

**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Legal Division

San Francisco, California

Date: June 4, 2009

Resolution No.: L-379

**RESOLUTION**

**RESOLUTION AUTHORIZING DISCLOSURE OF RECORDS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION CONSUMER PROTECTION AND SAFETY DIVISION (RAIL TRANSIT AND CROSSINGS SAFETY BRANCH) INVESTIGATION RECORDS, PURSUANT TO A SUBPOENA OF DEBORAH A. WOLFE, ESQ., SEEKING DISCLOSURE OF AN INJURY INCIDENT OF DAVID GLADDEN THAT OCCURRED ON APRIL 28, 2007 AT THE TROLLEY STATION ON CAMINO DE LA REINA, SAN DIEGO, CALIFORNIA.**

**BACKGROUND**

Deborah A. Wolfe, Esq., attorney representing David Gladden issued a subpoena for records of the California Public Utilities Commission ("Commission") for:

1. All written accident reports and accident corrective action summary reports referring or relating to the collision between the San Diego Trolley, Train No. 73, and David Gladden, on April 28, 2007, in San Diego, California, by San Diego Trolley, Inc. and/or Metropolitan Transit System.
2. All written accident investigation notes, and RTA Accident Investigation Procedures, including any changes, referring or relating to the collision between the San Diego Trolley, Train No. 73, and David Gladden, on April 28, 2007, in San Diego, California, by San Diego Trolley, Inc. and/or Metropolitan Transit System.

3. All data, videotapes, or electronic information from event recorders referring or relating to the collision between the San Diego Trolley, Train No. 73, and David Gladden, on April 28, 2007, in San Diego, California.
4. All written reports regarding the investigation findings, the most probable cause of the accident, contributing causes, and recommendations for corrective action to prevent a recurrence of the accident referring or relating to the collision between the San Diego Trolley, Train No. 73, and David Gladden, on April 28, 2007, in San Diego, California.
5. All written corrective action plan as part of the investigation report or in a separate document referring or relating to the collision between the San Diego Trolley, Train No. 73, and David Gladden, on April 28, 2007, in San Diego, California.
6. All final investigation reports and interim status reports referring or relating to the collision between the San Diego Trolley, Train No. 73, and David Gladden, on April 28, 2007, in San Diego, California.
7. All formal letters from the Staff of the Public Utilities Commission to the San Diego Trolley, Inc. and/or Metropolitan Transit System, approving, rejecting, and/or identifying areas in the report to be corrected in the final investigation report referring or relating to the collision between the San Diego Trolley, Train No. 73, and David Gladden, on April 28, 2007, in San Diego, California.
8. All written investigation notes, reports, or summaries of investigation(s) performed by Staff of the Public Utilities Commission referring or relating to the collision between the San Diego Trolley, Train No. 73, and David Gladden, on April 28, 2007, in San Diego, California.

The Commission staff could not make the investigation records public without the formal approval of the full Commission, pursuant to the disclosure limitations in General Order (G.O.) 66-C § 2.2(a).

On March 12, 2009, Roger P. Bingham, Esq., representing defendants San Diego Trolley, Inc., and Metropolitan Transit System (“SDTI/MTS”), sent the

Commission a letter objecting to the subpoena for production of business records served on the Commission by plaintiff's attorney. Mr. Bingham states in part that:

The objection is made on the grounds that the responsive documents are not admissible or discoverable in a civil action under Public Utilities Code section 315. Accordingly, Section 315 expressly states the following:

The commission shall investigate the cause of all accidents occurring within this State upon the property of any public utility or directly or indirectly arising from or connected with its maintenance or operation, resulting in loss of life or injury to person or property and requiring, in the judgment of the commission, investigation by it, and may make such order or recommendation with respect thereto as in its judgment seems just and reasonable. Neither the order nor recommendation of the commission nor any accident report filed with the commission shall be admitted as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property. Every public utility shall file with the commission, under such rules as the commission prescribes, a report of each accident so occurring of such kinds or classes as the commission may from time to time designate.

The Commission mandates the reporting and submission of records and reports by agencies to ensure the monitoring, evaluation, and assessment of incidents or accidents occurring within the state. The orders and recommendations of the Commission regarding subsequent remedial measures is not intended to foster or serve as evidence in civil actions against the public utilities and/or agencies who are mandated to report said occurrences.

Defendants herein object to the production of documents responsive to the subject subpoenas and will address the issue in the form of a motion to quash the subpoenas in Department C-64 of the San Diego Superior Court. In the interim, such documents must not be produced until such time as the court has issued an order regarding the subpoenas.

On March 19, 2009, Lann G. McIntyre, Esq., of the Wolfe Legal Group, sent the Commission a copy of letter he had sent to Mr. Bingham, notifying Mr. Bingham that:

Your objection is made on the grounds that the responsive documents “are not admissible or discoverable in a civil action under Public Utilities Code § 315.” This objection is not well-taken and should you seek to quash this subpoena on this ground, please be advised that we will seek sanctions for any such improper discovery motion.

As you are aware, admissibility at trial is not required. Rather, the test is whether the information sought might reasonably be expected to lead to other evidence that would be admissible. [CCP § 2017.010; *see, Davies v. Sup.Ct. (State of Calif.)* (1984) 36 Cal.3d 291, 301; *Volkswagen of America, Inc. v. Sup.Ct. (Rusk)* (2006) 139 Cal.App.4th 1481, 1490-1491.] The Discovery Act provides for discovery of matters “reasonably calculated to lead to discovery of admissible evidence.” [CCP § 2017.010 (*emphasis added*); *see, Greyhound Corp. v. Sup.Ct. (Clay)* (1961) 56 Cal.2d 355, 384.]

Even if the documents requested were not admissible, we are entitled to these documents as they may lead to discovery of admissible evidence. In addition, PUC § 315, by its own terms, only applies to the “order or recommendation of the commission” and any “accident report.” We are informed and believe that the commission’s files contain additional responsive documents to which the limited restriction on admissibility does not apply.

You can, of course, address the admissibility of any of the requested documents at the time of trial. But, you do not have grounds to entirely block the production of all the commission’s responsive documents in the first instance.

In order to avoid unnecessary and unmeritorious discovery motions, please withdraw your objection and advise Knox Attorney Service and the CPUC accordingly, so that the documents may be promptly produced.

**DISCUSSION**

The Commission has exercised its discretion under Cal. Pub. Util. Code § 583, and implemented its responsibility under Cal. Gov't. Code § 6253.4(a), by adopting guidelines for public access to Commission records.<sup>1</sup> These guidelines are embodied in G.O. 66-C. G.O. 66-C § 1.1 provides that Commission's records are public, except "as otherwise excluded by this General Order, statute, or other order, decision, or rule." General Order 66-C § 2.2 precludes Commission staff's disclosure of "Records or information of a confidential nature furnished to or obtained by the Commission...including: (a) Records of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action." Section 2.2(a) covers both records provided to the course of a Commission investigation and investigation records generated by Commission staff. G.O. 66-C § 3.4 permits those denied access to appeal to the Commission for disclosure. Subpoenas implicitly include such an appeal. This resolution constitutes the Commission's response to the subpoena served by Deborah A. Wolfe.

The California Code of Civil Procedure ("Cal. Code Civ. Proc.") provides broad discovery rights to those engaged in litigation. Unless limited by an order of the court, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (Cal. Code Civ. Proc. § 2017.010.) Although Mr. Bingham indicated the intent to file a motion to quash, the Commission has received no notice that any such motion has been filed with the Court, or that any formal action regarding discovery issues is currently pending.

California Evidence Code ("Cal. Evid. Code") § 911 provides that: "Except as otherwise provided by statute: (a) No person has a privilege to refuse to be a witness; (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing; [and] (c) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object or other thing." Thus, as a general rule, where state evidence law applies, a government agency's justification for withholding information in response to a subpoena must be based upon a statutory prohibition, privilege, or other protection against disclosure.

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<sup>1</sup> Cal. Pub. Util. Code § 583 states in 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."

Potentially applicable statutory restrictions on disclosure applicable to Commission incident investigation records include the “official information” privilege (Cal. Evid. Code § 1040), which provides an absolute privilege for information acquired in confidence by state employees where disclosure is prohibited by state or federal law, and a conditional privilege where the public’s interest in confidentiality outweighs the necessity for disclosure in the interests of justice; the lawyer-client privilege (Cal. Evid. Code § 950, *et seq.*); the attorney work product privilege (Cal. Code Civ. Proc. § 2018.010 *et seq.*); and the Information Practices Act of 1977 (“IPA”) (Cal. Civ. Code § 1798, *et seq.*), which limits disclosure of personal information.

There is no statute prohibiting disclosure of the Commission’s incident investigation records, including those relating to the Commission’s review of Rail Transit Agency accident investigations. We have often disclosed records of our completed investigations, noting that while Public Utilities Code § 315 does not limit disclosure of accident records, it does provide that: “Neither the order or recommendation of the commission nor any accident report filed with the commission shall be admitted as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property.” (*See, e.g. Commission Resolution L-240 Re San Diego Gas & Electric Company, rehearing denied in D.93-05-020* (1993), 49 CPUC 2d 241.) We may, of course, and, where appropriate, do, refrain from disclosing certain documents, or portions of documents, within an investigation file if they are subject to the Commission’s lawyer client privilege, attorney work product privilege, or other specific privilege or limitation on disclosure.

The Commission is the state agency responsible for safety oversight of Rail Transit Agencies (RTAs) and Rail Fixed Guideway Systems in accord with the provisions of 49 U.S.C. 5330, Intermodal Surface Transportation Efficiency Act of 1991, Sec. 3029, Title 49 of the Code of Federal Regulation, Part 659, Rail Fixed Guideway Systems, State Safety Oversight; Final Rule, and Sections 778 and 99152 of the California Public Utilities Code. The Commission’s Rail Transit Safety Section (“RTSS”) interacts with RTAs during the investigation of accidents involving RTA facilities and personnel, in accord with the provisions of Commission G.O.164-D and other authorities.

G.O.164-D sets forth regulations governing transit safety, and provides in part that:

- 8.1 Each RTA shall investigate, on behalf of the Commission, all reportable accidents involving a rail transit vehicle or taking place on rail transit-controlled property. Staff may also perform a separate, independent investigation of any such accident.

- 8.2 The accident investigations performed by each RTA shall be conducted in accordance with written procedures. Each RTA Accident Investigation Procedure, including any changes, shall be submitted to Staff for review.
- 8.3 When investigating accidents that require immediate notification per 7.2, the RTA shall:
- a. Notify Staff when additional investigation is conducted by an investigation team or panel performing interviews, questioning witnesses, or conducting inspections, measurements, examinations, or tests, etc. as part of the investigation beyond the initial on scene investigation;
  - b. Provide for Staff's participation to the fullest extent possible in accident investigations, and make all information related to the accident investigation, including data from event recorders, available to Staff for review;
  - c. Document in a written report each item investigated, the investigation findings, the most probable cause of the accident, contributing causes, and recommendations for corrective action to prevent a recurrence of the accident;
  - d. Prepare a corrective action plan as a part of the investigation report or in a separate document. (For corrective action plan detail, refer to Section 9.)
  - e. Submit its final investigation report within 60 calendar days of the occurrence of the accident. If the investigation takes longer than 60 calendar days to complete, the RTA shall submit interim status reports every 30 calendar days. If the final investigative report is acceptable to Staff, Staff shall issue a formal letter to the RTA approving the report as consistent with best industry investigation procedures and in furtherance of the public's interest in system safety and security. If it not acceptable, Staff shall identify the areas in the report to be corrected. If the RTA does not agree with the rejection, the Staff shall either conduct its own investigation, or communicate its disagreement with the findings of the accident investigation to the RTA and meet and confer with the RTA in an effort to make mutually agreeable findings. If such agreement is not reached, the RTA's report and a statement of the reasons why Staff disagrees shall be filed with the Commission.

- 8.4 No investigation report or recommendation of the Commission, nor any investigation report of an RTA filed with the Commission, shall be admissible as evidence in any action for damages based on or arising out of matters covered therein, pursuant to Public Utilities Code section 315.

SDTI/MTS cooperated with the RTSS during its investigation of the accident involving Mr. Gladden, in accord with the provisions of G.O. 164-D, and provided the required accident report and corrective action plan and schedule report. Commission records responsive to the Wolfe subpoena are not extensive, and consist of the following:

1. May 28, 2007 memorandum from SDTI System Safety Manager to File Re Train – Pedestrian Collision
2. December 19, 2007 letter from RTSS staff to SDTI System Safety Manager
3. January 3, 2008 letter from SDTI System Safety Manager to RTSS staff
4. January 29, 2008 letter from SDTI System Safety Manager to RTSS staff, accompanied by corrective action plan
5. July 17, 2008 letter from RTSS staff to SDTI System Safety Manager, accompanied by a Commission accident investigation record and SDTI accident report reviewed and adopted by Commission Staff

To the extent an RTA conducts an accident investigation on behalf of the Commission, the investigation information made available for review by Staff, and written report and corrective action plan required by G.O. 164-D §§ 8.3(c) and (d), become a core source of data for the Commission's own evaluation of the accident. Staff may approve an RTA's final investigative report, or identify areas in which it needs to be corrected. Here, Staff rejected SDTI's initial report based on its own on-site visit to the station at which the accident occurred, and requested that SDTI resubmit the accident report with recommendations for station improvements. RTSS Staff reviewed and adopted SDTI's resubmitted accident report. Since the Commission's investigation of the April 28, 2007 transit accident has been completed, disclosure of the subpoenaed records at this time would not interfere with that investigation.



G.O. 164-D does not limit Commission disclosure of RTA accident reports filed with the Commission, or Commission orders or recommendations regarding such accidents; it simply provides, in § 8.4, that “No investigation report or recommendation of the Commission, nor any investigation report of an RTA filed with the Commission, shall be admissible as evidence in any action for damages based on or arising out of matters covered therein, pursuant to Public Utilities Code section 315.”

We understand that RTAs may prefer non-disclosure to non-admissibility, and fear that disclosure of information to the Commission may lessen their ability to assert privileges against discovery of that information in litigation. Many years ago, we were required to remind a gas and electric utility that such fears were no excuse for a lack of candor with the Commission, and are grateful for SDTI/MTS’s full cooperation with our oversight review of its accident investigation.<sup>2</sup>

The Commission is required by Article 1, § 3, of the California Constitution, the California Public Records Act (Gov’t. Code § 6250 *et seq.*), and California discovery laws, to make agency records available to the public in the absence of a privilege, exemption, or other legal basis for nondisclosure. Given this state’s strong emphasis on public disclosure of government records, and on broad discovery rights in civil litigation, we could not justify a decision to withhold from disclosure all records associated with our transit accident investigation oversight responsibilities. Nor do we believe such a decision would be in the public interest.

We are, however, mindful of the situation RTAs find themselves in when cooperating with our investigation oversight, knowing full well that they are, or soon may be, involved in litigation in which Commission records are requested or subpoenaed. Where, as here, an RTA knows the Commission has been served with a subpoena seeking records relating to an RTA accident, the RTA may review the information it provided to the Commission and raise in court any legitimate objection to discovery. During the Commission’s oversight review of an RTA’s accident investigation, RTAs are invited to discuss with staff any relevant prohibition or limitation on the disclosure of system security plans or other information provided during the Commission’s oversight review or accident investigation. Such discussions may help the Commission to evaluate appropriately the public’s right of access to most Commission records and the public’s interest in the confidentiality of records where disclosure may violate legal restrictions or compromise transit system safety.

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<sup>2</sup> Decision (D.) 93-05-020 (1993), 49 CPUC 2d 241.

**Personal Information**

The IPA restricts the maintenance and dissemination of “personal information” maintained in the records of a state agency, and prohibits disclosure of “personal information in a manner that would link the information to the individual to whom it pertains,” except in specified circumstance.<sup>3</sup> (Cal. Civ. Code § 1798.24.) The Commission maintains transit accident investigation files by date and location information, rather by reference to the name of individuals involved in the incident, and considers any information in the records to “pertain” to the incident, not to the individuals involved in the incident. The “personal information” in the records subpoenaed here primarily consists of references to Mr. Gladden, SDTI/MTS employees, other governmental employees investigating the incident, Commission staff, and witnesses to the incident.

The identity of SDTI/MTS, other governmental employees, and Commission staff, and their job titles, contact information, and work-related statements, are generally not the type of “personal information” the IPA was designed to protect against inappropriate disclosure. (*See, e.g., Moghadam v. Regents of University of California* (2008) 169 Cal. App.4th 466.) The investigation records do not “pertain” to these individuals, and do not link the identities of these individuals to other personal information such as social security numbers. We will in the interests of individual privacy, however, redact the home telephone numbers of SDTI/MTS employees to the extent they are included in a document identifying individuals notified of the accident.

Cal. Civ. Code § 1798.24(a) authorizes disclosure of personal information to the individual to whom the information pertains; and § 1798.24(c) authorizes disclosure to an authorized representative of that person. Disclosure of personal information concerning Mr. Gladden, in response to a subpoena served on his behalf, is, therefore, not an issue.

We recognize that: “The disclosure of the names and addresses of potential witnesses is a routine and essential part of pretrial discovery.” (*People v. Dixon* (2007) 148 CalApp.4th 414, 443...)” and that: “Indeed, our discovery system is founded on the understanding that parties use discovery to obtain names and contact information for possible witnesses as the starting point for further investigations: ... ‘The party's ability to subpoena witnesses presumes that he has

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<sup>3</sup> The IPA defines “personal information” as: “any information that is maintained by an agency that identifies or describes an individual, including but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual.” (Cal. Civ. Code § 1798.3(a).)

the witnesses' contact information.' (*Dixon*, at p. 443.)" (*Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1249-1250.)

Cal. Civ. Code § 1798.24(k) authorizes disclosure to any person in response to a subpoena if the agency reasonably attempts to notify the individual to whom the record pertains. Although the subpoenaed investigation records pertain to the accident, not the witnesses whose personal information is included in the records, we will, nevertheless, make a reasonable attempt to notify the witnesses of the subpoena seeking Commission records that include their contact information.

### **TESTIMONY OF COMMISSION STAFF**

We strongly discourage litigants from seeking the testimony of Commission staff regarding incident investigations. The provision of such testimony at depositions or trials often greatly interferes with Commission staff's vital work conducting safety inspections and incident investigations, and thus with the Commission's efficient implementation of its regulatory responsibilities, since Commission staff must adjust normal workload to accommodate the often changing schedule of a subpoenaed appearance. Further, litigants frequently inappropriately seek Commission staff testimony regarding legal issues and Commission policy determinations beyond the scope of their knowledge or authority.

### **CONCLUSION**

The Commission's investigation of the April 28, 2007 transit accident has been completed. Disclosure of the subpoenaed records at this time would not interfere with that investigation.

The relevant files the Commission has located and intends to disclose in response to the subpoena do not include documents subject to the Commission's lawyer-client, attorney work product, or similar privileges. Therefore, in the absence of any timely court order limiting discovery in response to the subpoena, there is no reason for the Commission to refrain from disclosing the requested Commission's investigation records.

### **COMMENTS ON DRAFT RESOLUTION**

The Draft Resolution of the Commission Legal Division in this matter was mailed to the parties in interest on May 5, 2009. Pub. Util. Code § 311 (g)(1) requires that proposed resolutions be served on all parties and circulated for public comment at least 30 days before the Commission takes action regarding the draft resolution. No comments were received.

**FINDINGS OF FACT**

1. The Commission was served a subpoena on behalf of David Gladden which seeks disclosure of the Commission investigation records concerning an April 28, 2007 collision between a SDTI trolley and David Gladden in San Diego, California.
2. Access to the records in the Commission's investigation file was denied in the absence of a Commission order authorizing disclosure.
3. The Commission's investigation of the transit incident is now closed; therefore, the disclosure of the Commission investigation records would not compromise the Commission's investigation.
4. The public interest generally favors disclosure of records of completed Commission investigations of RTA accidents, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy or be inconsistent with the provisions of the IPA (Cal. Civ. Code § 1798 *et seq.*), or any information that is subject to the Commission's lawyer-client or other privilege.
5. The subpoenaing party represents David Gladden.

**CONCLUSIONS OF LAW**

1. Where state evidence laws apply, a government agency's justification for withholding a public record in response to a subpoena or other discovery procedure must generally be based upon statutory prohibition, privilege, or other protection against disclosure. (Cal. Evid. Code § 911.)
2. The Commission has, through G.O. 66-C § 2.2(a), limited Commission staff disclosure of investigation records and information in the absence of formal action by the Commission or disclosure during the course of a Commission proceeding. G.O. 66-C does not limit the Commission's ability to order disclosure of records and information.
3. The subpoenaed records may include "personal information" as defined in the IPA. (Cal. Civ. Code § 1798.3.)
4. The Commission maintains incident investigation files by incident numbers linked to the date and type of incident, rather by the name of individuals involved in the incident, and considers any information in the records to "pertain" to the incident, not to the individuals involved in the incident.

5. Cal. Civ. Code § 1798.24(k), which authorizes disclosure of personal information in response to a subpoena where the agency reasonably attempts to provide notice to the individual to whom the records pertain, does not require that notice of the Commission's intent to comply with the subpoena be provided to individual Commission staff, SDG&E employees, or other individuals identified in the subpoenaed investigation records, since the records do not pertain to those individuals.
6. The subpoenaed investigation files include no documents subject to the Commission lawyer-client, attorney work product, or similar privileges.
7. Cal. Pub. Util. Code § 583 does not limit the Commission's ability to order disclosure of records.
8. Cal. Pub. Util. Code § 315 prohibits the introduction of accident reports filed with the Commission, or orders and recommendations issued by the Commission, "as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property".

### **ORDER**

1. Commission records concerning its investigation of the April 28, 2007 collision between a SDTI trolley and David Gladden in San Diego, California will be disclosed in response to the subpoena served on behalf of Mr. Gladden, with the exception of any information which is subject to the Commission's attorney-client or other privilege, in the absence of a court order limiting disclosure in the litigation in which the subpoena was issued.
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 June 4, 2009, and that the following Commissioners approved it:

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PAUL CLANON  
Executive Director