

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

Resolution No.: L-620  
April 27, 2023

**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 REQUESTS 21-680, 21-681, 21-682, AND 21-683 ARE EXEMPT FROM DISCLOSURE**

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**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 3, 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 February 18, 2022, Commission legal staff provided Mr. Rittiman with some records responsive to the requests and also informed Mr. Rittiman that the remaining requested records were exempt from disclosure pursuant to the deliberative process privilege (*see, e.g., Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325), the official information privilege (Cal. Evid. Code § 1040) and/or the attorney client privilege.

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 3, 2021, Brandon Rittiman made the four CPRA requests to the Commission at issue in this Resolution, and they were subsequently identified as PRAs 21-800, 21-801, 21-802 and 21-803 (collectively "PRA 21-800 through 803.") Specifically, Mr. Rittiman requested the following documents:

PRA Request #21-680

Pursuant to my rights under the California Constitution and the CPRA, please provide me:

Any and all communications (to include emails and text messages whether made on state-owned or personal devices) between Clifford Rechtschaffen and any other commissioner between the dates of April 1 and May 31, 2020.

PRA Request #21-681

Pursuant to my rights under the California Constitution and the CPRA, please provide me:

Any and all communications (to include emails and text messages whether made on state-owned or personal devices) between Liane Randolph and any other commissioner between the dates of April 1 and May 31, 2020.

PRA Request #21-682

Pursuant to my rights under the California Constitution and the CPRA, please provide me:

Any and all communications (to include emails and text messages whether made on state-owned or personal devices) between Martha Guzman Aceves and any other commissioner between the dates of April 1 and May 31, 2020.

PRA Request #21-683

Pursuant to my rights under the California Constitution and the CPRA, please provide me:

Any and all communications (to include emails and text messages whether made on state-owned or personal devices) between Genevieve Shiroma and any other commissioner between the dates of April 1 and May 31, 2020.

All of the persons identified by name in these CPRA requests were Commissioners in April and May of 2020. On December 20, 2021, via letter sent by electronic mail, Commission staff informed Mr. Rittiman that these latest PRA Requests were an attempt to obtain the same documents requested by PRA 20-688, as they requested the same information from the same individuals as PRA 20-688. Commission staff denied PRA 20-688 via letter on June 25, 2021, and Mr. Rittiman failed to appeal this determination within the time frame afforded pursuant to General Order 66-D Section 5.5(d).

On February 18, 2022, via a letter sent by electronic mail, Commission legal staff provided Mr. Rittiman with some records responsive to the requests. The records provided to Mr. Rittiman were generally communications that were shared outside the Commission, such that many privileges did not apply. The February 18 letter also informed Mr. Rittiman that the remaining requested records were exempt from disclosure pursuant to the deliberative process privilege, the official information privilege and/or the attorney client privilege. Thus, records were exempt from disclosure pursuant to Cal. Govt. Code § 6254(k), which exempts: “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.”

On February 24, 2022, Mr. Rittiman emailed Commission legal staff to appeal the determination that the communications sought in PRA 21-800 through 803 were exempt from disclosure. Mr. Rittiman’s appeal stated:

Without a log of the withheld records, it is impossible to narrow this appeal further.

I will note that we are aware Commissioners made it their practice to communicate to one another via mobile text messages, none of which appear in this production. Such records were previously provided in response to a prior CPRA request from the legal representation for former CPUC executive director Alice Stebbins.

CPUC has offered no explanation for why such messages are being withheld from my request.

I would note that CPUC's response took 77 days to provide, which is well outside of the statutory time limit of 24 days under the CPRA.

Please issue a determination on this appeal as soon as possible.

If the agency intends to continue to withhold records, I ask that you please describe the records at issue and please provide the name of the staff member(s) who determined that they are exempt.

## **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.

## **TEXT MESSAGES**

There are no non-privileged text messages responsive to the PRA requests.

## **THE DELIBERATIVE PROCESS PRIVILEGE**

Legal staff cited the deliberative process privilege as an exemption to the production of records. 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 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). The deliberative process privilege protects the public's interest in allowing its policy makers to have "frank discussion of legal or policy matters," an interest that would be "inhibited if 'subjected to public scrutiny'" and "greatly hampered if, with respect to such matters, government agencies were 'forced to operate in a fishbowl.'" *Times Mirror*, 53 Cal. 3d at 1340.

In determining whether the privilege applies, “[t]he key question in every case is ‘whether the disclosure of materials would expose an agency’s decision-making 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).

Mr. Rittiman’s PRA requests seek communications between Commissioners. These internal communications between Commissioners about Commission business involved pre-decisional policy discussions. Thus, almost all the communications withheld from Mr. Rittiman are subject to the deliberative process privilege. The records provided to Mr. Rittiman were generally communications shared outside the Commission, so that the deliberative process privilege does not apply.

### THE ATTORNEY-CLIENT PRIVILEGE

In addition to the deliberative process privilege, legal staff cited the attorney-client privilege as an exemption to the production of records. 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 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 the privilege holder, the Commission bears the burden of proving its right to assert the attorney-client privilege.<sup>1</sup> As the California Supreme Court noted in *Costco Wholesale Corp. v. Superior Court*. (“*Costco*”) 47 Cal.4th 725, 733 (2009):

The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. . . . Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply.<sup>2</sup>

The communications reflected in the records subject to the Commission’s assertion of the attorney-client privilege were communications between Commission lawyers, Commissioners, and other Commission employees made in confidence during the course of the Commission’s attorney-client relationships. The Commission, through its Commissioners and other employees, routinely consults with its lawyers for the purposes of securing confidential legal services or advice. The privileged communications were not with utilities or individuals outside the Commission. Rather, these communications involve legal opinion and advice from Commission attorneys to their Commission clients regarding Commission regulatory activities.

### THE OFFICIAL INFORMATION PRIVILEGE

Finally, some of the communications that Mr. Rittiman seeks are exempt from disclosure pursuant to the official information privilege. The official information privilege is established by Cal. Evid. Code § 1040 and provides a lawful basis for the Commission to refrain from disclosing certain information acquired in confidence by the Commission, where disclosure is either prohibited by federal or state law, or where there is a need for confidentiality that outweighs the necessity for disclosure in the interests of justice. The conditional official information privilege in Cal. Evid. Code § 1040(b)(2) involves a careful balancing of the public interests served by disclosing, or withholding, information, and can, where appropriate, justify withholding records in response to CPRA requests, since it can support assertion of the California Government Code § 6254(k) exemption. *See* D.20-08-031, p. 14.

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<sup>1</sup> The Public Records Office is authorized to assert the Commission’s privileges and exemptions from disclosure in response to records requests and subpoenas, as appropriate.

<sup>2</sup> *See also* Cal. Evid. Code § 917(a); *Wellpoint Health Networks, Inc. v. Superior Court* (“*Wellpoint*”) 59 Cal.App.4th 110, 123-124 (1997).

The Commission has asserted the official information privilege for records, or portions of records, that include information that, if disclosed, could jeopardize the safety of regulated entity facilities and operations. *See* Resolution L-475, p. 5. Thus, some of the records sought by Mr. Rittiman are exempted from disclosure pursuant to the official information privilege.

### **PERSONAL PRIVACY**

Finally, although not previously discussed with Mr. Rittiman, some of the communications he sought are exempted from disclosure pursuant to Cal. Gov. Code § 6254(c), which exempts personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy. Thus, communications of confidential personnel information, or the health status of Commission personnel are exempted by Cal. Gov. Code § 6254(c).

### **NOTICE AND COMMENTS ON DRAFT RESOLUTION**

The Draft Resolution was mailed to Mr. Rittiman and his counsel, Steve Zansberg, on March 24, 2023, in accordance with Cal. Pub. Util. Code § 311(g). Comments were filed on \_\_\_\_\_. Reply comments were filed on \_\_\_\_\_.

### **FINDINGS OF FACT**

1. On December 3, 2021, Brandon Rittiman made four CPRA requests to the Commission, subsequently identified as PRA 21-680, 21-681, 21-682 and 21-683 (collectively “PRA 21-680 through 683.”) Specifically, Mr. Rittiman requested the following documents:

PRA Request #21-680

Pursuant to my rights under the California Constitution and the CPRA, please provide me:

Any and all communications (to include emails and text messages whether made on state-owned or personal devices) between Clifford Rechtschaffen and any other commissioner between the dates of April 1 and May 31, 2020.

PRA Request #21-681

Pursuant to my rights under the California Constitution and the CPRA, please provide me:

Any and all communications (to include emails and text messages whether made on state-owned or personal devices) between Liane

Randolph and any other commissioner between the dates of April 1 and May 31, 2020.

PRA Request #21-682

Pursuant to my rights under the California Constitution and the CPRA, please provide me:

Any and all communications (to include emails and text messages whether made on state-owned or personal devices) between Martha Guzman Aceves and any other commissioner between the dates of April 1 and May 31, 2020.

PRA Request #21-683

Pursuant to my rights under the California Constitution and the CPRA, please provide me:

Any and all communications (to include emails and text messages whether made on state-owned or personal devices) between Genevieve Shiroma and any other commissioner between the dates of April 1 and May 31, 2020.

2. All of the persons identified by name in the above CPRA requests were Commissioners in April and May of 2020.
3. On February 18, 2022, via a letter sent by electronic mail, Commission legal staff provided Mr. Rittiman with some records responsive to the requests and also informed Mr. Rittiman that some of the requested records were exempt from disclosure pursuant to the deliberative process privilege, the official information privilege and/or the attorney client privilege.
4. On February 24, 2022, Mr. Rittiman emailed Commission legal staff to appeal the determination that the communications sought in PRA 21-680 through 683 were exempt from disclosure.
5. On March 24, 2023 Mr. Rittiman received the draft Resolution and received notice that comments were due on April 23, 2023.
6. Mr. Rittiman filed comments to the draft Resolution on \_\_\_\_\_, 2023.



**CONCLUSIONS OF LAW**

1. Some of the communications sought by Mr. Rittiman in his PRA requests 21-680, 21-681, 21-682 and 21-683 are exempt from disclosure pursuant to California Government Code Section 6254 (k), which exempts records from disclosure pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.
2. The deliberative process privilege protects confidential, deliberative advice given to agency decisionmakers, and the confidential information used to develop such advice.
3. The attorney-client privilege protects communications between Commission lawyers, Commissioners, and other Commission employees made in confidence during the course of the Commission's attorney-client relationships.
4. The official information privilege in California Evidence Code § 1040 provides a lawful basis for the Commission to refrain from disclosing certain information acquired in confidence by the Commission, where disclosure is either prohibited by federal or state law, or where there is a need for confidentiality that outweighs the necessity for disclosure in the interests of justice.
5. Confidential information shared between governmental agencies pursuant to confidential agreements is generally subject to each agency's official information privilege, pursuant to Cal. Evid. Code § 1040.
6. Cal. Gov't Code § 6254(c) exempts from disclosure personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy.

**THEREFORE, IT IS ORDERED** that:

1. Mr. Rittiman's appeal of the Commission's determination that records sought under California Public Record Act requests 21-680, 21-681, 21-682 and 21-683 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 April 27, 2023, and the following Commissioners approved favorably thereon:

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Rachel Peterson  
Executive Director