PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

Resolution No. L-617
July 14, 2022

R E S O L U T I O N

RESOLUTION DENYING BRANDON RITTIMAN'S APPEAL OF THE COMMISSION'S DETERMINATION THAT RECORDS SOUGHT UNDER CALIFORNIA PUBLIC RECORD ACT REQUEST 21-704 ARE EXEMPT FROM DISCLOSURE

SUMMARY

The California Public Records Act establishes the public's right to access information concerning the conduct of the people's business, and it likewise creates a large number of categories of documents that are exempt from disclosure to the public. On December 17, 2021, Brandon Rittiman requested certain records from the California Public Utilities Commission ("Commission" or "CPUC") pursuant to the California Public Records Act ("CPRA" or "PRA"). On January 14, 2022, staff for the Legal Division of the Commission informed Mr. Rittiman of its determination that the requested records were exempt from disclosure pursuant to California Government Code section 6254(k), which does not allow public access to "Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege," as well as Government Code section 6254(l), which exempts "Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary."

This resolution denies Mr. Rittiman's subsequent appeal of the Commission staff determination that the records sought are exempt from disclosure. Having reviewed the request, we conclude the responsive documents fall within one or more of the privileges or statutory exemptions identified above.

BACKGROUND

Pursuant to Public Utilities Code section 583 and Government Code section 6253.4(a), the Commission has adopted guidelines for public access to Commission records embodied in General Order ("G.O.") 66-D. (*See* Order Instituting Rulemaking to Improve Public Access to Public Records Pursuant to the California Public Records Act (R.14-11-001), last amended by Decision 20-08-031).

When the Commission receives a CPRA request, the Commission's Legal Division determines if the information should be released or withheld pursuant to statutory exemptions or other applicable privileges. If documents are withheld, the Legal Division will inform the CPRA requestor and not release the information. (See G.O. 66-D, § 5.5(d).) The requestor may seek reconsideration of the matter by the full Commission by submitting a "Public Information Appeal Form" within ten days of receiving notice that the request has been denied. (See id.). The Commission will then reexamine the request and issue a Resolution on the matter.

On December 17, 2021, Brandon Rittiman made the CPRA request to the Commission at issue in this Resolution, and it was subsequently identified as PRA 21-704. Specifically, Mr. Rittiman requested the following documents:

> "For calendar years 2019 and 2020, all emails containing GSIBProjectWhitney@guggenheimpartners.com in any portion of the message or metadata.
>
> "Please provide any such messages in their original formats and include any attachments thereto."

There are 53 potentially responsive emails detected by Commission staff in which the term "GSIBProjectWhitney@guggenheimpartners.com" appears, but that email address is shown as a direct recipient of an email only a handful of times, and not once as a sender; usually the term is found in an email address line in a subsequent email that has been forwarded by attorneys to other attorneys. All of the emails are between or among attorneys, whether between Commission attorneys themselves or between Commission attorneys and Governor's Office attorneys.

On January 14, 2022, via a letter sent by electronic mail, Commission legal staff informed Mr. Rittiman of its determination that the communications sought were exempt from disclosure pursuant to California Government Code sections 6254(k) and (l). Specifically, staff cited the "lawyer-client privilege (Cal. Evid. Code § 950, *et seq*.); common interest doctrine (*see, e.g*., *Oxy Resources California LLC v. Superior Court* (2004) 115 Cal. App. 4th 874; attorney work product doctrine (Cal. Code Civ. Proc. § 2018.010, *et seq*.); deliberative process privilege (*see, e.g*., *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325); official information privilege (Cal. Evid. Code § 1040)." Mr. Rittiman was further advised that he would not receive correspondence to or from the Governor's Office, which is expressly exempt from disclosure pursuant to California Government Code section 6254(l).

On January 19, 2022, Mr. Rittiman emailed Commission legal staff to appeal the determination that the communications sought in PRA 21-704 were exempt from disclosure.[1] Mr. Rittiman[2] contended that:

> "Among the reasons CPUC's decision is in error: The determination misapplies the governor's correspondence exemption, which does not apply to intra-governmental communications. It also misapplies attorney-client privilege and related doctrines. Guggenheim is an investment bank acting in the role of a financial advisor and not as legal counsel. Additionally, Guggenheim's clients were the Governor's office and Department of Finance, not the CPUC. Lastly, the records pertain to a matter of great public interest: namely, the government's response to criminal behavior by a state-licensed monopoly over 40 percent of California's population and the related bankruptcy."

DISCUSSION

The California Constitution and the CPRA confer a public right to access a substantial amount of government information. The preamble to the CPRA declares "that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Cal. Gov. Code § 6250. However, "[t]he right of access to public records under the CPRA is not absolute." *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272, 1282 (2006). There are many statutory exemptions for documents that the California Legislature has deemed inappropriate for general public disclosure.

I. THE ATTORNEY-CLIENT PRIVILEGE AND COMMON INTEREST DOCTRINE

Government Code Section 6254(k) exempts from disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."

In the case of the attorney-client privilege, an assertion of the privilege requires: 1) an attorney-client relationship (Cal. Evid. Code sections 951, 954); 2) a confidential communication between client and lawyer, as defined in California Evidence Code

[1] Mr. Rittiman did not use the "Public Information Appeal Form," as required by G.O. 66-D, and instead informally emailed Legal Division staff of his appeal. Although the Commission has undertaken review of his appeal, this Resolution does not constitute precedent that the Commission will waive the procedural requirements of G.O. 66-D in future situations.

[2] Mr. Rittiman's CPRA request and appeal were both made on his behalf only.

section 952, during the course of the attorney-client relationship; and 3) a privilege claim by the holder of the privilege, or by a person who is authorized to claim the privilege by the holder of the privilege (Cal. Evid. Code section 954).

California Evidence Code section 952 defines "Confidential Communication Between Client and Lawyer" as follows:

> As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or to those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purposes for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

As embodied in the code section above, the law permits, without waiver, the disclosure of otherwise confidential information "to those who are present to further the interest of the client," or to those to whom disclosure is "reasonably necessary" for the "transmission of the information" or to accomplish "the purposes for which the lawyer is consulted."

As a result, attorney communications with agents and employees of a client likewise are protected by the attorney-client privilege. The attorney can both give and receive information from the client's agents without waiver of the privilege. See generally Rest.3d Law Governing Lawyers § 70, Comments f and g, § 73, Comment g.

The agent need not be a member of the client's "control group" (e.g., a managing officer or director in the case of a corporate client) because such a limitation on the privilege "would largely destroy the ability of corporate counsel to freely communicate." *Upjohn Co. v. United States*, 449 U.S. 383, 391-393 (1981); *Continental Ins. Co. v. Superior Court*, 32 Cal. App. 4th 94, 114 (2d Dist. 1995); *see also United States v. Graf*, 610 F.3d 1148, 1157-1164 (9th Cir. 2010) (health insurance company's corporate privilege extended to outside consultant deemed "functional equivalent" of employee).

Thus, the privilege extends even to lower level individuals of an organization who reasonably need to know of an otherwise confidential communication in order to act for the organization, even if that person had no direct contact with a lawyer. *Zurich American Ins. Co. v. Superior Court*, 155 Cal. App. 4th 1485, 1499-1500 (2007).

A confidential communication to or by a lawyer does not lose its privileged nature if made in the presence of a spouse, registered domestic partner (see Cal. Fam. Code §

297.5), parent, business associate, or joint client who is present to further the client's interest. See Evid. Code § 952, Law Rev. Comm'n Comment; *Fireman's Fund Ins. Co. v. Superior Court*, 196 Cal. App. 4th 1263, 1274 (2d Dist. 2011) (third persons to whom information may be conveyed without destroying confidentiality include nonattorney agents retained by attorney to assist with the representation).

The privilege "extends to communications which are intended to be confidential, if they are made to attorneys, to family members, business associates, or agents of the party or his attorneys on matters of joint concern, when disclosure of the communication is reasonably necessary to further the interest of the litigant." *OXY Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874 (1st Dist. 2004) (quoting *Insurance Co. of North America v. Superior Court*, 108 Cal. App. 3d 758, 767 (2d Dist. 1980). Financial advisors, such as those from Guggenheim Partners, are precisely the type of agent or consultant retained to "further the interest of the client" and to accomplish "the purposes for which the lawyer is consulted." Disclosure of confidential information from an attorney to such an expert consultant, or vice versa, does not waive its privileged character.

Although California law does not recognize a "common interest *privilege*," per se, it does recognize a "common interest *doctrine*" that serves as an exception to the general rule that the attorney-client privilege (and attorney work product protection) is waived upon voluntary disclosure of otherwise privileged information to a third party. *OXY Resources*, 115 Cal. App. 4th at 889, 890. The "common interest" doctrine does not create a new privilege or extend an existing one; instead, it is nonwaiver doctrine, analyzed under standard waiver principles applicable to attorney-client privilege and attorney work product protection. *Id*.; *see also Meza v. H. Muehlstein & Co.*, 176 Cal. App. 4th 969, 973 (2d Dist. 2009) (California recognizes "common interest" doctrine).

Under the common interest doctrine, an attorney can disclose confidential information to an attorney representing a separate client without waiving the attorney-client privilege or attorney work product protection "if (1) the disclosure relates to a common interest of the attorneys' respective clients; (2) the disclosing attorney has a reasonable expectation that the other attorney will preserve confidentiality; and (3) the disclosure is reasonably necessary for the accomplishment of the purpose for which the disclosing attorney was consulted." *Meza*, 176 Cal. App. 4th at 981.

The common interest doctrine is not limited to litigation matters and may apply even though the disclosure was not made during the course of litigation. The need to exchange otherwise privileged information may legitimately arise in a host of situations, including the negotiation of commercial transactions. In such a case, use of the doctrine allows businesses to "share more freely information that is relevant to their transactions" and hence "lubricates business deals and encourages more openness in transactions." *Hewlett-*

Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 311 (N.D. Cal. 1987); *OXY Resources*, 115 Cal. App. 4th at 898.

Finally, the common interest doctrine applies to public agencies, just as it does to private individuals and entities. *See Citizens for Ceres v. Superior Court*, 217 Cal. App. 4th 889, 919-922 (5th Dist. 2013) (doctrine applied to communications between developer and city after issuance of environmental impact report); *Golden Door Properties, LLC v. Superior Court*, 53 Cal. App. 5th 733, 785-786 (4th Dist. 2020) (doctrine applied to county's communications with developer before issuance of environmental impact report where project opponents had already filed action to terminate project); *STI Outdoor LLC v. Superior Court*, 91 Cal. App. 4th 334, 339-341 (2d Dist. 2001) (county transportation authority).

On March 12, 2019, in response to Pacific Gas and Electric Company's ("PG&E") declared bankruptcy, the CPUC, the Governor's Office, and the California Department of Finance memorialized in writing a common interest agreement among their respective agencies. As discussed, Guggenheim Partners was retained by the Governor's Office to provide financial analysis as to the impacts of PG&E's bankruptcy.

Consistent with the principles discussed above, each of the 53 emails at issue were initiated and/or received by attorneys from the agencies, they related to PG&E's bankruptcy, there was a reasonable expectation of confidentiality among the participants (as shown by the existence of the common interest agreement itself), and the emails were reasonably necessary to accomplish the purposes of the attorneys' consultations. Each of the emails at issue post-date the March 12, 2019 execution of the common interest agreement.[3] It is wholly permissible and does not constitute a waiver of the attorney-client privilege for the parties' attorneys and their necessary agents to communicate on issues of common interest in connection with PG&E's bankruptcy.

II. THE DELIBERATIVE PROCESS PRIVILEGE

In addition to the attorney-client privilege and the attorney work product doctrine, legal staff cited the deliberative process privilege as an exemption to the production of the documents. This privilege protects confidential, deliberative advice given to agency decisionmakers, and the confidential information used to develop such advice. *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1339-1346 (1991).

The deliberative process privilege protects "mental processes by which a given decision was reached" and "the substance of conversations, discussions, debates, deliberations and

[3] Common interest agreements do not need to be in writing, but a written agreement is evidence of an attempt and desire not to waive the attorney-client privilege. *OXY Resources*, 115 Cal. App. 4th at 892.

like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated." *Regents of University of California v. Superior Court*, 20 Cal. 4th 509, 540 (1999).

In determining whether the privilege applies, "[t]he key question in every case is 'whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" *Times Mirror*, 53 Cal.3d at 1342 (citation omitted). "Even if the content of a document is purely factual, it is nonetheless exempt from public scrutiny if it is 'actually... related to the process by which policies are formulated' or 'inextricably intertwined with 'policy-making processes.'" *Id*. (citations omitted).

Here, there is no question that the attorneys involved in the emails at issue were facilitating policy development for their respective agencies. Understanding and potentially minimizing the impact of PG&E's bankruptcy on its ratepayers, and preparing for the cascading economic impacts, were central policy issues facing each agency. The deliberative process privilege applies to these emails as well.

III. THE GOVERNOR'S CORRESPONDENCE EXEMPTION

Finally, the emails that Mr. Rittiman seeks are facially exempt from disclosure under the plain terms of Government Code section 6254(l), which exempts from public disclosure "[c]orrespondence of and to the Governor or employees of the Governor's office. . .."

As Mr. Rittiman's appeal recognizes, Guggenheim Partners had been retained by the Governor's Office and was acting as its agent during the course of these communications. Regardless of whether this agency creates an "employment" relationship for purposes of the Governor's Correspondence exemption, other attorneys of the Governor's Office were involved in each email sought by Mr. Rittiman in his request. They were "employees of the Governor's Office" and such records are categorically exempt from disclosure.

Mr. Rittiman argues, however, that the exemption "does not apply to intra-governmental communications." However, the plain text of Government Code section 6254(l) exempts from production "[c]orrespondence **of and to** the Governor or employees of the Governor's office . . ." (emphasis added). The Legislature did not limit the exemption to "extra-governmental correspondence" or otherwise suggest such a limitation, which it could easily have done if it had wished. A court's "primary task in construing a statute is to determine the Legislature's intent. Where possible, 'we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law. . .." *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 731 (2003).

Finally, the CPRA was modeled on the federal Freedom of Information Act ("FOIA," 5 U.S.C. § 552), and "[t]he legislative history and judicial construction of the FOIA thus 'serve to illuminate the interpretation of its California counterpart.'" *Times Mirror*, 53 Cal. 3d at 1338; *see also California First Amendment Coalition*, 67 Cal. App. 4th at 169, n.8 ("Because the Public Records Act is modeled after the federal Freedom of Information Act and serves the same purpose, federal decisions under the FOIA are often relied on to construe California's Act."). Under federal law, members of the public are not entitled to a President's records while that President is in office. FOIA does not apply to offices within the Executive Office of the President whose function is to advise and assist the President.[4] *See Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980) (noting that the term "agency" does not include "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President."). However, the Presidential Records Act (22 U.S.C. Sections 2201-09) makes many such records available five years after a president leaves office. To the extent the CPRA is based on FOIA, that would militate in favor of applying the Correspondence Exemption to the correspondence Mr. Rittiman has requested.

COMMENTS ON DRAFT RESOLUTION

The Draft Resolution was served by email to Mr. Rittiman and his counsel, Steve Zansberg, on June 10, 2022, in accordance with Cal. Pub. Util. Code § 311(g). Mr. Rittiman and his counsel were informed that comments were due on July 11, 2022. Comments were received _____.

FINDINGS OF FACT

1. On December 17, 2021, Brandon Rittiman made request PRA 21-704 to the Commission as follows:

   "For calendar years 2019 and 2020, all emails containing GSIBProjectWhitney@guggenheimpartners.com in any portion of the message or metadata.

   "Please provide any such messages in their original formats and include any attachments thereto."

[4] Title 5 United States Code Section 552(b)(5) provides that agencies need not disclose "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

2. On January 14, 2022, via a letter sent by electronic mail, Commission legal staff informed Mr. Rittiman of its determination that the communications sought were exempt from disclosure pursuant to California Government Code sections 6254(k) and (l). Specifically, staff cited the "lawyer-client privilege (Cal. Evid. Code § 950, *et seq*.); common interest doctrine (*see, e.g*., *Oxy Resources California LLC v. Superior Court* (2004) 115 Cal. App. 4th 874; attorney work product doctrine (Cal. Code Civ. Proc. § 2018.010, *et seq*.); deliberative process privilege (*see, e.g*., *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325); official information privilege (Cal. Evid. Code § 1040)."

3. Mr. Rittiman was further advised that he would not receive correspondence to or from the Governor's Office, which is expressly exempt from disclosure pursuant to California Government Code section 6254(l).

4. On January 19, 2022, Mr. Rittiman emailed Commission legal staff to appeal the determination that the communications sought in PRA 21-704 were exempt from disclosure.

5. Mr. Rittiman did not use the "Public Information Appeal Form," as required by G.O. 66-D, and instead informally emailed Legal Division staff of his appeal.

6. On June 10, 2022 Mr. Rittiman received the draft Resolution and received notice that comments were due on July 11, 2022.

CONCLUSIONS OF LAW

1. The communications sought by Mr. Rittiman in his PRA 21-704 request are exempt from disclosure pursuant to California Government Code sections 6254 (k) and 6254(l).

2. Although the Commission has undertaken review of Mr. Rittiman's appeal, this Resolution does not constitute precedent that the Commission will waive the procedural requirements of G.O. 66-D in future situations.

THEREFORE, IT IS ORDERED that:

1. Mr. Rittiman's appeal of the Commission's determination that records sought under California Public Record Act requests PRA 21-704 is hereby denied.

2. This Resolution is effective today.

I certify that the foregoing Resolution was adopted by the California Public Utilities Commission of the State of California at its regular meeting of July 14, 2022, and the following Commissioners approved favorably thereon:

_____

Rachel Peterson
Executive Director