

COM/LR1/gp2

Date of Issuance: 9/3/2020

Decision 20-08-031 August 27, 2020

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Improve
Public Access to Public Records Pursuant
to the California Public Records Act.

Rulemaking 14-11-001

**PHASE 2B DECISION ADOPTING BASELINE SHOWINGS NECESSARY TO
QUALIFY FOR CONSIDERATION OF CONFIDENTIAL TREATMENT**

TABLE OF CONTENTS

Title	Page
PHASE 2B DECISION ADOPTING BASELINE SHOWINGS NECESSARY TO QUALIFY FOR CONSIDERATION OF CONFIDENTIAL TREATMENT	2
1. Background	3
2. Discussion	6
2.1. Legal Authority Regarding Critical Infrastructure Information	7
2.2. Baseline Showing Requirements for Critical Infrastructure Confidentiality Claims.....	13
3. Conclusion	14
4. Comments on Proposed Decision	15
5. Assignment of Proceeding	15
Findings of Fact	15
Conclusions of Law	16
ORDER.....	18

Attachment 1- General Order NO. 66-D

PHASE 2B DECISION ADOPTING BASELINE SHOWINGS NECESSARY TO QUALIFY FOR CONSIDERATION OF CONFIDENTIAL TREATMENT

Summary

Transparency is critical to ensuring the public's trust in the California Public Utilities Commission (Commission) decision-making process and regulation of the utilities under its jurisdiction. A key component of that transparency is providing public access to the information and documents that the Commission relies upon or has access to, with only certain narrow exceptions.

Although this proceeding initially set out to develop new confidential matrices for the various industries subject to this Commission's jurisdiction in this rulemaking, the record - including the proposals submitted by parties - provided insufficient detail to achieve that goal and would not necessarily provide greater public access to information. It is apparent that the development of a specific matrix as adopted in Decision 06-06-066 for energy procurement and renewables documents, extended across all the industries subject to this Commission's jurisdiction, is not feasible at this time. Therefore, this decision declines to adopt any additional confidentiality matrices at this time.

However, this decision does establish a baseline showing that an information submitter must make in order to enable consideration of confidential treatment of critical infrastructure information. This new approach will ensure that confidentiality claims regarding critical infrastructure information are adjudicated more consistently by the Commission and reduce the time-consuming, difficult discretionary decisions as to the appropriateness of a critical infrastructure information privilege claim.

This decision closes the proceeding.

1. Background

This Rulemaking was opened in October 2014 to refine the process of “increas[ing] public access to records furnished to the Commission by the regulated entities, while ensuring that information truly deserving of confidential status retains that protection.”¹ To date, the Commission has divided the Rulemaking into several phases, and issued the following decisions:

Decision (D.) 16-08-024 – a Phase 1 decision, implementing an updated and clarified process for submitting potentially confidential information to the Commission, requiring among other things that a utility officer attest to the confidential nature of any document or part of a document for which [section 583] protection was claimed. D.16-08-024 was an interim decision which provided for a Phase 2 as follows: “the proceeding will remain open to further develop and refine the Commission’s processes relating to potentially confidential documents, and may result in the adoption of a new version of GO-66.”²

D.17-09-023 – a Phase 2 decision adopting General Order (GO) 66-D and establishing updated processes for: (1) regulated entities and the public to submit information to the Commission with a claim of confidentiality,³ (2) the public to submit requests for information to the Commission per the California Public Records Act (CPRA), (3) the Commission to determine whether a claim of confidentiality associated with the submission of information is lawful, and (4) the Commission to determine whether information, including both information submitted to the Commission and information created by the Commission, shall be disclosed to the public, including but

¹ Order Instituting Rulemaking 14-11-001 at 1.

² D.16-08-024 at 5.

³ “Information” is defined in GO 66-D to include but is not limited to, any document, record, account, book, or paper regardless of whether it is in an analog or digital format, which is prepared, owned, used, submitted to or retained by the Commission.

not limited to information that is provided in response to a CPRA request.

D.19-01-028 – a second Phase 2 decision, adopting Revision 1 to General Order 66-D, which in turn refined the Commission’s process to protect the public’s right to access government information under the California Constitution and the CPRA, provide the information submitter’s right to confidential protection when afforded by law, and ensure the Commission can release information in the course of its activities. GO 66-D Revision 1 superseded GO 66-D effective February 1, 2019.

In Phase 1 of this proceeding, the Commission noted that it would consider developing lists of specific documents for each of the different industries it regulates, or the functions it performs, designating which documents would be preemptively confidential or presumptively not confidential. These lists have commonly been referred to as Confidentiality Matrices, or Preemptive Designations.

“Confidential Matrices” is a term describing a Commission determination that specific categories of information are confidential per Section 3.4 of GO 66-D. The determination is made prior to the submission of such information and applies broadly to a category of documents. If information has been submitted in compliance with a specific confidential matrix, it will not be released per a CPRA request absent an order of the Commission.

The August 11, 2015 Scoping Memorandum and Ruling requested comment on an attached Draft Proposal, citing the matrix attached to Decision 06-06-066 as a model for “default confidential and non-confidential designations for procurement/renewables records.”

On January 12, 2016, the Assigned Commissioner issued a ruling setting a workshop on matrix issues, and the Commission held a workshop on

February 2, 2016, to explore the development of confidential matrices in areas other than the procurement/renewables records covered by the D.06-06-066 matrix. Parties submitted proposals after the workshop.

On December 30, 2016, the Assigned Commissioner issued an Amended Scoping Memorandum and Ruling (December 30, 2016 Scoping Memo) indicating that Phase 2B of this proceeding would focus on the issue of confidential matrices. The December 30, 2016 Scoping Memo identified the scope of issues for Phase 2B.⁴ In light of Comments received on the December 30, 2016 Scoping Memo, the Assigned Commissioner provided further direction in an August 18, 2017 Scoping Memorandum and Ruling, urging the parties to work together to create matrices as was done in R.05-06-040, leading to D.06-06-066, and to be specific rather than broad or overbroad in the confidentiality claims they were making. It also provided further guidance:

Matrices are appropriate where the confidential status of information is not disputed and the preemptive designation of confidentiality will aid both the public and the Commission in efficiently processing information. The matrices should set forth specific types of information so that it is easy for parties and the Commission to match a specific type of information for which the proponent claims confidentiality with the term in the matrix.⁵

To aid in creating that specificity, and based on the Comments previously received, the August 18, 2017 Scoping Memo and Ruling noted several categories of confidentiality claims, including critical infrastructure information.

⁴ December 30, 2016 Assigned Commissioner issued an Amended Scoping Memorandum and Ruling at 4.

⁵ August 18, 2017 Scoping Memo and Ruling at 2.

In response to the August 18, 2017 Ruling, the parties submitted proposed confidential matrices which attempted to detail confidential treatment for different types of information submitted to the Commission. On March 29, 2018, the Commission held another workshop to discuss the parties' submitted confidential matrices. The workshop included a panel discussion by information requestors and a presentation of the proposed matrices by their respective sponsors. While the purpose of the workshop was to develop new confidential matrices, it was evident that the proposals submitted provided insufficient detail to improve the process and often simply copied the relevant CPRA provisions verbatim.

2. Discussion

Based on the record of the proceeding, including workshop proposals and comments filed regarding the proposals, we find that a specific matrix as adopted in D.06-06-066 for energy procurement and renewables documents, extended across all the industries subject to this Commission's jurisdiction, is not feasible at this time.

Therefore, this Decision takes a new tack from previous efforts. It focuses on the critical infrastructure information confidentiality privilege, and provides guidance in the form of a specific baseline showing that the information submitter must make in order to qualify for consideration of confidential treatment for critical infrastructure information.

The August 11, 2015 Scoping Memo and Ruling incorporated by reference a Draft Proposal which contains a discussion of the "Legal Context" in which a matrix could be adopted. Having reviewed the comments submitted on that Ruling and subsequent comments, the Commission affirms that this "Legal

Context” is still the appropriate framework and provides sufficient legal authority for the guidance offered in this decision.

We note first, as the Draft Proposal did and as affirmed in D.16-08-024, that D.06-06-066 itself sets out the authority for the matrix which it attaches.

Accordingly, the Commission would also be authorized under existing law to order something more narrow than a legal matrix, including a requirement for a specific baseline showing that the information submitter must make in order to qualify for consideration of confidential treatment.

We find this approach is also consistent with public policy. One of the primary goals of this proceeding is to increase consistency in how the Commission addresses confidentiality claims. Information submitters will benefit from consistency because they may have confidence that certain information will be protected from public disclosure while acknowledging that other information will be disclosed to the public. A standard framework against which each confidentiality request is evaluated will improve the public trust in the Commission and allow for a more efficient process.

The other primary goal of this proceeding is to increase public access to the Commission’s information to achieve greater transparency, both in the operation of the Commission and its regulated entities. Requiring the information submitters to provide a baseline showing in support of critical infrastructure information privilege claims will allow only the required minimal amount of information to be kept confidential. Further, instituting more detailed requirements will allow the Commission’s Legal Division staff to more swiftly

and effectively address each confidentiality request and therefore be more responsive to both information submitters and requestors.

2.1. Legal Authority Regarding Critical Infrastructure Information

The need to guard detailed information about a utility's critical infrastructure is one of the most frequently asserted privileges for information submitted to the Commission. Indeed, the public disclosure of highly sensitive information that could disable the State's electrical, gas, water, transportation or telecommunications systems could be devastating to the safety of the entire population. While safety is of prime importance to the Commission, the fear and uncertainty surrounding terrorist attacks to the utilities' infrastructure has led to the privilege being overused.

The Legislature identified this category as an exemption to the CPRA:

Critical infrastructure information, as defined in Section 131(3) of Title 6 of the United States Code, that is voluntarily submitted to the Office of Emergency Services for use by that office, including the identity of the person who or entity that voluntarily submitted the information. As used in this subdivision, "voluntarily submitted" means submitted in the absence of the office exercising any legal authority to compel access to or submission of critical infrastructure information. This subdivision shall not affect the status of information in the possession of any other state or local governmental agency.⁶

To fall within this exception, the subject documents must have been "voluntarily submitted to the Office of Emergency Services for use by that office." For the Commission's purposes, however, this exemption would not apply to records provided to the Commission directly, since California Government Code

⁶ Cal. Gov't Code § 6254(ab).

§ 6254(ab) expressly states that “[t]his subdivision shall not affect the status of information in the possession of any other state or local governmental agency.”

The Federal law cited by the CPRA states, in part:⁷

3. Critical infrastructure information

The term “critical infrastructure information” means information not customarily in the public domain and related to the security of critical infrastructure or protected systems--
(A) actual, potential, or threatened interference with, attack on, compromise of, or incapacitation of critical infrastructure or protected systems by either physical or computer-based attack or other similar conduct (including the misuse of or unauthorized access to all types of communications and data transmission systems) that violates Federal, State, or local law, harms interstate commerce of the United States, or threatens public health or safety;

(B) the ability of any critical infrastructure or protected system to resist such interference, compromise, or incapacitation, including any planned or past assessment, projection, or estimate of the vulnerability of critical infrastructure or a protected system, including security testing, risk evaluation thereto, risk management planning, or risk audit; or

(C) any planned or past operational problem or solution regarding critical infrastructure or protected systems, including repair, recovery, reconstruction, insurance, or continuity, to the extent it is related to such interference, compromise, or incapacitation.

Although the United States Code (U.S.C.), specifically 6 U.S.C. § 671, defines “critical infrastructure information” as “information not customarily in the public domain and related to the security of critical infrastructure or

⁷ 6 U.S.C.A. § 671(3).

protected systems,” it does not define “critical infrastructure” itself. For that, we need to turn to 42 U.S.C. § 5195c: "In this section, the term ‘critical infrastructure’ means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."

6 U.S.C. § 673 bars state agencies from disclosing certain critical infrastructure information pursuant to state law requiring the disclosure of information or records only where such information: (1) was voluntarily submitted to a covered federal agency for the use by that agency regarding the security of critical infrastructure; (2) was accompanied by the express statement specified in 6 U.S.C. § 673(a)(2); (3) was viewed, classified, and marked as protected critical infrastructure information by the appropriate Department of Homeland Security (DHS) office; and (4) was provided by that office to a state agency.⁸ 6 U.S.C. § 673(c) expressly states that the prohibitions on disclosure do not apply to information independently obtained by a state agency.⁹

⁸ 6 U.S.C. § 673(a)(1) "... critical infrastructure information ... that is voluntarily submitted to a covered Federal agency for use by that agency regarding the security of critical infrastructure ... when accompanied by an express statement specified in paragraph (2)-- ... (E) shall not, if provided to a State or local government or government agency—(i) be made available pursuant to any State or local law requiring disclosure of information or records; ... (iii) be used other than for the purpose of protecting critical infrastructure"

6 U.S.C. § 673(a)(2): "**Express statement** For purposes of paragraph (1), the term ‘express statement’, with respect to information or records, means--(A) in the case of written information or records, a written marking on the information or records substantially similar to the following: ‘This information is voluntarily submitted to the Federal Government in expectation of protection from disclosure as provided by the provisions of the Critical Infrastructure Information Act of 2002.’;" (Bold in original.)

At 6 C.F.R. § 29.2(g), the federal regulation defines “Protected Critical Infrastructure Information (PCII)” as:

Protected Critical infrastructure Information, or PCII, means validated CII, ... that is voluntarily submitted, directly or indirectly, to DHS for its use regarding the security of critical infrastructure and protected systems, analysis, warning, interdependency, study, recovery, reconstitution, or other appropriate purpose, and any information, statements, compilations or other material reasonably necessary to explain the CII, put the CII in context, describe the importance or use of the CII, when accompanied by an express statement as described in 6 CFR 29.5.

Relevant to our analysis, 6 C.F.R. § 29.8 states:

(b) PCII may be provided to a State ... government entity for the purposes of protecting critical infrastructure ... or in furtherance of an investigation or the prosecution of a criminal act. The provision of PCII to a State ... government entity will normally be made only pursuant to an arrangement with the PCII Program Manager providing for compliance with the requirements of paragraph (d) of this section and acknowledging the understanding and

6 U.S.C. § 673(e) requires the Secretary of the Department of Homeland Security to establish uniform procedures for the receipt, care, and storage by Federal agencies of critical infrastructure information that is voluntarily submitted to the Government. These procedures, in 6 C.F.R. Part 29: 1) set forth specific requirements for protection of information voluntarily submitted to PCII Program Manager or designee (§ 29.5); 2) state that “Only the DHS PCII Program Manager is authorized to validate, and mark information as PCII.” (§ 29.6(a)); 3) describe the review, validation, and marking process (§ 29.6); 4) detail use and storage requirements (§ 29.7); and 5) set forth rules for the sharing of PCII with state entities for the purpose of protecting critical infrastructure or protected systems, or investigation and prosecution of criminal acts, but not for direct or indirect use for any collateral regulatory purpose (§ 29.8).

² 6 U.S.C. § 673(c): “Independently obtained information Nothing in this section shall be construed to limit or otherwise affect the ability of a State ... Government entity, agency, or authority, ... , under applicable law, to obtain critical infrastructure information in a manner not covered by subsection (a), including any information properly disclosed generally or broadly to the public and to use such information in any manner permitted by law....” (Bold in original.)

responsibilities of the recipient. State ... governments receiving such information will acknowledge in such arrangements the primacy of PCII protections under the CII Act; agree to assert all available legal defenses to disclosure of PCII under state ... public disclosure laws, statutes or ordinances; and will agree to treat breaches of the agreements ... as matters subject to the criminal code

The Code of Federal Regulations (CFR) provides that: "State and local governments may use PCII only for the purpose of protecting critical infrastructure or protected systems, or as set forth elsewhere in these rules."¹⁰

The sensitive information obtained by the Commission primarily comes directly from the regulated utilities. As such, the restrictions on PCII based in federal law and regulation rarely apply to the Commission.

Parties frequently refer to a Federal Energy Regulatory Commission (FERC) critical electric infrastructure information (CEII) regulation, 18 C.F.R. § 388.113, which implements 16 U.S.C. § 824o-1. As is the case with 6 U.S.C. § 673 and its implementing regulations, above, neither 18 C.F.R. § 388.113 nor 16 U.S.C. § 824o-1 limit disclosure of information independently obtained by state agencies.¹¹ FERC Order Number 833A clarifies that entities providing critical electric infrastructure information to the FERC are free to provide such information to others.¹²

¹⁰ 6 C.F.R. § 29.8 (d)(2).

¹¹ 16 U.S.C. § 824o-1, states in § 824o-1(a)(3) that: "The term "critical electric infrastructure information" means information related to critical electric infrastructure or proposed critical electrical infrastructure, generated by or provided to the Commission or other Federal agency ... that is designated as critical electric infrastructure information by the Commission or the Secretary pursuant to subsection (d). Such term includes information that qualifies as critical energy infrastructure information under the Commission's regulations."

¹² FAST Act Section 61003-*Critical Electric Infrastructure Security and Critical Infrastructure*

The federal statute requires that the subject information be of the type that is not customarily in the public domain. This precludes an information submitter from asserting that the location of any physical structure which is visible with the naked eye should be subject to confidential treatment. Likewise, any information readily accessible online or publicly available in print could not be deemed confidential under this provision.

Ultimately, the most relevant statute governing the Commission's review of critical infrastructure claims is California Government Code § 6255(a), which provides that:

The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

The provision permits agencies to engage in a balancing of the public interests for and against disclosure, on the basis of the facts of the particular situation, in response to CPRA requests.

The official information privilege in California Evidence Code § 1040 provides a lawful basis for the Commission to refrain from disclosing certain information acquired in confidence by the Commission, where disclosure is either prohibited by federal or state law, or where there is a need for

Information, FERC Order No. 833-A, *Order on Clarification and Rehearing*, May 17, 2018) 82 FR 24656-01, Paragraph 13: " ... The new voluntary sharing provisions, at 18 CFR 388.113(f) of the Commission's CEII regulations, only govern the process by which the Commission will voluntarily share CEII that has been submitted to the Commission or generated by staff. [Fn. 20 omitted] Before the FAST Act and under the revised regulations, entities remain free to share the CEII that they submitted to the Commission with others."

confidentiality that outweighs the necessity for disclosure in the interests of justice. The conditional official information privilege in California Evidence Code § 1040(b)(2) involves a careful balancing of the public interests served by disclosing, or withholding, information, and can, where appropriate, justify withholding records in response to subpoenas (and in response to CPRA requests, since it can support assertion of the California Government Code § 6254(k) exemption).

2.2. Baseline Showing Requirements for Critical Infrastructure Confidentiality Claims

With the above legal considerations in mind, this decision adopts the following requirements for a baseline showing that must be provided with a claim of the critical infrastructure information privilege submitted outside of a formal proceeding.

1. In order to assert that the submitted information is deemed confidential on the basis that it is critical infrastructure information, the submitter must make a detailed showing that the subject information both:
 - a. Is not customarily in the public domain by providing a declaration from an officer of the utility in compliance with Section 3.2(c) of General Order 66-D stating that the subject information is not:
 - 1) related to the location of a physical structure that is visible with the naked eye; or
 - 2) available publicly online or in print; and
 - b. The subject information either:
 - 1) could allow a bad actor to attack, compromise or incapacitate physically or electronically a facility providing critical utility service; or

- 2) discusses vulnerabilities of a facility providing critical utility service.

As indicated above, the above baseline showing does not apply to claims of critical infrastructure information privilege in a formal proceeding.¹³

3. Conclusion

This decision declines to adopt new confidential matrices for the various industries subject to this Commission's jurisdiction at this time because the record provides insufficient detail to achieve that goal. The development of a specific matrix as adopted in Decision 06-06-066 for energy procurement and renewables documents, extended across all the industries subject to this Commission's jurisdiction, is not feasible at this time. However, this decision does establish a baseline showing that an information submitter must make in order to qualify for consideration of confidential treatment of critical infrastructure information.

4. Comments on Proposed Decision

The proposed decision of Commissioner Randolph in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code, and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Joint opening comments were filed by Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas and Electric Company and Southwest Gas Corporation ("Joint Energy IOUs") on August 10, 2020. The Communications Industry Coalition also filed opening comments on August 10, 2020. The California Cable & Telecommunications

¹³ GO 66-D, Section 3.3.

Association and the California Water Association each filed reply comments on August 17, 2020. We have considered the comments and made appropriate modifications.

5. Assignment of Proceeding

Liane Randolph is the assigned Commissioner and Marcelo L. Poirier is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The new confidentiality matrices proposals submitted in this rulemaking provided insufficient detail to improve the process of supporting and assessing confidentiality claims, and often simply copied the relevant California Public Records Act provisions verbatim.

2. The development of specific matrices as adopted in Decision 06-06-066 for energy procurement and renewables documents, extended across all the industries subject to this Commission's jurisdiction, is not feasible at this time.

3. The critical infrastructure information privilege is one of the most frequently asserted privileges for information submitted to the Commission.

4. Providing baseline requirements for critical infrastructure information submitters when they claim confidentiality privilege will streamline the process and make the process more consistent.

5. Requiring the information submitters to provide a baseline showing in support of critical infrastructure information privilege claims will allow only the required minimal amount of information to be kept confidential and will improve transparency.

6. The baseline showing requirements for critical infrastructure information privilege claims will allow the Commission's Legal Division staff to address each

confidentiality request more expediently and effectively, and be more responsive to both information submitters and requestors.

7. Electric and gas transmission as well as distribution facilities may qualify as critical infrastructure.

Conclusions of Law

1. The Commission should implement a consistent process for the processing of potentially confidential information regarding critical infrastructure submitted to the Commission.

2. 6 United States Code § 671, defines “critical infrastructure information” as “information not customarily in the public domain and related to the security of critical infrastructure or protected systems.”

3. 42 United States Code § 5195c defines critical infrastructure to mean systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.

4. 6 United States Code § 673 bars state agencies from disclosing certain critical infrastructure information pursuant to state law requiring the disclosure of information or records only where such information: (1) was voluntarily submitted to a covered federal agency for the use by that agency regarding the security of critical infrastructure; (2) was accompanied by the express statement specified in 6 United States Code § 673(a)(2); (3) was viewed, classified, and marked as protected critical infrastructure information by the appropriate Department of Homeland Security (DHS) office; and (4) was provided by that office to a state agency.

5. 6 United States Code § 673(c) expressly states that the prohibitions on disclosure do not apply to information independently obtained by a state agency.

6. The official information privilege in California Evidence Code § 1040 provides a lawful basis for the Commission to refrain from disclosing certain information acquired in confidence by the Commission, where disclosure is either prohibited by federal or state law, or where there is a need for confidentiality that outweighs the necessity for disclosure in the interests of justice.

7. This decision establishes the baseline showing for requests for confidential treatment of critical infrastructure information, and revises Section 3.2 of GO-66 D accordingly.

8. Section 3.3 of GO 66-D states that Section 3.2 of GO 66-D does not apply to submissions in a formal proceeding where a party files information in the docket.

9. The processes adopted by this decision are consistent with Public Utilities Code Section 583 and the California Public Records Act.

10. The release of all potentially confidential information by the Commission shall be consistent with the protocols established in General Order 66-D and this decision.

O R D E R

IT IS ORDERED that:

1. The process identified in General Order 66-D and this decision shall be used for the submission of potentially confidential critical infrastructure information to the Commission.

2. Any information submitter claiming the critical infrastructure information privilege must make the baseline showing specified in this decision.

3. General Order 66-D is modified to include the baseline information requirements established in this decision for any information submitters claiming the critical infrastructure privilege, as specified in Attachment 1.

4. The process established in this decision is effective 45 days from the date of issuance of this decision.

5. Rulemaking 14-11-001 is closed.

This order is effective today.

Dated August 27, 2020, at San Francisco, California.

MARYBEL BATJER

President

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

GENEVIEVE SHIROMA

Commissioners

ATTACHMENT 1

GENERAL ORDER NO. 66-D
Revision 1
(Supersedes General Order No. 66-C)

PROCEDURES FOR (1) SUBMISSION OF INFORMATION TO THE CALIFORNIA PUBLIC UTILITIES COMMISSION WITH CLAIMS OF CONFIDENTIALITY, (2) SUBMISSION OF REQUEST PER THE CALIFORNIA PUBLIC RECORDS ACT, AND (3) THE RELEASE OF ANY INFORMATION BY THE COMMISSION, INCLUDING PURSUANT TO THE CALIFORNIA PUBLIC RECORDS ACT

Adopted September 28, 2017; Effective January 1, 2018. Decision 17-09-023, as modified by Revision 1 effective February 1, 2019. [Decision 19-01-028]

1. Definitions and Acronyms

- (1.1) **“Commission”** includes the Commission; each commissioner; any person employed by the Commission; which includes the Office of Ratepayer Advocates, Safety and Enforcement Division, and Office of Safety Advocate.
- (1.2) **“Confidential Matrices”** is a term describing a Commission determination that specific classifications of information are confidential per Section 3.4 of this GO. The determination is made prior to the submission of such information and applies broadly to a classification of information.
- (1.3) **“CPRA”** is an acronym for California Public Records Act (Section 6250 et seq. of the Government Code).
- (1.4) **“GO”** is an acronym for General Order.
- (1.5) **“Information”** includes but is not limited to, any document, record, account, book, or paper regardless of whether it is in an analog or digital format, which is prepared, owned, used, submitted to or retained by the Commission.
- (1.6) **“Information Submitter”** includes any person or entity submitting information to the Commission.

- (1.7) **“Information Requestor”** includes any person or entity requesting information from the Commission per the CPRA.
- (1.8) **“Modified D.06-06-066”** is a citation to Decision 06-06-066, as modified by D.07-05-032, which addresses confidentiality in the context of energy procurement information.
- (1.9) **“Public Records Office”** is the portion of the Commission Legal Division assigned to process claims of confidentiality and responses to CPRA requests.

2. Statement of Liability For Non-Compliance

- (2.1) Compliance with all Commission Orders is subject to Public Utilities Code Sections 702 and the penalty provisions in the Public Utilities Code including but not limited to, Sections 2107, 2107.5, 2108 2110, 2111, 2112, 2113, and 2114 and Rule 1.1 of the Commission’s Rules. Non-compliance by a person, corporation, and/or organization with this GO may be referred to the Commission’s General Counsel and/or law enforcement for further action.

3. The Submission of Information with a Claim of Confidentiality to the Commission

- (3.1) **Applicability:** This section applies to information submitted to the Commission on or after January 1, 2018. Information submitted between September 25, 2016, and December 31, 2017, is governed by D.16-08-024. Where D.16-08-024 references future decisions in R.14-11-001, this GO shall apply. Information submitted prior to September 25, 2016, is subject to GO 66-C or its predecessors.
- (3.2) **Submission of Information with a Claim of Confidentiality:** An information submitter bears the burden of proving the reasons why the Commission shall withhold any information, or any portion thereof, from the public. To request confidential treatment of information submitted to the Commission, an information submitter must satisfy all of the following requirements:

- a) If confidential treatment is sought for any portion of information, the information submitter must designate each page, section, or field, or any portion thereof, as confidential. If only a certain portion of information is claimed to be confidential, then only that portion rather than the entire submission should be designated as confidential.
- b) Specify the basis for the Commission to provide confidential treatment with specific citation to an applicable provision of the CPRA.

A citation or general marking of confidentiality, such as "GO-66" and/or "Public Utilities Code Section 583" without additional justification of confidentiality does not satisfy the information submitter's burden to establish a basis for confidential treatment by the Commission.

If the information submitter cites Government Code Section 6255(a) (commonly known as the public interest balancing test) as the legal authority for the Commission to withhold the document from public release, then the information submitter must demonstrate with granular specificity on the facts of the particular information why the *public* interest served by not disclosing the record clearly outweighs the *public* interest served by disclosure of the record. A *private* economic interest is an inadequate interest to claim in lieu of a *public* interest. Accordingly, information submitters that cite Section 6255(a) as the basis for the Commission to withhold the document and rest the claim of confidentiality solely on a *private* economic interest will not satisfy the requirements of this Section. To invoke the administrative processes described in Sections 5 and 6, the information submitter must satisfy the requirements of this Section.

If the information submitter cites Government Code Section 6254(k) (which allows information to be withheld when disclosure of it is prohibited by federal or state law), it must also cite the applicable statutory provision and explain why the specific statutory provision applies to the particular information.

An information submitter may not cite Government Code Section 6254(a) as the legal authority to establish a basis for confidential treatment by the Commission, because Section 6254(a) does not apply to any communication between the Commission and a member of the public.

If the information submitter asserts that the submitted information is confidential because it is critical infrastructure information, the submitter must make a detailed showing that the subject information: (1) is not customarily in the public domain by providing a declaration in compliance with Section 3.2(c) stating that the subject information is not related to the location of a physical structure that is visible with the naked eye or is available publicly online or in print; **and** (2) the subject information either: could allow a bad actor to attack, compromise or incapacitate physically or electronically a facility providing critical utility service; or discusses vulnerabilities of a facility providing critical utility service.

- c) Provide a declaration in support of the legal authority cited in Section 3.2(b) of this GO signed by an officer of the information submitter or by an employee or agent designated by an officer. The officer delegating signing authority to an employee or agent must be identified in the declaration.
- d) Provide a name and email address of the person for the Commission to contact regarding the potential release of information by the Commission per Section 5 of this GO. An information submitter may designate as many as three people by name and email address for all document submissions to

the Commission. Failure of the information submitter to monitor and respond to Commission communications to the designated email address(es) does not preclude release of information per Section 5 of this GO. There is no requirement for the Commission staff to contact each name provided. To change the designated email address and contact name, an information submitter shall send a letter to:

Public Records Office, Legal Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

There are limited circumstances when the requirements of this Section do not apply. First, information subject to the requirements of Modified D.06-06-066 is exempted from the requirements of this Section and may continue to be submitted consistent with the requirements of that decision. Second, valid submission of information per Section 3.3 (submission in a formal proceeding) and Section 3.4 (submission consistent with a determination of confidentiality in a decision) of this GO is exempted from the requirements of this Section.

If an information submitter satisfies the requirements in this Section, then the Commission will evaluate the legal authority for the Commission to withhold the document from the public per the process established in Sections 5 and 6 of this GO. Unless information is submitted in accordance with Section 3.2-3.4, information submitted in non-compliance with this Section, may be released to the public per Section 5.2.

(3.3) Submissions in a Formal Proceeding: The requirements of Section 3.2 of this GO do not apply when a party in a formal proceeding files information in the docket. To obtain confidential treatment of information to be filed in the docket of a formal proceeding, the information submitter must file a motion pursuant to Rule 11.4 of the

Commission's Rules, or comply with a process established by the Administrative Law Judge for that specific proceeding. Please note that advice letters are not part of formal proceedings and thus confidentiality for information in advice letters shall be governed by the process in Section 3.2 or 3.4.

(3.4) Preemptive Determination of Confidentiality in a Decision:

- a) The Commission may adopt confidential matrices which preemptively designate certain information as confidential or public in a decision. Information submitted to the Commission per this Section shall clearly designate the relevant decision adopting the applicable confidential determination. If the information is appropriately identified as being preemptively determined to be confidential, the Commission will not release information in response to a CPRA, unless by order of the Commission. The Commission's *general* determination that a classification of information in a confidential matrix is confidential may only be challenged by filing an Application for Rehearing or a Petition to Modify of the Commission decision adopting the confidential matrix. The Commission's *specific* determination of whether particular information qualifies for confidential treatment per a confidential matrix adopted by the Commission may be challenged per Sections 5.5 and 6.
- b) In addition, in any proceeding in which the Commission issues a decision requiring the submission of information, the Commission may make a determination of whether the information required by the decision will be treated as public or confidential. In such an instance the Commission will:
 - i. Identify the type of information to be submitted, and

- ii. Provide an analysis of the legal authority for the Commission to provide confidential treatment to the specific information.

Information submitted to the Commission per this Section should clearly designate the relevant decision containing the confidential determination. Any party may challenge the confidentiality determination of the decision by filing an Application for Rehearing or Petition to Modify. The determination of confidentiality in a decision governs the release of the information to the public, including in response to a CPRA request. Any determination to treat certain information as confidential is limited to the particular information required to be submitted in that decision and does not constitute a decision of more general applicability made pursuant to Section 3.4(a).

If the Commission has made a determination in another General Order regarding confidentiality, an information submitter may cite that General Order. In such instances the process in Sections 5.5 and 6 will apply.

- (3.5) Confidential Treatment Unavailable for Public Information:** A request for the Commission to provide confidential treatment of information per Sections 3.2 – 3.4 of this GO, which is already public, will not be granted. An information submitter requesting confidential treatment must make reasonable steps to maintain the information confidentially and in the event an information submitter becomes aware that the information is public, the information submitter must so inform the Commission in a timely manner.

4. California Public Records Act Requests

(4.1) Submission of California Public Record Act Requests: A CPRA request for information from the Commission can be made in four ways. First, CPRA requests can be submitted to the Public Records Office, Legal Division, by using the electronic Public Records Request Form available at publicrecords.cpuc.ca.gov/. Second, a request can be submitted by U.S. mail by mailing a request to:

Public Records Office, Legal Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

- Third, a request can be submitted by email or phone to a Commission employee. And lastly, a request may be submitted in person to the Public Records Office. Before submitting a request, please check to see if the information is available from the Commission's website, <https://publicrecords.cpuc.ca.gov/requests>. The Commission will process a CPRA request per this GO regardless of how it is titled.
- (4.2) Fees for Copies:** Fees may be assessed consistent with the CPRA. Checks for payment should be made payable to the Public Utilities Commission of the State of California. Information requestors may request fees to be waived when submitting a request.
- (4.3) Review of CPRA Requests:** Requests will be reviewed and processed by the Public Records Office per Sections 5 and 6 of this GO. The Office will promptly notify the person making the request of the determination of whether the information is disclosable, in accordance with Government Code Section 6253 of the CPRA. If information is withheld, the provisions of Sections 5 and 6 of this GO shall apply.
- (4.4) Exemptions to Disclosure Per the CPRA:** Information in possession of the Commission is available for public inspection unless deemed to be exempt by the Commission from inspection pursuant to the exemptions in the CPRA (Government Code Sections 6250, et seq.,

except Section 6254(a) which does not apply to information submitted by regulated entities and the public).

5. Guidelines for the Commission's Release of Information to the Public

(5.1) Scope: This section defines when information submitted to the Commission and information created by the Commission may be released to the public, including in response to CPRA requests.

In instances when the Commission receives a subpoena, it will review claims of confidentiality consistent with lawful claims of privileges and applicable law.

(5.2) Release of Information with No Claim of Confidentiality:

Information submitted to the Commission with no claim of confidentiality at all may be released to the public without further action by the Commission, unless the Commission withholds the information per an exemption of the CPRA. This provision applies regardless of the date the information was submitted to the Commission. Information created by the Commission may be released to the public without further action by the Commission, unless the Commission withholds the information per an exemption of the CPRA.

(5.3) Release of Information with Claims of Confidentiality: The determination of rules applicable for the release of information submitted to the Commission with a claim of confidentiality will be based on the date of submission to the Commission. Section 5.4 of this GO governs the release of information with a claim of confidentiality submitted prior to January 1, 2018. Section 5.5 of this GO governs the release of information with a claim of confidentiality submitted on or after January 1, 2018.

If the Commission withholds the information created by the Commission per an exemption of the CPRA, then Section 5.5 of this GO will govern the release of information.

(5.4) Information with a Claim of Confidentiality Submitted Prior to the Effective Date of this GO

- a) **Information Submitted per the Requirements of Modified D.06-06-066:** This section applies when the Commission seeks to release information submitted to the Commission as confidential pursuant to the requirements of Modified D.06-06-066 after the effective date of that decision, and that are in compliance with the requirements of that decision. Such information will only be released, including in response to CPRA requests, after the applicable time period set forth in Modified D.06-06-066. After the expiration of the applicable time period, or if the submission does not comply with the requirements of Modified D.06-06-066, such information may be released by Commission staff.
- b) **Information Submitted Prior to September 25, 2016; not per the Requirements of Modified D.06-06-066:**¹⁴ This section applies when the Commission seeks to release information submitted prior to September 25, 2016, including in a response to a CPRA request, and the document submitter simply marked the information confidential, or invoked Section 583 or General Order 66-C, without more information to substantiate the claim of confidentiality.

If the Commission has received a CPRA request for such information, Legal Division will contact the information submitter and provide them ten days to meet the requirements of Section 3.2 of this GO. An information submitter may request an extension of time of an additional ten days.

If the Commission seeks to release such information in any context other than a CPRA request, Legal Division will contact the information submitter and provide them ten days to meet the requirements of Section 3.2 of this GO. In this instance, the ten

¹⁴This section resolves Section 3.2(4) of D.16-08-024, which stated such documents “will only be released subject to a process to be determined in this proceeding or a successor proceeding, consistent with these guidelines.”

days may be extended by Legal Division to fifteen days, if the information submitter requests an extension.

Rule 1.15 of the Commission's Rules governs calculation of time.

- c) **Information submitted between September 25, 2016 and December 31, 2017, not per the requirements of Modified D.06-06-066:** This section applies when the Commission seeks to release information, including in response to a CPRA request, submitted to the Commission between September 25, 2015, the date established in D.16-08-024 for the implementation of the D.16-08-024 rules, and December 31, 2017, which was not submitted per the requirements of Modified D.06-06-066. Section 3.2 of D.16-08-024 governs the release of such information.

If the information submitter has satisfied the requirements of Section 3.1 of D.16-08-024, and the Commission receives a CPRA request for such a document, then the provisions of Sections 5.5 and 6 of this GO will apply.

If the information submitter fails to satisfy the requirements of Section 3.1 of D.16-08-024, and the Commission receives a CPRA request for such information, then the information may be released.

(5.5) Information Submitted on or after January 1, 2018, with a Claim of Confidentiality and Information Created by the Commission

- a) **Release of Information Submitted on or After January 1, 2018, With a Claim of Confidentiality:** This section applies if an information submitter has satisfied Section 3.2 of this GO, or if the information submitter has met the requirements of a confidentiality matrix established per Section 3.4 of this GO. Before releasing information in response to a CPRA request, or in any other context, Legal Division will determine whether the information submitter has established a lawful basis of confidentiality. If Legal Division finds *the information submitter*

did establish a lawful basis of confidentiality, then Legal Division will not release the information, and will proceed as described in Section 5.5(b) of this GO. If Legal Division finds *the information submitter has failed to establish a lawful basis of confidentiality*, Legal Division will proceed as described in Section 5.5(c) of this GO.

- b) Commission Review of CPRA Request Where a Confidentiality Claim Has Been Found Lawful:** If an information submitter has met the requirements of Section 3.2 of this GO or if the information submitter has met the requirements of a confidentiality matrix established per Section 3.4 of this GO, and Legal Division finds *the information submitter did establish a lawful basis of confidentiality*, then Legal Division will inform the CPRA requestor and not release the information. In these cases, Legal Division will comply with the CPRA by providing the requestor with enough detail about the withheld information so that the requestor broadly understands what is being withheld and why, without disclosing confidential information. If a CPRA request is denied in whole or in part, the requestor may appeal to the Commission for reconsideration by submitting a Public Information Appeal Form within ten days of receiving notice that a CPRA request has been denied in whole or in part. The Public Information Appeal Form may state the reasons why the information should be released. Information requesters are encouraged to provide reasons why information should be released. Rule 1.15 of the Commission's Rules governs calculation of time.

If an information requestor submits a Public Information Appeal Form, Legal Division will prepare a draft resolution per the requirements of Section 6.

- c) Commission Review of Request Where a Confidentiality Claim Has Been Found Unlawful:** If an information submitter has met the requirements of Section 3.2 of this GO or if the information submitter has met the requirements of a confidentiality matrix

established per Section 3.4 of this GO, but Legal Division finds *the information submitter has failed to establish a lawful basis of confidentiality*, then Legal Division will submit a draft resolution per Section 6. In these cases, the information submitter receives notice of the resolution and may comment on the draft resolution per Rule 14.5 no later than ten days before the Commission meeting when the draft resolution is first scheduled for consideration. Rule 1.15 of the Commission's Rules governs calculation of time.

- d) Information Created by the Commission:** If the Commission receives a CPRA request for information created by the Commission, and the Legal Division finds a lawful basis to withhold the information created by the Commission, then Legal Division will inform the CPRA requestor and not release the information. In these cases, Legal Division will comply with the CPRA by providing the requestor with enough detail about the withheld information so that the requestor broadly understands what is being withheld and why, without disclosing confidential information. If a CPRA request is denied, in whole or in part, the requestor may appeal to the Commission for reconsideration by submitting a Public Information Appeal Form within 10 days of receiving notice that a CPRA request has been denied in whole or in part. The Public Information Appeal Form may state the reasons why the information should be released. Information requesters are encouraged to provide reasons why information should be released. Rule 1.15 of the Commission's Rules governs calculation of time. If an information requestor submits a Public Information Appeal Form, Legal Division will prepare a draft resolution per the requirements of Section 6.

6. Resolutions

- (6.1) Resolutions:** If the Public Records Office, Legal Division, prepares a draft resolution granting or denying, in whole or in part, the CPRA request per Section 5.5(b), (c), or (d), then:

- a) The Commission will serve the draft resolution on both the information submitter and information requestor (except for the scenario identified in Section 5.5(d) where there is not an information submitter, because the Commission created the information).
- b) The Commission will release the draft resolution for public review and comment pursuant to Pub. Util. Code § 311(g) and Rule 14.5 of the Commission's Rules.
- c) The Commission shall not release such information pending the adoption of the resolution provided for in this section.

(6.2) Applications for Rehearing: To challenge a Commission resolution, which disposes of the appeal of staff action, a party may file an Application for Rehearing pursuant to Pub. Util. Code § 1731 and Rule 16.1 of the Commission's Rules of Practice and Procedure. Per Pub. Util. Code § 1732, the Application for Rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision to be unlawful and no corporation or person shall in any court urge or rely on any ground not so set forth in the application.

7. Release of Information in Response to an Audit, Inspection, Investigation or Enforcement Action

- (7.1) Scope:** This section applies to information submitted to the Commission in response to an audit, inspection, investigation, or enforcement action performed by the Commission. This section only applies when the Commission staff conducting the audit, inspection, investigation, or enforcement action invokes the provisions of this section. A regulated entity may not invoke the provisions of this section. This section does not apply to a formal proceeding, which is governed by Section 3.3.
- (7.2) Timing of Responses:** After a request by the Commission per this section, the information

submitters shall produce the information to the Commission at the time directed by the request.

(7.3) Format of Responses: Responses to the Commission's requests shall be in the form directed by the request. If the information submitter cannot comply with this requirement, it must provide a justification for its inability to comply.

(7.4) Claim of Confidentiality: Concurrently with submission of information to the Commission pursuant to this section, the information submitter shall inform Commission staff (a) whether the regulated entity is making a preliminary claim of confidentiality for information submitted and (b) whether the regulated entity is withholding responsive information per an assertion of privilege.

If the regulated entity does assert a preliminary claim of confidentiality for information submitted, then the Commission shall maintain the information confidentiality for the 20 days following submission. During this time period, the information submitter may submit a claim of confidentiality per the requirements of Section 3. If no claim of confidentiality is submitted 20 days after submission of information to the Commission, then the Commission may release information to the public without further action, unless the Commission withholds the information per an exemption of the CPRA, per Section 5.2. Rule 1.15 of the Commission's Rules governs calculation of time.

If the regulated entity informs the Commission it is withholding responsive information under an assertion of privilege, it shall provide a redacted version of the information to the Commission within

10 days and identify how the claim applies to the specific information requested.

(END OF ATTACHMENT 1)