

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

San Francisco, California

Date: May 24, 2007

Resolution No. L-343

**RESOLUTION**

**RESOLUTION AUTHORIZING DISCLOSURE OF COMMISSION  
CONSUMER SERVICES DIVISION (UTILITIES SAFETY AND  
RELIABILITY BRANCH) INVESTIGATION RECORDS  
PURSUANT TO A SUBPOENA OF THE CALIFORNIA STATE  
AUTOMOBILE ASSOCIATION SEEKING DISCLOSURE OF  
COMMISSION STAFF INVESTIGATION RECORDS RELATING  
TO A JUNE 29, 2004 FIRE AT 1251 W. KEATS AVENUE IN  
FRESNO, CALIFORNIA. (INCIDENT NO. E20040629-03.)**

**BACKGROUND**

An April 24, 2007 subpoena served by Joseph G. Astleford, Esq., on behalf of the California State Automobile Association, seeks disclosure of records concerning the Commission's investigation of a June 29, 2004 fire at 1251 W. Keats Ave. in Fresno, California, that occurred after a Pacific Gas & Electric Company PG&E) contractor replaced a service drop. California Public Utilities Commission (Commission) staff could not make the Commission's investigation records public without the formal approval of the Commission.

**DISCUSSION**

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.<sup>1</sup> 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 precludes staff's disclosure of "[r]ecords or information of a confidential nature furnished to or obtained by the Commission ... including: (a) Records of

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<sup>1</sup> Public Utilities 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."

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 by utilities in the course of a Commission investigation and investigation records generated by Commission staff.

Because 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, staff denies most initial requests and subpoenas for investigation records. Section 2.2 (a) covers information provided by PG&E employees to Commission staff in the course of staff’s investigation, as well as Commission-generated records containing this information.

Although G.O. 66-C § 2.2(a) requires staff to deny most initial requests seeking Commission investigation records and information, and to object to such subpoenas until the Commission has authorized disclosure, section 3.4 of the G.O. 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 Joseph G. Astleford, Esq..

## **DISCUSSION**

The Code of Civil Procedure 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. (Code of Civil Procedure § 2017 (a).)

Evidence 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. (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.

There is no statute prohibiting disclosure of the Commission’s incident investigation records. The potentially applicable statutory restrictions on disclosure applicable here relate to “official information” obtained in confidence by a public employee in the course of his duties that has not been open or officially disclosed to the public (Evidence Code § 1040 (a)) and “personal

information” pursuant to the Information Practices Act (IPA) (Civil Code § 1798, *et seq.*).

### **Official Information**

The records include information from PG&E, including information and a North Central Fire Protection District Investigation Report (NCFPD 2004-1932). Because there is no statute prohibiting disclosure of the Commission’s incident investigation records, the official information privilege governing information obtained in confidence by public employees during the course of their duties and not open, or officially disclosed, to the public is not absolute, and the Commission has discretion whether to exercise the privilege. (Evidence Code § 1040 (b).) During the past twelve years, the Commission has ordered disclosure of records and information concerning completed incident investigations on numerous occasions. The Commission has found that such disclosure 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 incident.<sup>2</sup>

Viewing the current subpoena for records within the context of these laws and policies, we note that Commission staff has completed its investigation of this incident and closed the incident administratively. Thus, disclosure of investigation records will not interfere with staff’s ability to complete its incident investigation responsibilities.

### **Personal Information**

The IPA is generally intended to restrict disclosure of information that it is not otherwise public that is obtained from “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.” (Civil Code §§ 1798.24.) 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, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual. (Civil Code § 1798.3(a).)

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<sup>2</sup> 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.

The primary “personal information” in the records subpoenaed here consists of references to witnesses to the fire in the North Central Fire Protection District Report concerning this incident, including the residents of 1251 W. Keats Ave., the names of North Central Fire Protection District and Fresno Fire Department personnel, and the names of Commission staff and PG&E employees. Most of this information is not restricted from disclosure because: (1) it is otherwise public; (2) it does not link the individual with other “personal information” in the records; or (3) by service of this resolution, the Commission made a reasonable attempt pursuant to Civil Code § 1798.24(k) to provide notice that “personal information” will be disclosed.

### **Testimony of Commission Employees**

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

### **COMMENTS ON DRAFT RESOLUTION**

Public Utilities Code § 311 (g)(1) generally requires that proposed resolutions be served on all parties and subject to at least 30 days public review and comment before the Commission may vote on them. Section 311 (g)(3) and Rule 14.5 (c)(7) of the Commission’s Rules of Practice and Procedure provide that the Commission may reduce or waive the period for public review and comment regarding decisions authorizing disclosure of documents in the Commission’s possession when such disclosure is pursuant to subpoena. The comment period is reduced under this authority because the subpoena requests disclosure on May 24, 2007, and it would be impossible to comply if a full 30 day comment period were provided. Comments are due May 15, 2007. Reply Comments are due May 20, 2007.

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

The Draft Resolution of the Legal Division in this matter was mailed to the parties in interest on May 8, 2007, in accordance with Public Utilities Code section 311(g). Comments were filed on \_\_\_\_\_ by \_\_\_\_\_.

**FINDINGS OF FACT**

1. The Commission received on April 24, 2007 a subpoena seeking disclosure of Commission investigation records concerning a fire that occurred on June 29, 2004 at 1251 W. Keats Ave. in Fresno, California, when a Pacific Gas & Electric Company replaced a service drop. Access to the records in the investigation file requires a Commission order authorizing disclosure, or disclosure during the course of a proceeding before the Commission.
2. The Commission's investigation of the June 29, 2004 incident is closed; therefore, the disclosure of the investigation records would not compromise the investigation.
3. The public interest favors disclosure of the requested investigation records.

**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 a statutory prohibition, privilege, or other protection against disclosure. (Evidence Code § 911.)
2. The Commission has, through G.O. 66-C § 2.2(a), limited 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 public interest in nondisclosure of records concerning the June 2, 2004 incident in Fresno, California does not outweigh the necessity for disclosure in the interest of justice.
4. The subpoenaed records include "personal information" protected by the Information Practices Act (IPA). (Civil Code § 1798, et seq.)
5. The service of this resolution provides notice that the records include "personal information" related to PG&E employees and the residents of 1251 W. Keats Ave. and constitutes a reasonable attempt to provide notice pursuant to Civil Code § 1798.24(k).
6. The names of Commission staff, other government employees, and employees of PG&E are not "personal information" restricted from disclosure by the IPA if the information is otherwise public information or does not link the

individual to any other “personal information” pertaining to that individual in the records.

7. The subpoenaed investigation file does not include documents subject to the Commission’s lawyer-client, attorney work product, or similar privilege regarding the Commission’s deliberations concerning the investigation of the June 29, 2004 fire at 1251 W. Keats Ave. in Fresno, California.
8. Public Utilities Code § 583 does not limit the Commission’s ability to order disclosure of records.
9. 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 an electric incident and fire that occurred on June 29, 2004 at 1251 W. Keats Ave. in Fresno, California, 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 May 24, 2007 and that the following Commissioners approved it:

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PAUL CLANON  
Executive Director