § 3.2(b) provides in relevant part that:

- (a) 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

²³ D.20-12-021 at p. 35.

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.

As mentioned earlier, SJWC's confidentiality claims cite to Cal. Gov't. Code Section 6225(a) and state: "[t]he public interest served by not disclosing the information in this document clearly outweighs the public interest served by disclosure of the information contained."²⁴

SJWC's confidentiality claims merely states the conclusion SJWC should be trying to prove. SJWC makes no effort to "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."

When it comes to a decision regarding whether, on the facts of the particular case, the public interest served by nondisclosure clearly outweighs the public interest that would be served by disclosure, it is the Commission, not the information submitter, that applies the balancing test under Gov. Code Section 6255(a).²⁵ When the Commission engages in an independent balancing of public interests for and against disclosure, we find a strong balance in favor of public disclosure. The information in SJWC's audited financial reports may assist the public and those participating in formal proceedings regarding SJWC to verify or counter assertions made by the utility during the proceeding. The information may also give the public an opportunity to evaluate the performance of the Commission as a regulatory agency by permitting a ready comparison between the information submitted by the utility in annual reports posted on the Commission's internet site with the information provided by the utility to the Commission in other contexts, such as the audited financial reports at issue.

SJWC has failed to persuade us that the public interest that would be served by withholding the 2018, 2019, and 2020 audited financial reports from the public clearly outweighs the public interest that would be served by disclosure.

E. Cal. Evid. Code Sections 1060 and 1061; Cal. Civ. Code Section 3426.1(d); Penal Code Section 499(c)(a)(9)

Cal. Evid Code Section 1060 provides that:

²⁴ SJWC Response to Audited Financial Statements 2018 at p. 3; SJWC Response to Audited Financial Statements 2019 at p. 3; SJWC Response to Audited Financial Statements 2020 at p. 3.

²⁵ D.20-12-021 at p. 35.

If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.²⁶

Cal. Evid. Code Section 1061(a)(1)²⁷ defines trade secret as defined under Cal. Civ. Code Section 3426.1 and Penal Code Section 499(c).²⁸ Cal. Civ. Code Section 3426.1(d) defines trade secret as:

information, including a formula, pattern, compilation, program, device, method, technique, or process, that (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

A party asserting the trade secret privilege under Cal. Evid. Code Section 1060 bears the burden of proving that the information it wishes to keep secret meets all elements in the Civ. Code Section 3426.1(d) definition of a “trade secret.”²⁹ Thus, in addition to proving that information falls within the applicable statutory definition of a trade secret, SJWC must show that it “claimed the privilege” when it submitted the information to the Commission and that “allowance of the privilege will not tend to conceal fraud or otherwise work injustice.”

²⁶ The trade secret privilege is conditional, rather than absolute, since by its own terms it may not be asserted if its assertion would tend to conceal fraud or otherwise work injustice. A public interest in specific information may counter an effort to assert the trade secret privilege, where denial of access to information could be considered to “otherwise work injustice.” *See*, e.g., D.20-12-021, at p. 19; *Uribe v. Howie*, 19 Cal. App. 3d 206, 199-215.

²⁷ Cal. Evid. Code § 1061 primarily address the trade secret privilege in the context of criminal proceedings, it’s main relevance here is its references to trade secret definitions in the Civil and Penal Codes.

²⁸ Penal Code § 499c(a)(9): “Trade secret’ means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (A) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” This definition is similar to the Cal. Civ. Code § 3426.1(d) definition of a trade secret and is set forth in Penal Code provisions describing the theft of trade secrets; we need not discuss this definition separately.

²⁹ Cal. Evid. Code § 500: “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” *See also*, Cal. Evid. Code § 405; *Agricultural Labor Relations Board v. Richard A. Glass Co., Inc.* (ALRB) (1985) 175 Cal.App.3d 703.

Here, SJWC's trade secret assertions fail on several levels: in identifying with specificity the information to be withheld, and in showing that the documents meet each of the elements of trade secret. Finally, trade secret assertions are ultimately conditional.

1. Failure to Identify with Specificity the Information to be Withheld and Explain how Specific Statutory Provision Applies

In cases alleging misappropriation of trade secrets, trade secret asserters are required by Cal. Code Civ. Pro Section 2019.210 to "identify the trade secret with reasonable particularity," and judicial decisions interpreting this requirement state that this provision requires trade secret asserters to describe the trade secret in sufficient detail to all parties to understand the difference between the trade secret and other information.³⁰

While SJWC cites various statutory provisions relating to the trade secret privilege and the statutory definition of trade secrets, it fails to directly assert the trade secret privilege or explain how the information it desires the Commission to keep secret falls within the definition of a trade secret and within the scope of the trade secret privilege. SJWC merely asserts the document contains confidential corporate financial records and non-public information that SJWC derives independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. While this assertion recites elements of the Cal. Civ. Code Section 3426.1(d) definition of a trade secret, it neither directly asserts the trade secret privilege,³¹ nor explains how the information at issue falls within the definition.

Simply stating that a company "derives independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use" presumes that the Commission will accept as a given a fact not supported by evidence or by anything more than the statement itself: the confidential status of the information.

Conclusory statements alone without facts to substantiate the claim of trade secret are insufficient to prove the audited financial records contains trade secrets.

2. Failure to Meet the Elements of a Trade Secret

The Cal. Civ. Code Section 3426.1(d) definition of a trade secret is "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its

³⁰ See, e.g., D.20-12-021 at p. 21.

³¹ Cal. Evid. Code § 1060.

disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

3. Failure to Prove Requested Records have Economic Value

SJWC’s broad assertions that the information is not generally known to the public or to those who could obtain economic value from its disclosure or use imply but do not demonstrate that such information is not available to the public and stop short of showing “independent economic value” to meet the definition of trade secret under Section 3426.1(d)(1). SJWC failed to adequately explain the “independent economic value” within the Requested Record by virtue of such information not being available to the public.

Mere conclusory statements such as in this case are insufficient to qualify for the trade secret privilege or comply with G.O. 66-D Section 3.2(b) requirement that information submitters explain how the authority cited in confidentiality declarations applies to the particular information at issue.

4. Failure to Prove Reasonable Efforts to Maintain Secrecy

G.O. 66-D Section 3.5 states that:

A request for the Commission to provide confidential treatment of information per Section 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 confidentiality 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.

G.O. 66-D Section 3.5 imposes a practical obligation on information submitters similar to that imposed by Cal Code Civ. Pro. Section 2019.210 in that it requires information submitters to inform the Commission if they become aware that the information is public, and necessarily implies that information submitters should not make confidentiality claims for publicly available information.³² An assertion that publicly available information is a trade secret is misleading.

A comparison of the audited financial statements for which SJWC requests confidential treatment, and the Annual Reports that SJWC files each year with the Commission, and

³² One cannot “identify the trade secret with reasonable particularity” if the alleged trade secret is already public, since the public nature of the information defeats the “secret” element of the trade secret definition.

which are publicly available on the Commission's website, shows a substantial and significant overlap of information.

SJWC fails to distinguish between the specific language and data it considers to be trade secrets and public information. Additionally, SJWC's confidentiality claims do not explain any efforts SJWC made to maintain the secrecy of the information within the Requested Record.

5. Trade Secret Privilege is Conditional, Not Absolute

The trade secret privilege is, in any event, conditional rather than absolute. Cal. Evid. Code Section 1060 provides that a trade secret owner has a privilege, "if allowance of the privilege will not tend to conceal fraud or otherwise work injustice."³³

After receiving proof sufficient to support a Commission finding that the information is in fact a trade secret; the Commission must then determine whether it believes assertion of the privilege should be allowed, or whether it believes assertion of the privilege would "tend to conceal fraud or otherwise work injustice." If it believes the latter, it is not required to accept the party's Cal. Evid. Code Section 1060 trade secret privilege assertion.

D.20-12-021, at 25-26, states that:

As noted earlier, the Evid. Code § 1060 trade secret privilege is a conditional privilege that can only be asserted where allowance of the privilege would not tend to conceal fraud or otherwise work injustice.³⁴ Relying largely on *Uribe v. Howie, supra*, the Court in *Coalition of University Employees v. The Regents of the University of California (CUE)*³⁵, *supra*, explained that, when an agency seeks to withhold records from the public on the grounds that the records are trade secrets, the court is ultimately required to balance the public's interest in disclosure against the public's interest in nondisclosure. The *CUE* Court further explained that *Uribe v. Howie, supra*, construed the "work injustice" language to embody a balancing test analogous to the balancing test required by Gov. Code § 6255(a). Thus, when an agency wants to withhold records on the basis of trade secret privilege assertions, it must first determine whether the records include trade secrets, and then balance public

³³ Cal. Evid. Code § 1060. See also, D.20-12-021 at pp. 25-26.

³⁴ See e.g., *Uribe v. Howie*, (1971) 19 Cal.App.3d 194, 205-207, 210-211.

³⁵ *Coalition of University Employees v. The Regents of the University of California (CUE)* (Super. Ct. Alameda County, 2003, No. RG03-089302) 2003 WL 22717384.

interests for and against disclosure. In *Uribe, supra, CUE*, and *ALRB, supra*, the courts found that the public interest in disclosure outweighed the claimed need for secrecy.³⁶

Thus, even if SJWC complied with G.O. 66-D and met the requirements to assert trade secrets privilege, the Commission would also have to address whether the allowance of trade secret privilege to the Requested Records would be contrary to the public's interests and "otherwise work injustice." However, SJWC did not address this.

Upon review, we find that SJWC did not establish a lawful basis to withhold their audited financial statements for the years 2018, 2019, and 2020 under Cal. Evid. Code Sections 1060 and 1061; Cal. Civ. Code Section 3426.1(d); Penal Code Section 499(c)(a)(9) as a trade secret.

F. Cal Pub Util Code Section 583

Cal. Pub. Util. Code Section 583 is often cited in G.O. 66-D confidentiality claims. But, as the Commission has often previously stated,³⁷ Cal. Pub. Util. Code Section 583 "neither creates a privilege of nondisclosure for a utility, nor designates any specific types of documents as confidential."³⁸ In fact, Pub. Util. Code Section 583 vests the Commission with broad discretion to disclose information that a party deems confidential.³⁹ Therefore, a party may not rely on Pub. Util. Code Section 583 for the proposition that information required by the Commission to be submitted is confidential.⁴⁰

G.O. 66-D Section 3.2 (b) states explicitly: "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."

³⁶ D.20-12-021 at pp. 24-26.

³⁷ D. 20-03-014, at pp. 21-22; D. 20-12-021 at pp. 14-15.

³⁸ (*Re Southern California Edison Company* (1991) 42 CPUC2d 298, 301; *Southern California Edison Company v. Westinghouse Electric Corporation* (1989) 892 F.2d 778, 783 ["On its face, Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities."]; and Decision 06-06-066,52 as modified by Decision 07-05-032 at 27 [583 does not require the Commission to afford confidential treatment to data that does not satisfy substantive requirements for Trade Secret such treatment created by other statutes and rules.])

³⁹ (D.99-10-027 (1999) Ca. PUC LEXIS 748 at *2 [Pub. Util. Code § 583 gives the Commission broad discretion to order confidential information provided by a utility made public.])

⁴⁰ See, e.g., G.O. 66-D § 3.2(b): "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."

Additionally, the September 18, 2019 letter, quoted earlier, specifically cautioned water utilities against the indiscriminate use of PU Code Section 583 to classify as “confidential” information in the reports filed with the Commission, and noted that this Commission has released similar reports to the public upon request.⁴¹ The September 18, 2019 letter cautions against the indiscriminate use of PU Code Section 583 to classify as “confidential” information in the reports filed with the Commission.

For these reasons we find that Cal. Pub. Util. Code Section 583 does not establish a lawful basis for the Commission to withhold SJWC’s audited financial statements from the public.

SUMMARY

A successful confidentiality claim would need to fulfill the procedural requirements of G.O. 66-D Section 3.2, establish a specific basis of confidentiality and demonstrate how the basis of confidentiality applies to the facts of the specific documents.

Based on the foregoing analysis, we conclude that SJWC has failed to meet the minimal procedural requirements in G.O. 66-D Section 3.2(b), and failed to establish the elements for any one confidentiality claim or how they would relate to the facts of the records.

As SJWC has not established the burden of proof for any one confidentiality claim, we authorize the public disclosure of the Audited Financial Statements of SJWC for the years ending Dec. 1, 2018, 2019, and 2020.

COMMENTS ON DRAFT RESOLUTION

In accordance with Cal. Pub. Util. Code § 311(g), the Draft Resolution was mailed to the parties on January 7, 2022. Comments were filed on _____. Reply comments were filed _____.

FINDINGS OF FACT

1. The Commission received a public records request seeking disclosure of the Commission’s records concerning SJWC’s Audited Financial Statements for the Years Ending December 31, 2018, 2019, and 2020.
2. SJWC filed confidentiality statements for the entirety of their Audited Financial Statements for the Years Ending December 31, 2018, 2019, and 2020, consistent with General Order 66-D.

⁴¹ September 18, 2019 Letter to Class A Water Utilities at p. 2.

3. Access to the records was denied in the absence of a Commission order authorizing disclosure.
4. Upon review of their confidentiality claims, the Commission finds SJWC did not establish a lawful basis for confidential treatment.
5. Disclosure of SJWC's Audited Financial Statements for the Years Ending December 31, 2018, 2019, and 2020, is in the public interest.

CONCLUSIONS OF LAW

1. The documents in the requested Commission's investigation file and report are public records as defined by Cal. Gov't. Code § 6250, *et seq.*
2. The California Constitution favors disclosure of governmental records by, among other things, stating that the people have the right of access to information concerning the conduct of the peoples' business.
3. The California Constitution requires that authority favoring disclosure be broadly construed, and that authority limiting disclosure be construed narrowly; and that any new statutes, court rules, or other authority limiting disclosure be supported by findings determining the interest served by keeping information from the public and the need to protect that interest. Cal. Const. Article I, §§ 3(b)(1) and (2).
4. The general policy of the CPRA favors disclosure of records.
5. Justification for withholding a public record in response to a CPRA request must be based on specific exemptions in the CPRA or upon a showing that, on the facts of a particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. Cal. Gov't. Code § 6255.
6. Cal. Pub. Util. Code § 583 does not limit the Commission's ability to order disclosure of records.
7. There is no legal barrier to the Commission's disclosure of SJWC's Audited Financial Statements for the Years Ending December 31, 2018, 2019, and 2020, and disclosure is in the public interest.

ORDER

1. The request for disclosure of the Commission records concerning SJWC's Audited Financial Statements for the Years Ending December 31, 2018, 2019, and 2020, is granted.
2. The effective date of this order is today.

I certify that this Resolution was adopted by the California Public Utilities Commission at its regular meeting of February 10, 2022, and that the following Commissioners approved it:

Rachel Peterson,
Executive Director