

## PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California  
Date: September 22, 2005  
Resolution No. L-321**RESOLUTION**

**RESOLUTION AUTHORIZING DISCLOSURE OF COMMISSION CONSUMER PROTECTION AND SAFETY DIVISION (RAILROAD SAFETY BRANCH) INVESTIGATION RECORDS PURSUANT TO PUBLIC RECORDS ACT REQUEST BY GIDEON KRACOV SEEKING DISCLOSURE OF COMMISSION RECORDS RELATING TO THE DERAILMENT OF A UNION PACIFIC RAILROAD CORPORATION FREIGHT TRAIN AT OR ABOUT THE INTERSECTION OF SOUTH MERIDIAN AND RIALTO AVENUES IN SAN BERNARDINO, CA ON APRIL 4, 2005.**

**BACKGROUND**

On June 1, 2005, Gideon Kracov, an attorney representing several residents of the City of San Bernardino asked the California Public Utilities Commission (Commission) to provide records concerning the Commission's investigation of the April 4, 2004 derailment of a freight train belonging to Union Pacific Railroad Corporation (UPRR). The UPRR freight train derailed at or about the intersection of South Meridian and Rialto Avenues in the city of San Bernardino, while transporting certain materials believed to be toxic. Mr. Kracov opines that some of the toxic materials spilled at the time of the derailment causing injuries to his clients whose residences were in the vicinity of the accident location. On or about July 13, 2005, Commission staff informed Mr. Kracov that the records were part of an on going investigation and could not be made public without the formal approval of the Commission. On July 28, 2005, Mr. Kracov appealed staff's denial of the request.

**DISCUSSION**

The requested records are "public records" as defined by the California Public Records Act (PRA). (Government Code § 6250 et seq.) Further, Proposition 59 amended the California Constitution to elevate the public's right of access to governmental information to a constitutional privilege. (California Constitution, Article 1, §3(a).) While Proposition 59 amendments expressly preserve existing privileges and exemptions

against disclosure of government records, they also impose new rules of statutory construction. 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. (California Constitution, Article 1, § 3 (b)(2).) Finally, these amendments require that any new statutes, court rules, or other authority that limits the right of access be adopted with findings demonstrating the interest protected by the limitation and the need to protect that interest. (Id.)

To justify withholding a public record in response to a PRA request, the Commission must show that disclosure was specifically exempted by the express provisions of the Act or show that, on the facts of a particular case, the public interest in confidentiality clearly outweighs the public interest in disclosure.<sup>1</sup>

The Commission has exercised its discretion under Public Utilities Code § 583, and implemented its responsibility under Government Code § 6253.4 (a), by adopting guidelines for public access to Commission records. These guidelines are embodied in General Order 66-C. General Order 66-C § 1.1 provides that Commission records are public, except "as otherwise excluded by this General Order, statute, or other order, decision, or rule." General Order 66-C, § 2.2 (a) provides the most relevant exemption from mandatory disclosure under the PRA in this instance. Section 2.2 precludes staff's disclosure of "[r]ecords 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 records provided by PG&E to Commission staff confidentially in the course of its investigation, as well as Commission records containing this confidential information.

General Order 66-C § 2.2(a) limits staff's ability to disclose Commission investigation records in the absence of disclosure during a hearing or a Commission order authorizing disclosure. For this reason, staff denies most initial requests seeking Commission investigation records. Such a denial usually notes the option under General Order 66-C § 3.4 to appeal to the Commission for disclosure of the records. If an appeal is received, staff prepares a draft resolution for the Commission's consideration.

There is no statute specifically forbidding the disclosure of the Commission's accident investigation records. However, portions of such records may be subject to disclosure limitations in the Information Practices Act (IPA) (Civil Code § 1798 et seq.). The IPA limits state agency disclosure of "personal information," defined as "any information that

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<sup>1</sup> The fact that records may fall within a PRA exemption does not preclude the Commission from authorizing disclosure of the records. Except for records which may not be disclosed by law, PRA exemptions are discretionary, rather than mandatory, and the Commission is free to refrain from asserting such exemptions when it finds that disclosure is appropriate. See Government Code §6253 (e); *Black Panthers v. Kehoe* (1974) 42 Cal. App.3d 645, 656.

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.” The IPA authorizes disclosure of personal information in a number of circumstances, including, most relevant to the Commission’s response to this Public Records Act request: “(g) Pursuant to the California Public Records Act.”

A limited disclosure of the information in the accident investigation records at issue in the current PRA request is consistent with the IPA. There is no information in the Commission’s investigation of the April 4, 2005 UPRR freight train derailment investigation concerning individuals injured in the accident. Further, while the identity of, and statements made by, witnesses are subject to the IPA, the only witnesses identified in this Commission investigation are two UPRR employees. These witnesses’ employment records and disciplinary history are also part of the Commission accident investigation record. However, disclosure of these employment records and disciplinary history would constitute an unwarranted invasion of personal privacy. Disclosure of these records therefore exempt pursuant to Government Code Section 6254(c). These documents will not be disclosed.

During the past ten years the Commission has ordered disclosure of records concerning completed safety incident investigations on numerous occasions. The Commission has found that disclosure of such records will not interfere with the Commission’s investigations, and may lead to discovery of admissible evidence and aid in the resolution of litigation regarding the accident/incident under investigation.<sup>2</sup>

The Commission has on numerous occasions found that Public Utilities Code § 315, which expressly 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,” offers regulated entities sufficient protection against injury caused by the release of requested investigation records.

If records of an investigation completed by Commission staff contain any confidential personal information, or other privileged or exempt information, the redaction of which is

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<sup>2</sup> See, e.g. Commission Resolutions L-240 *Re San Diego Gas & Electric Company*, rehearing denied in D.90-05-020 (1993), 49 CPUC 2d 241; L-248 *Re Lopez 1* (April 26, 1995); L-249 (August 11, 1995); L-255 *Re Murrillo* (1997); L-257 *Re Johnson* (1997); L-260 *Re Banda* (1997); L-262 *Re Peralta and Boyadjian* (1997); L-263 *Re Schwab* (1997); L-265 *Re Johnson 2* (1998); L-271 *Re City of Pinole* (1998); L-272 *Re Johnson 3* (1998); L-273 *Re Disney* (1998); L-275 *Re Lopez* (1998); L-278 *Re Turner* (1999); L-279 *Re Rodriguez* (1999); L-280 *Re Kimball* (1999); L-286 *Re EBMUD* (1999); L-289 *Re Cornelius* (2000); L-290 *Re Grady Plumbing* (2000); L-291 *Re Morales* (2001); L-292 *Re White* (2001); L-295 *Re Maldonado-Colin* (2001); L-297 *Re Kuno’s Grading* (2002); L-298 *Re Wilson* (2002); and L-300 *Re Teegardin* (2002).

permitted by law, such information need not be disclosed. Disclosure of the following documents is consistent with Commission policy:

- a) Memorandum dated April 10, 2005 prepared by Commission investigators James McInerney and Tom Barcleo regarding UPRR Derailment of April 2, 2005 Rialto.
- b) Investigation Report dated April 4, 2004.
- c) Two-page handwritten interview report, indicating D. Smith.
- d) Two-page typed report of interview with W.D. Buse.
- e) One page handwritten report, indicating W.D. Buse.
- f) Two-page handwritten interview report, indicating K.S. Bunting
- g) One page report titled: Rialto, CA; FRA #HQ-28-2005 (possibly a loose attachment to FRA Factual Railroad Accident Report)
- h) FRA Factual Railroad Accident Report – FRA #HQ-28-2005(4 pages)

#### **COMMENTS ON DRAFT RESOLUTION:**

The Draft Resolution of the Legal Division in this matter was mailed to the parties in interest on August 23, 2005, in accordance with PU Code § 311(g). Comments were filed on \_\_\_\_\_, by \_\_\_\_\_.

#### **FINDINGS OF FACT**

1. The Commission initially received a letter dated June 1, 2005, seeking disclosure of Commission staff investigation records seeking disclosure of records relating to the derailment of a Union Pacific Railroad freight train at or about the intersection of South Meridian and Rialto Avenues in San Bernardino, CA on April 4, 2005.
2. Mr. Kracov represents certain individuals who allege they suffered injuries as a result of the derailment.
3. The Commission's investigation of the April 4, 2004 accident is on going, but railroad safety staff contemplates disclosure of some investigation records compiled by the Commission would not compromise the investigation.
4. Disclosure of witnesses' employment records and disciplinary histories would constitute an unwarranted invasion of personal privacy.

5. Disclosure of witnesses' employment records and disciplinary histories are exempt pursuant to Government Code Section 6254(c).

### **CONCLUSIONS OF LAW**

1. The documents in the requested investigation file and report are public records as defined by Government 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, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny. Furthermore, the California Constitution also requires that statutes, court rules, and other authority favoring disclosure be broadly construed, and that statutes, court rules, and other 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. California Constitution, Article 1, Section 3 (b)(1)and (2).
3. The general policy of the California Public Records Act favors disclosure of records.
4. Justification for withholding a public record in response to a Public Records Act request must be based on specific exemptions in the Public Records Act or upon a showing that, on the facts of a particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. (Government Code § 6255.)
5. The Commission has exercised its discretion under Public Utilities Code § 583 to limit staff disclosure of investigation records in the absence of formal action by the Commission or disclosure during the course of a Commission proceeding. (General Order 66-C § 2.2 (a).)
6. Public Utilities Code § 583 does not limit the Commission's ability to order disclosure of records.
7. Public Utilities 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. The request for disclosure of the Commission's records concerning the investigation of a UPRR freight train derailment accident that occurred on April 4, 2005 at or about the intersection of South Meridian and Rialto Avenues in the City of San Bernardino is granted.
2. The effective date of this order is today.

I certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting of September 22, 2005 and that the following Commissioners approved it:

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STEPHEN LARSON  
Executive Director