PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

Los Angeles, California
Date: October 6, 2005
Resolution No. L-321

R E S O L U T I O N

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, 2005 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.[1]

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

[1] 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 § 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.[2]

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

[2] *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, 2005.

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 Public Utilities Code § 311(g). Comments were filed by UPRR in opposition to the Draft Resolution. Gideon Kracov and State Senator Nell Soto filed responses to UPRR's comments.

UPRR opposes disclosure on the grounds that: 1) the attorney requesting the records intends to use them in litigation against UPRR, and the records may contain staff's subjective judgments about the cause of the derailment, the extent of the damage or other injuries, the railroad's compliance with regulatory requirements, and other information that could be highly prejudicial to UPRR; 2) release of these records is contrary to Public Utilities Code §§ 315 and 583[3], and General Order 66-C, §§ 2.1, 2.2 (a), (b), and 2.4[4]; 3)

[3] PU Code Section 583 states: "No information furnished to the commission by a public utility, except such matters as are specifically required to be open to public inspection by the provisions of this part, 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. Any officer or employee of the commission who divulges any such information is guilty of a misdemeanor."

[4] General Order 66-C § 2 states: Public records not open to public inspection include (2.1) Records or information specifically precluded from disclosure by statute. (E.g.: accident reports, P.U. Code § 315)[footnote omitted] (2.2) Records or information of a confidential nature furnished to, or obtained by, the Commission. (See P.U. Code §§ 583, 3709, 5228.)

the Commission should not help plaintiff sidestep discovery procedures that would permit the railroad a chance to object to disclosure; and 4) the Commission should let the FRA determine whether FRA documents are to be disclosed. UPRR asserts that when it cooperates to provide staff with access to confidential information, to interview railroad employees, or to sit in on interviews conducted by the FRA or the National Transportation Safety Board, it expects the Commission to keep such information from the public, and that no railroad could be expected to facilitate staff inspections and interviews with railroad employees, or provide sensitive proprietary information relating to railroad accidents if it feared we would hand it over upon request to prospective litigants. UPRR asks that the Commission, to the extent it has discretion over disclosures, provide the railroad a chance to review the documents and further object to disclosure if appropriate.

Gideon Kracov filed a response to UPRR's comments. Kracov contends that UPRR disregards well-established Commission precedent (e.g. Resolution L-316 *Re Powell* (2005) which finds that Public Utilities Code § 583 does not limit the Commission's ability to order disclosure of records, that Public Utilities Code § 315 offers utilities sufficient protection against any unfair business disadvantage or other injury caused by the release of requested investigation records, and that disclosure of investigation records upon an order of the Commission is in the public interest, as long as personal information is redacted where appropriate. Mr. Kracov contends that disclosure is particularly in the public interest here: "as this incident involved hundreds of residents evacuated by the threatened release of hazardous substances. As the attached newspaper articles indicate, there is legitimate and bona fide public concern about the incident, the hazardous substances involved and ways to improve the notification and evacuation procedures for the residents of San Bernardino." He provides a copy of a graph from the Commission's rail safety action plan, showing an increase in rail-highway crossing accidents between 1999 and 2004, and several newspaper articles on rail safety and the April 4, 2005 accident. One article includes comments by Commission's Executive Director and Commissioner Gruenich.

California State Senator Nell Soto filed comments strongly urging us to follow precedent and permit the disclosure of documents concerning the derailment. The Senator notes that the derailment caused a spill of chlorine gas in populated neighborhoods, forcing the evacuation of hundreds of residents, many of whom complained of breathing difficulties and skin rashes; and states that the railroad's objection to disclosure is not in the best interests of the public, which deserves to know details of what happened as soon as possible to make sure it doesn't happen again. A Statement of Reverend Patricio Guillen Executive Director, Liberia Del Pueblo, Inc. is attached to the Senator's comments.

[footnote omitted] Such records or information shall include, but not be limited to: a) Records of investigations and audits made by the Commission, except to the extent disclosed at hearing or by formal Commission action. B) Reports, records, and information which would, if revealed, place the regulated company at an unfair business disadvantage. … (2.3) Intra-agency notes, drafts, memoranda, and other communications not otherwise made public by the Commission."

Reverend Guillen notes that many people in neighborhoods affected by the derailment: 1) complained of adverse health impacts; 2) believed the evacuation was chaotic, reflecting the absence of a clear plan to follow in the case of derailments; and 3) felt that UPRR was trying to cover up the derailment, and that many people, including some who didn't understand English, were signing waivers agreeing not to sue the railroad. Reverend Guillen concludes that there is a great urgency to develop good evacuations plans to deal with any future hazardous materials spills.

After reviewing Draft Resolution L-321, and arguments for and against disclosure of a limited number of documents from our records concerning our investigation of the April 4, 2005 derailment, we remain convinced that disclosure of these documents is in the public interest.

UPRR errs in concluding that Public Utilities Code §§ 315 and 583, and General Order 66-C, limit our ability to authorize disclosure of the derailment records. Public Utilities Code § 315 does not actually limit disclosure of accident reports, it merely states that such reports cannot be admitted into evidence during accident related litigation. (D.93-05-020 (1993) 49 CPUC 2d 241, 242-243; *see also*, *e.g*., Resolution L-320 *Re Knutson* (August 25, 2005)). And while Public Utilities Code § 583 limits staff's disclosure of certain information obtained from utilities in the absence of an order of the Commission or disclosure during a hearing, it does not limit the Commission's discretion to disclose. (*See*, *e.g*., *Southern California Edison Company v. Westinghouse Electric Corporation* (9th Cir. 1989) 892 F.2d 778, 783; *Re Southern California Edison Company* [Mohave Coal Plant Accident] D.91-12-019 (1991) 42 CPUC 2d 298, 300; and *Order Modifying Decision 04-08-055 and Denying Rehearing of the Decision as Modified* [*Re General Order 77-K*] D.05-04-030 (2005) at pp.19-22.) The same is true of General Order 66-C, which lists a number of classes of records for which the Commission is willing to consider confidential treatment, but makes clear, in § 3.4, that we will entertain appeals seeking disclosure of such listed records. Again, staff's ability to disclose certain records is limited by General Order 66-C, but we retain our own rights to authorize disclosure. (*See*, *e.g*., D.93-05-020 *supra*, 49 CPUC 2d at 242.)

Our discretion under Public Utilities Code § 583, General Order 66-C, and other statutes and regulations is not wholly unfettered. Our decisions, both for and against disclosure, must be consistent with constitutional provisions and statutes governing public access to government records. (See, e.g., California Constitution, Article 1, § 3; Government Code § 6250 et seq.; Civil Code § 1798 et seq.; and Evidence Code Section 911 et seq.) As noted earlier, statutes and other authority limiting public access to information must be narrowly construed. (Cal. Const., Article 1, § 3 (b).)

Railroads and other regulated entities should raise disclosure concerns at the time information is provided to the Commission, and not rely on vague assumptions about our ability or willingness to keep such information from the public. Regulated entities that

wish the Commission to keep certain information from the public should provide a detailed explanation why the specific information is subject to a statutory prohibition against disclosure, or why it is in the public's interest for the Commission to assert a specific Commission-held privilege or exemption from disclosure. This type of information, provided up front, may greatly assist us in determining what level of confidentiality we can, or may, choose to provide.

We will discuss disclosure of the records at issue here. With certain exceptions for incident reports filed by electric utilities, we generally refrain from making most accident investigation records public until staff's investigation of the incident is complete. Commission staff and management need to be able to engage in confidential deliberations regarding an accident investigation without concern for the litigation interests of plaintiffs or regulated entities.

We recognize, however, that certain accidents generate great public interest and extensive media coverage, and that other governmental entities responding to those accidents may disclose information to the public. The National Transportation Safety Board, for example, often provides factual information during accident investigations, although it may keep its conclusions confidential until its investigations are complete. Where the public already has access to significant information concerning an accident, our own disclosure of a limited number of accident facts will not inherently impair staff's investigation or our own analysis.

As UPRR points out, our rail safety staff often work with the FRA on rail accident investigations. We respect the FRA's information disclosure policies. Whether or not we have worked with the FRA on a particular accident, we generally refer those seeking rail accident records to the FRA since the FRA has an excellent rail-safety internet site which provides information on rail accident trends, grade crossings, and individual accidents, and makes additional information available upon request.

We note that the FRA has already posted on its internet site a short summary of the April 4, 2005 derailment, in accord with its standard practice. This summary lists the number of cars derailed, the number carrying hazardous materials, and the number of cars carrying hazardous materials that either spilled or were damaged in the incident. Our rail safety staff has reviewed the documents at issue here, and concluded that disclosure of the additional FRA Factual Railroad Accident Report identified in the Draft Resolution would not interfere with its investigative work or disrupt their interactions with the FRA.

Several documents listed in the Draft Resolution include information from our rail safety staff's interviews of several Union Pacific employees during the course of the accident investigation. PU Code Section 309.7 (b) gives the Commission's safety staff authority to "exercise all powers of investigation granted to the Commission, including rights to enter upon land or facilities, inspect books and records, and compel testimony…" While

our rail safety staff is required to consult with representatives of railroad corporations, labor organizations representing railroad employees, and the Federal Railroad Administration, (*id*.,) it is not required to defer to others regarding the interviewing of railroad employees. We have the discretion to decide whether to disclose interview records, and we find no reason to provide them to the railroad for its review prior to our disclosure decisions. The same is true for the remainder of the listed records.

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, 2005 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 October 6, 2005 and that the following Commissioners approved it:

STEPHEN LARSON
Executive Director