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Decision 98-02-041 February 4, 1998

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the Application of Southern California Gas Company (U-904 G) et al. for Rehearing of Resolutions L-258.	A.97-08-043 (Filed August 15, 1997)
In the matter of the Application of Southern California Gas Company (U-904 G) et al. for Rehearing of Resolutions L-258A.	A.97-12-023 (Filed December 17, 1997)

ORDER DENYING APPLICATIONS FOR REHEARING OF RESOLUTIONS L-258 AND L-258A

In Resolution L-258, we adopted a revised method for dealing with discovery requests by various state and federal law enforcement agencies involving records not generally open to public inspection. Previously, such requests were resolved by the Commission at a regular meeting, which proved cumbersome, time-consuming and inimical to the confidentiality often required by law enforcement agencies, particularly in the preliminary stages of investigations.

Under the new procedure, the Executive Director or General Counsel or their designates are given authority to release these records with certain safeguards. These include a written request for the information and an agreement that the requesting agency not make the information public and an express reservation of the Commission's authority to determine whether information kept confidential under General Order (G.O.) 66-C should be disclosed to the public by the law enforcement agency.

With the exception of SDG&E, the above utilities filed applications for rehearing of Resolution L-258. On September 24, 1997, the Commission issued D.97-09-124. This decision modified Resolution L-258 to forbid the release of information about customer records by the Commission staff, as requested by applicants, and allowed for further comments on Resolution L-258 within 20 days of the effective date of the order.

On October 22, 1997, the Commission issued Resolution L-258A, which superceded Resolution L-258. The later resolution added the Department of the Treasury, Internal Revenue Service, to the list of law enforcement agencies eligible to receive information. The resolution further incorporated the modification of Resolution L-258 contained in D.97-09-124 by excluding customer records from discoverable information and clarified the procedures for record release by including Commissioner Oversight Review.

On December 12, 1998, Applicants filed their Application for Rehearing of Resolution L-258A. PG&E filed Comments to the Application essentially supporting it in all respects. The arguments made in the original Application for Rehearing to Resolution L-258, the comments filed thereto, and the Application for Rehearing of Resolution L-258A are virtually identical, and are dealt with simultaneously.

Applicants first argue that the Resolution violates Public Utility Code Section 583, which provides:

> "No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by 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 present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor."

Applicants allege that the delegation to the Commission staff of the authority to release confidential information is unlawful in the absence of express statutory authority. If the Resolution had allowed the Commission staff to release confidential information to the public, the argument would perhaps have merit. However, the Resolution only permits release of information to certain designated law enforcement agencies, with appropriate safeguards for preserving the confidentiality of the information.

As pointed in D.97-09-124, a law enforcement agency is not the same as "the public," which is defined for the purposes of the Public Utilities Code in Section 207:

> "Public or any portion thereof" means the public generally, or any limited portion of the public, including a person, private corporation, municipality, or other political subdivision of the State, for which the service is performed or to which the commodity is delivered.

Similarly, the Public Records Act, at Government Code Section 6252(f), specifically excludes law enforcement agencies from the definition of public":

> "(f) 'member of the public means any person, except a member, agent, officer, or employee of a federal, state or local agency acting within the scope of his or her membership, agency, office, or employment."

As Applicants correctly point out, the effect of Section 6252(f) is only to exclude federal, state or local agencies from the provisions of the Public

Records Act. It is offered here only as an aid to determine how the legislature would define "public" for the purposes of legislation.

As pointed out in D.97-09-124, the federal courts have specifically held that police officers are not members of the "public" as protected by Hawaii's disorderly conduct statute. Carnell v. Grimm (1994) 872 F Supp. 746, 753, See also State v. Jandrusch (1977) 567 P2d 1242.

And the California courts have defined public to mean "pertaining to a whole community," Crane v. Arizona Republic (1969) 972 Fd 1511 and "the community at large," Goldberg v. Barger (1973) 37 Cal App.3d 987, 112 Cal.Rptr. 827, 833. Finally, Black's Law Dictionary, revised Fourth Edition (1968) defines "public" as follows:

> "The whole body politic, or the aggregate of the citizens of a state, district, or municipality... the community at large...all the inhabitants of a particular place." (citations omitted)

Applicants attempt to dismiss Grimm and Jandrusch, supra, by stating that they "should be placed in context" as pertaining to a disorderly conduct statue. However, Applicants have not demonstrated that the "context" of those definitions of "public" detract from their applicability to the instant situation. A rose is a rose and the public is the public whether in a criminal or civil context.

Similarly, Applicants' complaint that the definition of "public" by the California courts "would lead to absurd results" is without merit. Applicants allege that the definition of "public" adopted by the California courts would require the release of confidential information to the entire "body politic" of the State of California to produce a violation of Section 583, supra. The legislature did not intend such an absurd result, nor did the Commission in D.97-09-124. Rather, the Decision correctly defined "public" as "the whole body politic, or the aggregate of the citizens of a state, district, or municipality...."

We reiterate that the law enforcement agencies referred to in the Resolution are not the "public" within any of the available statutory or judicial definitions and Applicants' argument is without merit. The Resolution does not violate Section 583.

Applicants' final argument with regard to Section 583 is of greater concern. Applicants argue that under the Commission's interpretation of Section 583, Commission employees could "sell confidential information to anyone so long as they signed a confidentiality agreement not to divulge it to the public at large."

First, the Resolution only provides that, under certain circumstances with appropriate safeguards for the protection of trade secrets and other confidential information, the Executive Director, General Counsel, or their delegates, with the oversight of a Commissioner, may release information to certain designated law enforcement agencies, not to the public. Applicants fear that Commission employees will sell confidential information to law enforcement agencies. First, one can only surmise what information contained in the Commission records could be so urgent and/or salacious that law-enforcement personnel would be moved to buy it, in violation of State and Federal law against the bribery of state officials and employees. Indeed, this allegation is an insult, not only to the enumerated agencies and to the Commission staff, but to this Commission itself. Applicants have given absolutely no support for this allegation for the reason that there could be none.

Although Applicants spend scarce time on the subject, the issue of the protection of utility trade secrets appears to be at the heart of their objections to the Resolution. We have gone to considerable length to protect such information in Resolution L-258A by requiring signed confidentiality agreements from the

requesting agency and for oversight of the entire process by a designated Commissioner. Ordering Paragraphs 1 and 1B provide as follows:

> 1. The Executive Director with the advice of the general Counsel, or their respective delegates, are authorized to release to the law enforcement organizations specified below, acting in their official capacity, confidential records as described in Paragraph 2 of G.O. 66-C as "Public records not open to public inspection" upon written request and execution of an agreement with there requesting organization for the receipt of information for use in a confidential manner. In addition to the specific documents requested, the written request shall include an explanation of the purpose for the request and of how pursuit of the request relates to the law enforcement organization's functions. The confidentiality agreement, signed by a person authorized to contractually bind the requesting law enforcement organization, shall include an express reservation of this Commission's authority to determine whether information kept confidential under G.O. 66-C should be disclosed to the public.
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> 1B. The President of the Commission, or another Commissioner designated by the President or by the Commission, shall act in the capacity of oversight for this procedure. In that role, the President or the designated Commissioner shall review all subpoenas, summons or requests (hereafter referred to as requests) for confidential information submitted by the Department of Treasury, Internal Revenue Service and all other requests submitted by the Executive Director for oversight review. The task of oversight review shall be for the purpose of determining whether the procedure authorized in Ordering Paragraph No. 1 above should be employed to respond to the specific request being reviewed.

Applicants have not demonstrated that this procedure will compromise their trade secrets in any way. Moreover, since there will be no dissemination of the requested information at a public meeting, as under the prior procedure, the result should be to protect the confidentiality of the sensitive information.

Applicants next argue that the Commission misconstrued the provisions of the Public Records Act. As Applicants correctly point out, the Commission held in D.97-09-124 that public agencies are specifically exempted from the provisions of the Act by Section 6252(f), supra, and may not seek to obtain information pursuant to the Act. However, the Act has no relevance to the situation here, as the enumerated public agencies are authorized to solicit information and other records pursuant to the Resolution itself, not the Public Records Act. The purpose in quoting from the Act was not to avoid the provisions of Section 583, supra, but only to aid in the Commission's statutory construction of the word "public" as contained in Section 583 of the Public Utilities Code, which itself contains no definition of the word.

Finally, Applicants once again raise the spectre of the Administrative Procedure Act (APA), arguing that the Resolution is of no effect because it was issued without compliance therewith. In D.97-09-124, the Commission held that the APA is not applicable to the adoption of the Resolution because it does not adopt or change any rules of practice or procedure, but merely changes the method the staff uses in processing requests for information by law enforcement agencies. Government Code Section 11,351 specifically exempts the Commission from the APA except for matters involving practice and procedure. In fact, G.O. 66-C, which previously governed the method the staff used in processing requests for information was itself not issued pursuant to the APA. Applicants' argument that the internal management exemption contained in the APA does not apply to the Resolution is without merit. The Resolution is not one of "general applicability," but provides for a specific methodology applicable only to the Commission staff and certain designated law enforcement agencies and not to the public at large.

The Applications for Rehearing of Resolution L-258 and Resolution L-258-A demonstrate no legal or factual error and should be denied.

IT IS ORDERED that:

1. The Applications for Rehearing of Resolutions L-258 and L-258A are denied.

2. These proceedings are closed.

This order is effective today.

Dated February 4, 1998 , at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners