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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California
Date: December 5, 2002
Resolution No. L-302

R E S O L U T I O N

RESOLUTION AFFIRMING DENIAL OF PUBLIC RECORDS ACT REQUESTS BY JOHN E. ROSENBAUM ON BEHALF OF MIRANT AMERICAS ENERGY MARKETING, LP, et al., AND OF JOSE GUZMAN ON BEHALF OF DUKE ENERGY CORPORATION

BACKGROUND

On May 28, 2002, John E. Rosenbaum, Esq., of White & Case, on behalf of his client, Mirant Americas Energy Trading, LP, *et al*. ("Mirant"), requested copies of all Commission records relating to the Commission staff's investigation of Mirant's facilities, including, without limitation, all reports, correspondence, memoranda, notes summaries and conclusions related to or arising out of the Commission's or its staff's inspections of Mirant's facilities, communications with Mirant's employees, or review of Mirant's documents and records conducted between January 1, 2001 and May 1, 2002. Mirant renewed this PRA request on July 12, 2002.

On July 24, 2002, the Commission's Legal Division informed Mr. Rosenbaum in writing that the Commission would not release the requested records on the grounds that they are exempt from disclosure under California Government Code § 6254(f)), "which exempts from disclosure investigation records" and California Government Code § 6254(a) "which exempts preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained in the ordinary course of business, where the public interest in nondisclosure clearly outweighs the public interest in disclosure" among other reasons.

By letter dated August 15, 2002, Mr. Rosenbaum expressed his disagreement with the Legal Division's July 24, 2002 letter, and by letter dated September 4, 2002, Mr. Rosenbaum appealed this denial of its PRA request to the full Commission. By letter dated September 16, 2002, the Commission's Executive Director informed Mr. Rosenbaum that this appeal would be scheduled for consideration by the Commission.

On May 21, 2002, Jose Guzman, Esq., of Nossaman, Guthner, Knox & Elliot, on behalf of his client, Duke Energy Corporation ("Duke"), requested copies of all Commission records relating to the Commission staff's investigation of Duke's facilities, including, without limitation, all reports, correspondence, memoranda, notes summaries and conclusions related to or arising out of the Commission's or its staff's inspections of Duke's facilities.

On July 23, 2002, the Commission's Legal Division informed Mr. Guzman in writing that the Commission would not release the requested records on the grounds that they are exempt from disclosure under California Government Code § 6254(f)), "which exempts from disclosure investigation records" and California Government Code § 6254(a) "which exempts preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained in the ordinary course of business, where the public interest in nondisclosure clearly outweighs the public interest in disclosure" among other reasons.

Mr. Guzman subsequently appealed this denial of its PRA request to the full Commission. By letter dated September 16, 2002, the Commission's Executive Director informed Mr. Guzman that this appeal would be scheduled for consideration by the Commission.

DISCUSSION

The legal test for state agency disclosure of public records is set forth in the PRA (Government Code § 6250 et seq.). The PRA is intended to provide "access to information concerning the conduct of the people's business," while being "mindful of the rights of individuals to privacy." (Government Code § 6250.) The PRA requires that the public be given access to government records unless they are specifically exempt from disclosure, or the public interest in nondisclosure clearly outweighs the public interest in disclosure. (Government Code § 6255.)

The Public Records Act explicitly exempts from the disclosure requirements of the statute "[r]ecords of…investigatory or security files complied by any …state agency for correctional, law enforcement or licensing purposes…" See Government Code § 6254(f).

The Commission staff's ongoing investigation of the wholesale generators, including Duke, clearly falls within this PRA exemption and is unquestionably a law enforcement investigation. The purpose of this investigation is to determine precisely what circumstances gave rise to the energy crisis of November 2000 through May 2001, including but not limited to whether any laws were broken or statutes were violated in connection with this crisis.

The fact that the Commission staff issued its Investigative Report on Wholesale Electric Generation (the "Report") on September 17, 2002 in no way changes or affects the applicability of the PRA exemption set forth in Government Code § 6254(f) to the records requested by Duke and Mirant. If anything, the issuance of this Report, which raises questions regarding whether the wholesale generators, including Duke and Mirant, provided all available generation on blackout and service interruption days during the crisis, supports the public interest in nondisclosure of the records sought by Duke and Mirant.

The investigation of the behavior of the wholesale electric generators is ongoing, and the disclosure of the information requested by Duke and Mirant could compromise the integrity of this investigation. Thus, while the investigation is ongoing, the public interest in nondisclosure of the records in question outweighs the public interest in disclosure of these records.

In this regard, we note that the recent unanimous California Supreme Court decision in *Haynie v. Superior Court (County of Los Angeles)*, 26 Cal.4th 1061 (2001) specifically recognized and endorsed the language of Government Code § 6254(f) as a legitimate basis for an agency's refusal to disclose its investigative records pursuant to a PRA request.

The parties requesting disclosure of the Commission staff's investigative reports might argue that the materials they are seeking may be withheld from disclosure only when the prospect of enforcement proceedings is "concrete and definite" under *Uribe v. Howie* (1971) 19 Cal. App. 3d 194. However, *Uribe* does not support such a proposition. As the *Haynie* court pointed out:

> Uribe, unlike the present case, involved the construction of section 6254(f)'s exemption for "investigatory . . . files compiled by any . . . local agency for correctional, law enforcement, or licensing purposes . . . ." (Italics added.) The plaintiff, a farm worker who suffered from health problems attributed to pesticides, requested access to mandatory reports filed by farmers who had sprayed pesticides in the area. The county agricultural commissioner argued that the reports were part of investigatory files compiled for law enforcement and licensing purposes and thus exempt under section 6254(f). The Court of Appeal rejected the commissioner's claim, finding that "this was not the primary purpose [for which] they were compiled" and there was no indication "that any of the reports were being put to such a purpose at the time of trial." (Uribe, supra, 19 Cal. App. 3d at p. 213.)

> Uribe then held, as we have previously observed, "that the exemption for 'files' applies 'only when the prospect of enforcement proceedings is concrete and definite. [Citation.]"

However, the *Haynie* court went on to say:

> …neither this court nor any court Haynie has identified has extended this qualification to section 6254(f)'s exemption for "[r]ecords of . . . investigations . . . ." The case law, in fact, is to the contrary. In American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal. 3d 440 [186 Cal. Rptr. 235, 651 P.2d 822] (ACLU), for example, we explained that the "concrete and definite" qualification to the exemption in section 6254(f) "relates only to information which is not itself exempt from compelled disclosure, but claims exemption only as part of an investigatory file. Information independently exempt, such as 'intelligence information' in the present case, is not subject to the requirement that it relate to a concrete and definite prospect of enforcement proceedings." (ACLU, supra, at p. 449, fn. 10.) In Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645 [117 Cal. Rptr. 106] (Black [***86] Panther Party), the Court of Appeal explained that in Uribe, "the record in question was not a complaint but a routine report in a public file. It could gain exemption not because of its content but because of the use to which it was put, that is, when and if it became part of an investigatory file. Here, by their very content, the documents are independently entitled to exemption as 'records of complaints'; their exemption is not dependent upon the creation of an investigatory file." (Black Panther Party, supra, at p. 654.)
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> What is true for records of complaints (Black Panther Party) and intelligence information (ACLU) is true as well for records of investigations. The latter, no less than the former, are exempt on their face, whether or not they are ever included in an investigatory file. Indeed, we alluded to this in Williams, when we noted

> that "a document in the file may have extraordinary significance to the investigation even though it does not on its face [*1070] purport to be an investigatory record and, thus, have an independent claim to exempt status." (Williams, supra, 5 Cal. 4th at p. 356, italics added.) Limiting the section 6254(f) exemption only to records of investigations where the likelihood of enforcement has ripened into something concrete and definite would expose to the public the very sensitive investigative stages of determining whether a crime has been committed or who has committed it.

The logic used by the *Haynie* court is equally applicable to the investigative records sought to be disclosed by Mirant and Duke. Limiting the section 6254(f) exemption only to records of investigations where the likelihood of enforcement has ripened into something concrete and definite would expose to the public the very sensitive investigative stages of determining whether any of the wholesale generators have engaged in any illegal behavior.

In view of the above, the request of Mr. Rosenbaum for records concerning the Commission staff's inspections of Mirant's facilities, and the request of Mr. Guzman for records concerning the Commission staff's inspections of Duke's facilities, are denied.

COMMENTS

The Draft Resolution of the Legal Division in this matter was mailed to the parties in interest on November 5, 2002, in accordance with Public Utilities Code Section 311(g). Comments were received from Jose E. Guzman, Jr., Esq., of Nossaman, Guthner, Knox & Elliott, on behalf of Duke and from Lisa A. Cottle, esq., of White and Case, on behalf of Mirant. Both Mr. Guzman and Ms. Cottle opposed the adoption of the draft resolution and urged the Commission to grant the appeals filed by their respective clients. Their comments raised three basic points in support of their position. (1) The Commission is not a law enforcement" agency and hence, does not qualify for the Public Records Act exemption set forth in Government Code § 6254(f). (2) The draft resolution failed to meet the Commission burden of demonstrating that the statutory exemption set forth in Government Code § 6254(f) applies to the records for which disclosure was sought. (3) The Commission had previously released similar documents requested by another company (Reliant Energy Corporation) when, subsequent to denial by the Commission of that company's Public Records Act request, that company filed an action in Superior Court seeking disclosure of records relating to the Commission staff's inspections of the company's facilities. However, none of

these provides a legally or factually compelling reason why the Commission must disclose the records in question.

With respect to whether the Commission is engaged in "law enforcement" functions or not, the commenters rely on the old Court of Appeal decision in *Division of Industrial Safety v. Superior Court*, 43 Cal.App.3d 778 (1974) for the proposition that the exemption should be interpreted to apply only to law enforcement "in the traditional sense," i.e., the enforcement of penal statutes. We do not agree with the commenters' reliance on dicta in the *Division of Industrial Safety* decision regarding the limited scope of Government Code § 6254(f). Even under the logic of this decision, however, the commenters' argument fails, because the Commission unquestionably does have law enforcement authority "in the traditional sense." See, *e.g.*, Public Utilities Code § 2112, which makes it a misdemeanor for any person other than a public utility to violate any provision of law enforced by the Commission. Also see Public Utilities Code § 308.5, which specifies that the Commission's designated inspectors and investigation supervisors have the authority of "peace officers," as specified in Section 830.11 of the Penal Code.

We also note in this regard the recent adoption by the Legislature of SB 39XX (Statutes of 2002, Chapter 19), which gives the Commission explicit enforcement authority over the wholesale generators. Moreover, the recent revelations concerning electricity market manipulation by Enron and other companies, and the associated guilty pleas of former high-level Enron employees, contradicts the contentions in the comments that the Commission's on-going investigation of the behavior of the wholesale generators during the energy crisis of autumn 2000 through spring 2001 is not a "law enforcement activity" with potential criminal consequences for the perpetrators.

The comments further argue that the Commission has failed to meet its burden of demonstrating that the statutory exemption set forth in Government Code § 6254(f) applies to the records for which disclosure is sought. The comments point out that an agency may justify withholding disclosure of records by demonstrating that on the facts of the particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure of the records. This argument is based on Government Code § 6255, whereas the Commission staff's denial of Duke's and Mirant's records requests was based on Government Code § 6254(f), which does not incorporate such a "balancing test." Even applying the Government Code § 6255 "balancing test", however, the public interest in the denial of Duke's and Mirant's records requests clearly outweighs the public interest in disclosure of those records. Contrary to the arguments set forth in the comments, the issuance of the Commission staff's Report, and the fact that the investigation discussed in that Report is continuing, provide the strongest possible public interest

justification for withholding the inspection records in question from disclosure. The comments complain that the "demonstration" in this regard is not detailed enough, but there is no reason why the draft resolution need repeat in detail the conclusions and the analysis set forth in that Report. The Report provides clear evidence of the contribution of the wholesale generators, including Duke and Mirant, to the energy crisis, and a direct and unequivocal reference to that Report in the draft resolution is more than sufficient to provide the required public interest demonstration.

Finally, the fact that the Commission may have released similar sorts of records in the past to Reliant is entirely irrelevant. As the commenters recognize, the Commission did not release any records to Reliant pursuant to a Public Records Act request. Rather, Reliant was denied the requested records. Subsequently, Reliant went to court to seek disclosure of the records in question. The matter was ultimately resolved by a settlement. An out-of-court settlement of a lawsuit has no precedental value and cannot be used as proof of a fact or the endorsement of a given legal principle. Moreover, Mirant's reliance on *Black Panther Party v. Kehoe* 42 Cal.App.3d 645 (1974) in support of its argument on this point is misplaced. In that case, the agency routinely disclosed complaint information to one class of the public, the collection agencies against which the complaints were filed, while denying these records to representatives of the complaining public. Here, there is no such pattern of selective disclosure and withholding of public records. Rather, irrespective of the settlement of the lawsuit brought by Reliant, the Commission has consistently taken the view that its staff inspection records are exempt from disclosure. Accordingly, the commenters reference to the Reliant settlement has no bearing on the Commission's consideration of its legal justification for denying release of the plant inspection records in question here.

We also note that Duke claims that disclosure of the records in question is necessary to "rebut the unsubstantiated conclusions" set forth in the Commission staff Report. However, the Report clearly states that the data on which its analysis and conclusions are based derives from data ultimately provided by the generators themselves to the California Independent System Operator. See Report, at page 17

FINDINGS OF FACT

1. Public Records Act requests were filed by John E. Rosenbaum, Esq., of White & Case on behalf of his client, Mirant Americas Energy Marketing, LP, *et al*, and by Jose Guzman, Esq., of Nossaman, Guthner, Knox & Elliot on behalf of his client, Duke Energy Corporation, regarding the Commission staff's inspections of Mirant and Duke facilities.

2. In light of the Commission staff's ongoing investigation of the behavior of wholesale generators, including Mirant and Duke, during the energy crisis of November 2000 through May 2001, the public interest in the confidentiality of the Commission staff's records of its inspections of the facilities owned and/or operated by those wholesale generators clearly outweighs the public interest in disclosure of those records.

CONCLUSIONS OF LAW

1. Public records may be withheld if they fall within a specified exemption in the Public Records Act, or if the Commission demonstrates that the public interest in confidentiality clearly outweighs the public interest in disclosure.

2. Pursuant to Government Code Section 6254(f), the records at issue are exempt from disclosure as "public records."

3. The public interest served by withholding the requested plant inspection records clearly outweighs the public interest served by disclosure of the records.

ORDER

1. The Public Records Act requests of John E. Rosenbaum, Esq., of White & Case on behalf of his client, Mirant Americas Energy Marketing, LP, *et al*, and by Jose Guzman, Esq., of Nossaman, Guthner, Knox & Elliot on behalf of his client, Duke Energy Corporation, regarding the Commission staff's inspections of Mirant and Duke facilities are denied.

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 December 5, 2002, and that the following Commissioners approved it:

WESLEY M. FRANKLIN
Executive Director

CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

President Loretta M. Lynch, being necessarily absent, did not participate.

I dissent.

/s/ Henry M. Duque
Commissioner

Commissioner Henry M. Duque, dissenting:

I dissent on both policy and legal grounds. I disagree with the policy conclusions in L-302 about what serves the public interest here. I believe the issuance of the generator report actually supports the public interest in releasing records. Is it in the public interest to highly publicize a report with serious allegations and then refuse to subject its basis to public scrutiny? I am not so sure. I am also a little unclear as to how an investigation can be complete enough to issue a report but then be "on-going" for purposes of a Public Records Act request. I read the records requests to include documents which were utilized in the preparation of the generator report.

I also question the applicability and the implications of asserting the law enforcement exception. The reasoning in L-1 is somewhat tenuous at best. If the Commission is exercising police powers, can the generators now invoke constitutional rights under the 4th and 5th Amendments? Will the Commission now be forced to obtain search warrants based on probable cause from superior court judges? Do the generators have a right not to incriminate themselves? These questions go unanswered in Resolution L-1.

Finally, we ultimately released similar records when we were sued by Reliant. It seems like a waste of time and resources to force another battle in superior court. At a minimum, the Commission should release the same type of records for the sake of consistency.

For these reasons, I dissent from the majority decision in Resolution L-302.

/s/ HENRY M. DUQUE
Henry M. Duque
Commissioner

December 5, 2002

San Francisco, California