

State of California

Public Utilities Commission
San FranciscoCONFIDENTIAL DOCUMENT
ATTORNEY-CLIENT COMMUNICATIONS

M E M O R A N D U M

Date : July 12, 1989

To : The Commission
(Meeting of July 19, 1989)

From : Suzanne Engelberg
Public Utilities Counsel IV *CE*

File No.:

Subject : Appeal to the Commission by Donald Connelly for
Release of Commission Records Withheld as
Confidential Under General Order 66-C

RECOMMENDATION: It is recommended that the Commission Staff investigative report be released but that the incident report prepared by PG&E be withheld.

FACTS: This is an appeal from a staff determination that certain records subpoenaed under Section 3.4 of General Order (G.O.) 66-C records be withheld as confidential. The records relate to a civil action filed by Donald Connelly against PG&E concerning the fatal electrocution of his two sons as a result of a fallen PG&E power line in Sebastopol, California.

On November 30, 1988 the Commission was served with a subpoena for copies of "any and all reports" prepared by Commission employees regarding the accident. On December 23, 1988 the Commission staff concluded that the requested documents were confidential pursuant to G.O. 66-C. The instant appeal to the full Commission ensued. Specifically, it is requested that the following documents be released:

- 1) Commission staff investigative report; and
- 2) Incident Report prepared by PG&E.

DISCUSSION: The instant appeal should be analyzed with full recognition that the Commission bears the burden under the California Public Records Act Government Code Sec. 6259 et seq. to justify withholding of the records in question either by express exemption or by demonstrating that the public interest in nondisclosure outweighs the public interest in disclosure. (San Gabriel Tribune v. Superior Court of the State of California (1983) 143 Cal. App.3d 762). Government Code Section 6255 is explicit on this point. As stated therein:

"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 making the record public clearly outweighs the public interest served by disclosure of the record."

There must be a balancing of interests with the proponent of confidentiality having the burden of demonstrating why the public interest in nondisclosure outweighs the public interest in disclosure. (Black Panther Party v. Kehoe (1974) 42 Cal. App.3d 645, 657).

1) Commission Staff Investigative Report

The Commission staff withheld the request for the Commission prepared report pursuant to Section 2.2(a) of G.O. 66-C, which designates as confidential "records of investigations ... made by the Commission except to the extent disclosed at a hearing or by formal Commission action." Section 2.3 also exempts from public disclosure "[i]ntra-agency notes, drafts, memoranda and other communications not otherwise made public by the Commission." The staff investigative report clearly falls within these exemptions.

Before concluding that the document may properly be withheld, it must be determined whether nondisclosure complies with the California Public Records Act. A general policy favoring disclosure of public records is contained in the Act.^[1] However, twenty exemptions from this policy are specifically enumerated in § 6254. The only potentially relevant exemption with regard to the staff report is § 6254(a) which exempts from disclosure:

"(a) Preliminary drafts, notes, or interagency or intraagency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure."

In order for this exemption to apply, three conditions must be satisfied: 1) the record sought must be a preliminary draft, note, or memorandum, 2) which is not customarily retained by the public agency in the ordinary course of business, and 3) the public interest in withholding must clearly outweigh the public

1 A public record is defined as "any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code § 6252(d)).

interest in disclosure. (Citizens For A Better Environment v. Dept. of Food & Agriculture (1985) 171 Cal. App.3d 704, 712). Neither conditions 1 nor 2 are met in the instant case. This report should, therefore, be released. A similar conclusion was reached by the Commission in October, 1988 with respect to a staff on-site inspection report requested by John M. Rajcic. (2)

2) Incident Report Prepared by PG&E

While the Commission may release the staff investigative report, it is concluded that it should not disclose the incident report prepared by PG&E. First, it is very questionable whether the underlying subpoena even encompassed the utility prepared report. The subpoena refers specifically to reports prepared by Commission employees. Therefore, it is doubtful that the request for disclosure of the PG&E report is properly before the Commission on appeal.

Assuming arguendo that the request for disclosure is properly before the Commission, it is still recommended that this request be denied. Public Utilities Code Section 583 provides as follows:

"No information furnished to the Commission by a public utility...except those matters specifically required to be open to public inspection by this part...shall be 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."

Under § 583 confidential information furnished to the Commission by a public utility may only be disclosed upon order of the Commission. In this instance, a good argument can be made that the request should be denied in order to further the public policy of encouraging public utilities to be forthcoming in their reports to the Commission. This policy is more likely to be advanced if such reports are not subject to disclosure. Accordingly, the incident report prepared by PG&E should not be released.

SEE:pds

2 An apparent conflict exists with respect to G.O. 66-C and the Public Records Act. This analysis supports the view that G.O. 66-C is overbroad in its exemption from disclosure. The Government Code is clearly controlling over the General Order.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution No. M-4751

{ RESOLUTION ADOPTING LEVEL OF TRANSPORTATION }
{ RATE FUND FEE THAT SHOULD BE IMPOSED }
{ FOR FISCAL YEAR 1989-90 }

Public Utilities Code Section 5003.1 provides that:

"Every express corporation, freight forwarder, motor transportation broker, and every person or corporation owning or operating motor vehicles in the transportation of property for hire upon the public highways under the jurisdiction of the Commission shall...pay to the Commission a fee equal to one-third of one percent of the amount of such gross operating revenue; provided, however, that for any particular fiscal year the Commission, with the approval of the Department of Finance, may fix said fee at less than one-third of one percent of said amount."

Section 5003.2 (amended 1988, Chapter 375) of the PU Code further provides that:

"(a) Notwithstanding Section 5003.1, the Commission shall require every highway carrier otherwise subject to Section 5003.1 for whom the Commission does not establish minimum rates, or require rates to be on file with the Commission, to pay a fee equal to 1/10 of 1 percent of the amount of gross operating revenue.

(b) The Commission may raise the fee imposed by Section 5003.1 upon those persons and corporations subject to that section for whom the Commission establishes minimum rates or requires rates to be on file, up to a maximum of one-half of 1 percent of gross operating revenue, if the Commission decides this increase is necessary to maintain adequate financing for the Transportation Rate Fund."

The Commission finds that for fiscal year 1989-90, the Transportation Rate Fund fee should be fixed as follows:

One-tenth of one percent (.001) of gross operating revenue for highway carriers of property for whom the Commission does not establish minimum rates or require rates to be on file with the Commission, and two-tenths (.002) of gross operating revenue for highway carriers of property for whom the Commission establishes minimum rates or requires rates to be on file with the Commission.

IT IS ORDERED THAT:

For the fiscal year 1989-90, the fee provided for in Public Utilities Code Sections 5003.1 and 5003.2 is hereby fixed at the following level:

One-tenth of one percent (.001) of gross operating revenue for highway carriers of property for whom the Commission does not establish minimum rates or require rates to be on file with the Commission, and two-tenths of one percent (.002) of gross operating revenue for highway carriers of property for whom the Commission establishes minimum rates or requires rates to be on file with the Commission.

I certify that this resolution was adopted by the Public Utilities Commission at its regular Meeting on MAY 26 1989.
The following Commissioners approved it:

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

Victor Weissert
Victor Weissert
Executive Director

