

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

San Francisco, California
Date: April 23, 1997
Resolution No. L-253*

RESOLUTION

BACKGROUND

A formal request to the Commission has been made for disclosure of a preliminary draft environmental review document related to the electric restructuring. (See General Order 66-C, para. 3.4.) The document in question, referred to by staff as the "Bookmark ADEIR" was compiled by the Commission's consultant, Greystone, following enactment of AB 1890. Because AB 1890 called into question the necessity of preparing an EIR, work was suspended and Greystone was directed to compile the material it was working on into a single document, so that no information that was being developed would be lost. On January 23, 1997, staff determined not to release the ADEIR to lawyers representing San Luis Obispo County in the electric restructuring proceeding, in accordance with the provisions of General Order 66-C. Subsequently, a request for a full Commission decision on the public availability of the ADEIR was properly filed with the Executive Director of the Commission.

DISCUSSION

When AB 1890 was enacted, Greystone was working on an Administrative Draft Environmental Impact Report (ADEIR) studying the Commission's Preferred Policy for electric restructuring. (See D.95-12-063, as modified by D.96-01-009.) Greystone was engaged in producing an environmental analysis, and in combining its analysis with material being produced by its sub-contractors in order to produce a single document. This document would have become the ADEIR. Because the enactment of AB 1890 raised a question as to whether an electric restructuring EIR was necessary or appropriate, Greystone was asked to suspend work until the Commission decided on its response to the act, which was later signed into law by the Governor.

When work was suspended, Greystone compiled the material it was working on into a single document, so that information in the process of being developed would not be lost. Material that had been developed was preserved and project staff who had not yet written ADEIR material were asked to write their material as best they could so that their analysis up to that point was not lost. The purpose of producing a document at this point was not to provide a complete ADEIR to the Commission for review or to produce a complete environmental review document.

Thus, the material produced was designed to allow Greystone to continue work where it had left off. Although a document was written in the format of an ADEIR, that document was never intended to serve the purpose of a complete ADEIR. This is why the document is sometimes referred to as a "Bookmark ADEIR."

The Office of the County Counsel of San Luis Obispo County (County Counsel) has requested that the Commission provide it with a copy of the ADEIR pursuant to the California Public Records Act (CPRA), codified at Government Code section 6250, et seq. Despite its preliminary nature, the ADEIR is a "public record," as defined by the CPRA. (Gov. Code, § 6252, subd. (d), (e).) As such, the ADEIR is open to inspection unless the CPRA provides an exemption permitting the Commission not to provide for disclosure. (Gov. Code, § 6253, 6254, 6254.1-6254.15.)

Government Code section 6254, subdivision (a),¹ specifically exempts from disclosure:

Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the agency in the normal course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.

In addition, section 6255 provides that records need not be disclosed if:

... on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

Government Code section 6254, subdivision (k), further exempts from disclosure:

Records the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

This exemption covers materials that are subject to attorney-client privilege.

In its initial determination, staff concluded that the ADEIR was exempt from disclosure under section 6254(a). Staff found that the ADEIR was a preliminary draft not retained in the ordinary course of business, and concluded that because of the incomplete nature of the ADEIR the public interest would not be served by its disclosure.

¹ All subsequent references to code sections will be to the Government Code unless otherwise specified.

In its letter requesting full Commission disposition of this matter, the County Counsel contests staff's determination that the ADEIR is exempt by virtue of section 6254(a). The County Counsel argues that the section 6254(a) exemption does not apply because the Commission has not yet discarded the ADEIR. Although it acknowledges that the public interest generally does not favor disclosure of an ADEIR, the County Counsel's letter asks the Commission to consider whether or not the public interest favors disclosure with respect to this document.

1. Applicability of the Section 6254(a) Exemption to Drafts that are Still Retained

In order to be exempt from the CPRA's disclosure requirement under section 6254(a), a document must not be "retained by the agency in the normal course of business." This nonretention requirement is explained in Citizens for a Better Environment v. Department of Food & Agriculture (1985) 171 Cal.App.3d 704. The court stated: "If preliminary materials are not customarily discarded or have not in fact been discarded as is customary they must be disclosed." (Citizens for a Better Environment v. Department of Food & Agriculture, supra, at p. 714.) Thus, documents that are retained because the customary time for their disposal has not yet arrived qualify for the exemption. The documents that do not qualify for the exemption by virtue of being retained are those that: (i) are usually retained, or (ii) have been retained past the time when they normally would be discarded.

The Commission does not customarily retain ADEIRs. When the Commission decided to produce an informational report rather than continue with a formal EIR, Greystone used the ADEIR to pick up where it left off and complete its work on this project, as ordered in D.96-12-075.

The County's letter argues that the use of the ADEIR in order to prepare the informational report required by D.96-12-075 is "different from the initial reason for retaining it." The County relies on the letter from Legal Division stating that the purpose of creating a ADEIR was to allow the consultants to "pick[] up where they left off" and produce a complete ADEIR. Although the informational report Greystone produced is not an ADEIR, it represents the completion of Greystone's work with respect to electric restructuring. In terms of document use and retention the Commission's policy and practice did not change. The ADEIR was being retained so that Greystone could continue work, if the Commission decided to proceed. It is plausible to claim that retention does not fall into either of the two categories that would result in a requirement of disclosure and the exemption in section 6254(a) should be available.

On the other hand, the County Counsel points out that the special circumstances surrounding the production of the ADEIR lessen the generally present public interest in favor of withholding an ADEIR. Specifically, the County Counsel points out: "In this case, however, there will be no Draft EIR. The problems that one would normally

encounter with the release of an administrative draft EIR simply do not exist." (Letter of San Luis Obispo County Counsel, at p. 3.)

The County Counsel is correct that there will be no Draft EIR, and there also will be no Final EIR. Although staff intended to discard the ADEIR after the preparation of the administrative report, D.96-12-075 did not order this to occur. In fact, the Commission could choose to retain the ADEIR for purposes other than the administrative report. Therefore, it is arguable that the ADEIR does not in fact represent a draft of any one specific final document, the exemption in Section 6254(a) does not apply, and the ADEIR should be disclosed.

2. Balancing the Interests in Disclosure and Nondisclosure

If the ADEIR qualifies as a preliminary draft not retained in the ordinary course of business, it may not be disclosed only if the public interest clearly favors its non-disclosure over its disclosure. In its initial determination, staff concluded that the preliminary nature of the ADEIR created a public interest weighing against disclosure. The County Counsel acknowledges that generally the public interest does not favor the release of an ADEIR. However, the County Counsel claims that such a conclusion cannot be reached here because the circumstances surrounding the production of this ADEIR. The county counsel requests full Commission consideration of the matter.

a. The Public Interest in Favor of Disclosure

There is a public interest in favor of disclosure if the records sought pertain to the conduct of the people's business. (Citizens for a Better Environment v. Department of Food & Agriculture, *supra*, 171 Cal.App.3d at p. 715.) The "weight of the interest is proportionate to the gravity of the governmental tasks sought to be illuminated and the directness with which the disclosure will serve to illuminate." (*Ibid.*) Thus, this interest depends on two factors: (i) the importance of the matter to which the records relate and (ii) the ability of the records to illuminate the matter. The identity of the requesting party is not material to the weight of the public interest in favor of disclosure. "The Public Records Act does not differentiate among those who seek access to public information." (State Bd. Of Equalization v. Superior Court (1992) 10 Cal.App.4th 1177, 1190-1191.)

The County Counsel correctly states that electric restructuring is an important matter. This creates a public interest weighing in favor of the public's being informed about the matter. The ADEIR may or may not serve to "illuminate" electric restructuring directly. As staff's initial determination explained, the ADEIR is a unique document: it is a note from Greystone to itself about what the content of a complete ADEIR might be. As such, the ADEIR was not compiled as an attempt to draft an environmental disclosure document. The preliminary nature of the ADEIR suggests that its disclosure may help the public "know[] the environmental benefits and detriments of deregulation," (Letter of San Luis Obispo County Counsel, at p. 3.) but may not illuminate matters as clearly as the County Counsel would like. On the other hand, the ADEIR contains material not

available in the informational report. The value of this material is open to question; however, it is the judgment of the County Counsel that the material is valuable and we will not substitute our judgment for theirs in this instance. As a result, there is a public interest that weighs in favor of disclosing materials related to electric restructuring because the records may illuminate the matter.

b. The Public Interest Favoring Non-disclosure

The question of whether or not the public interest favors withholding an ADEIR has not been addressed in a published California case.

The public interest in withholding an ADEIR includes: (1) preventing persons outside the agency from surmising the content of confidential staff advice, including legal advice; (2) fostering robust discussion of policy questions within an agency; (3) avoiding confusion between an ADEIR and a Draft EIR, for which CEQA provides a formal review and comment process. The first two of these factors are present here, although they may not weigh as heavily in favor of non-disclosure as they normally would.

First, the ADEIR was produced so that Greystone could continue its work on electric restructuring and Greystone used the ADEIR as the starting point for its informational report. Comparison of the ADEIR with the informational report would reveal changes that occurred between these two documents, possibly including confidential staff and/or legal advice. However, there are unique circumstances surrounding the production of this document. This ADEIR is not now part of the normal drafting process for an EIR. At this point no subsequent drafts will be produced and no final EIR will be certified by the Commission. Usually the release of draft, predeliberative material would raise serious concerns, creating a strong public interest in favor of non-disclosure. In this unique situation, however, these concerns are present only to a lesser extent.

Second, release of this, or any other, ADEIR would have some effect of preventing robust debate, since staff could not use the ADEIR as a vehicle to test ideas of which they are not yet certain. There is a public interest in nondisclosure when disclosure would "expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." (Times Mirror Co. v. Superior Court (1991) 53 Cal.3d 1325, 1342.) Release of this ADEIR could have a negative effect on the inclusion of ideas about which staff were not certain in future ADEIRs despite the fact that an important function of an ADEIR is to test approaches before the Draft EIR is released. In addition, disclosure of the ADEIR would discourage the documentation of work in progress if a project is suspended. It would not be in the public interest to face staff with the dilemma of either continuing with expensive, but probably unnecessary, work or losing much of the analysis completed up to that point.

The County Counsel points out that the third factor creating a public interest weighing against disclosure is not present. Since the Commission will not produce a Draft EIR the

public interest in avoiding confusion between the ADEIR and the Draft EIR is not present. On the other hand, the preliminary nature of the ADEIR creates its own risk of public confusion. Release of a highly preliminary document not designed to be fully accurate could tend to confuse the public, which would generally view as legitimate the information produced by the relevant government agency. This risk must be considered since electric restructuring and its sub-proceedings are contested by a number of parties advocating their own local or private interests. In addition, releasing the ADEIR under the CPRA would mimic the production of a policy-level EIR under CEQA. The public interest weighs against using the CPRA to require production of an environmental review document that is possibly inaccurate when there are mechanisms under CEQA that will ensure a complete and accurate EIR is produced, if required.

c. The Balancing Test

The public interest favors disclosure because electric restructuring is an important public matter and the public disclosure of the materials may illuminate the issue. On the other hand, there is a public interest in favor of non-disclosure of ADEIRs. The County argues that this interest is not as strong as it would be otherwise because of the unique nature of the ADEIR, which will not be followed by a Draft EIR. We concur that a public interest generally would weigh against release of an ADEIR, but the production of a Draft, and Final EIR will not occur here. While the incomplete nature of the ADEIR creates its own danger that the public will be confused or misled about the environmental consequences of electric restructuring, other factors do not weigh as strongly against disclosure as they would otherwise.

The California Public Records Act requires the Commission to balance these interests and to release the ADEIR unless the public interest clearly weighs in favor of non-disclosure. The circumstances in this situation are unique. In our judgment, the case for disclosure is not clearly outweighed by the public interest in non-disclosure. Therefore, the law requires release of the document requested by the County Counsel. However it is not clear the same result would be required under ordinary circumstances.

3. The Exemption for Privileged Materials

Even though the document as a whole will be released, one portion of it should be withheld. Appendix 7 contains confidential legal advice, which should not be disclosed. The CPRA specifically provides that an agency may not disclose such information. (Gov. Code, § 6254(k).) Therefore the Commission will withhold the contents of Appendix 7, in Volume Two of the ADEIR.

Conclusion

In the absence of a public interest clearly favoring the non-disclosure of the ADEIR, the full Commission will order its release, with the exception of Appendix 7.

Findings of Fact

1. A document sometimes referred to as the "Bookmark ADEIR" was compiled when AB 1890 was enacted and the Commission's EIR consultant for electric restructuring, Greystone, was asked to suspend work and compile the material it was working on into a single document, so that information in the process of being developed would not be lost.
2. Although it was written in the format of an ADEIR, the ADEIR was designed to allow Greystone to continue work where it had left off; it was not designed to be a complete ADEIR.
3. A request to review the ADEIR was denied by Commission staff, in accordance with General Order 66-C.
4. An appeal of the staff denial to the full Commission has been properly filed.
5. The ADEIR would not be retained by the Commission in the ordinary course of business.
6. There is a public interest in favor of disclosing the ADEIR because electric restructuring is an important matter and public release of the information may illuminate the issues.
7. There is a public interest in favor of not disclosing the ADEIR because disclosure would interfere with the Commission's decisionmaking process and might engender confusion.
8. The ADEIR is not now part of the normal drafting process for an EIR. In this unique set of circumstances the County claims this public interest is not as strong as it otherwise would be because no Draft EIR will be released.
9. In this unique set of circumstances, the public interest in not disclosing the ADEIR does not outweigh the public interest in disclosure.
10. The confidential legal advice in Appendix 7 should not be disclosed.

Conclusions of Law

1. The ADEIR is a public record, as defined in the California Public Records Act, at Government Code, section 6252.
2. A public record need not be disclosed if it falls within the ambit of a specific exemption to the California Public Records Act or the public interest in non-disclosure clearly outweighs the public interest in disclosure.

3. The exemption in Government Code, section 6254, subdivision (a) applies to preliminary drafts that are retained by an agency because the time for their disposal has not yet arrived if the public interest clearly favors their non-disclosure.
4. The weight of the public interest in disclosure depends on the importance of the matter involved and the ability of the record to directly illuminate the matter.
5. The public interest generally favors not disclosing an ADEIR for reasons including: preventing persons outside the agency from surmising the content of confidential staff advice, including legal advice; fostering robust discussion within an agency; and not confusing the public with potentially inaccurate information, especially where accurate environmental review, if required, can be obtained through the CEQA process.
6. When the public interest in disclosure is equal to the public interest in non-disclosure, the CPRA requires disclosure.
7. The CPRA permits agencies not to disclose confidential legal advice.

Order

1. Except for Appendix 7, located in Volume Two, the formal request for the disclosure of the ADEIR is granted.
2. This order is effective today.

I certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting on April 23, 1997. The following Commissioners approved it:


WESLEY M. FRANKLIN
Executive Director

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
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