

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: June 21, 2018

Resolution No. L-565

RESOLUTION

RESOLUTION DENYING IN WHOLE MICHAEL AGUIRRE'S APPEAL OF STAFF'S DISPOSITION OF PUBLIC RECORD REQUEST NUMBER 17-583

SUMMARY

The California Public Records Act enshrines the public's right to access information concerning the conduct of the people's business, while also recognizing a number of exemptions to the duty to disclose. On December 20, 2017, Mr. Michael Aguirre requested records from the Commission pursuant to the California Public Records Act ("CPRA" or "PRA"), hereinafter referred to as PRA #17-583. On January 2, 2018 the Legal Division of the California Public Utilities Commission ("Commission") responded that the requested records were exempt from disclosure.

In an effort to improve the processing of CPRA requests, the Commission promulgated General Order ("G.O.") 66-D.¹ G.O. 66-D provides for full Commission review of Legal Division's disposition of a CPRA request if the requestor seeks an appeal. On January 22, 2018, Mr. Aguirre requested an appeal under the provisions of G.O. 66-D. This resolution denies that appeal seeking access to the records withheld in response to PRA #17-583. The CPRA does not apply to documents controlled by the state grand jury and even if it did, the requested documents would be exempt from disclosure.

BACKGROUND

The California Constitution, the CPRA, and discovery law favor disclosure of public records.² The public has a constitutional right to access most government information.³ The Commission has exercised its discretion under Public Utilities Code § 583, and implemented its responsibility under Government Code § 6253.4(a), by adopting the guidelines for public access to Commission records embodied in G.O. 66-D. (See Order

¹ G.O. 66-D can be found on the Commission's web site at <http://cpuc.ca.gov/generalorders/>.

² Gov. Code § 6250, *et seq.*

³ Cal.Const. Article I, § 3(b)(1).

Instituting Rulemaking to Improve Public Access to Public Records Pursuant to the California Public Records Act, Decision 17-09-023, 2017 Cal. PUC LEXIS 419.)

When the Commission receives a request for documents that were created by the Commission, the Legal Division will determine if the information should be released or withheld. If the latter, the Legal Division will inform the CPRA requestor and not release the information. (See G.O. 66-D, § 5.5(d).) The requestor may seek reconsideration of the matter by the full Commission by submitting a “Public Information Appeal Form” within ten days receiving notice that the request has been denied. (See *id.*)

On December 20, 2017, Mr. Michael Aguirre submitted a CPRA request, which is labeled CPRA #17-583. The request stated:

Please provide to me under the California Public Records Act and Art. Sec.3 of the Cal. Constitution all files on the discs provided by the CPUC’s outside counsel re: “Cal AG Seized Materials” to the California Attorney General’s office dated 8/19/2015 via the eDiscovery service QUIVX pursuant to Superior Court’s ruling requiring such disclosure on 12 August 2016.

The request attached a photocopy of two discs that contained electronic images of documents the Commission compiled in response to two subpoenas issued by an investigating criminal grand jury convened in San Francisco. The first grand jury subpoena sought communications between identified custodians. The second one demanded production of documents concerning how and to whom various cases were assigned to administrative law judges, and, by its nature, included confidential and privileged material. The Commission conducted specific searches for documents responsive to the criminal grand jury subpoenas and compiled those documents with the sole and exclusive purpose of responding to the subpoenas. The Commission produced these discs directly to the Attorney General, as custodian for the grand jury, on August 27, 2015.

Mr. Aguirre specifically requests “all files on the discs.” The discs were given to the Attorney General as the designated custodian for the grand jury. The Attorney General and the grand jury maintain custody of the discs and it is they who are the proper parties to whom the PRA request ought to be made. The request to the Commission does not specifically seek anything other than the discs nor does it define the documents sought by subject matter, date range, or in any other manner.

Separately, the Commission received grand jury subpoenas from the U.S. Attorney’s Office in San Francisco, which had a joint task force with the Attorney General. The federal and state grand jury subpoenas overlapped on subject matter. The U.S. Attorney’s Office specifically admonished that disclosure of any of its issued subpoenas

or the Commission's response could impede or obstruct its investigation. It directed the Commission not to disclose the subpoenas or its response to any third party, including CPRA requests, for the indefinite future. Since the U.S. Attorney's Office and the Attorney General's investigations overlapped, the task force included state prosecutors, and the documents sought in the state grand jury subpoenas are similar to those covered by the federal grand jury subpoenas, the Commission cannot disclose the subpoenas or its responses. Doing so could impinge on the integrity of the criminal investigations. Moreover, since grand juries are subject to strict secrecy requirements, the Commission understood that the documents would be treated confidentially and not be distributed to any person without judicial or statutory authority.

Some of the documents produced on the discs are protected by the deliberative process privilege and/or the official information privilege, codified by Government Code sections 6254, 6255 and Evidence Code section 1040 respectively and thus are exempted from the CPRA. Other documents contain confidential, proprietary and/or personnel information which is also not subject to disclosure under the CPRA. The Commission produced these documents because it was compelled to do so by the terms of the criminal grand jury subpoenas but expressly reserved the right to assert these privileges in response to any civil or CPRA requests.

The letter which accompanied the production of the discs states:

The documents that are subject to this privilege have been designated "Deliberative Process Privilege" on their footers. In general, the CPUC is entitled to withhold these documents from any production. However, since CPUC is being compelled to produce these documents in response to grand jury subpoenas and grand juries are subject to strict secrecy requirements, the CPUC is producing these privileged documents to the grand jury.

However, this limited compelled production to the secret grand jury does not by any means constitute a waiver of the privilege, voluntary or otherwise. Nor does it in any way hinder the CPUC's right or ability to assert this privilege in other proceedings. See, e.g., The Regents of University of California v. Super. Ct., 165 Cal.App.4th 627 (2008); Regents of the University of California v. Workers' Comp. Appeals Bd., 226 Cal.App.4th 1530 (2014).

As you well know, state grand jury proceedings are subject to strict secrecy requirements such that the information and evidence provided to a grand jury may only be further disclosed, by court order, in the limited contexts designed by the California Penal Code. See Goldstein v. Super Ct., 45 Cal.4th 218, 221 (2008). Thus, by law, the documents must be treated

confidentially and not disseminated to any persons without judicial or statutory authority.

The Los Angeles Superior Court, which later ruled on a series of motions concerning the scope of production required by the Commission in response to search warrants served by the Attorney General, held that the Commission was required to produce deliberative process privilege documents in the criminal investigation but would not be deemed to have waived the privilege in any other context.

Thereafter, the Attorney General and the Commission entered into a court approved protective order which provides that designated deliberative process privilege documents may only be disclosed to the court, the Attorney General and its staff, necessary witnesses, or, should criminal indictments issue as required by criminal discovery rules. The Commission has not received any communication from the Attorney General indicating that the criminal investigation has concluded. (See e.g., “AG must follow through on Michael Peevey investigation”, Editorial, *Mercury News*, February 3, 2018.)

On January 2, 2018, the Legal Division responded to CPRA #17-583 stating:

The records that you request are exempt from disclosure in response to your Public Records Act request, as provided in the attached documents.

The attached documents consisted of the Commission production cover letter to the Attorney General discussed above and a prior CPRA request (PRA #17-533) response letter from the Commission to Mr. Aguirre regarding a related CPRA request for documents provided to the Attorney General’s office. This letter discussed a number of reasons why the Commission could not produce the requested records pursuant to the California Government Code, the California Evidence Code, and applicable case law. On January 22, 2018, Mr. Aguirre emailed the Commission’s Legal Division management requesting an appeal of staff’s January 2, 2018 denial letter and stating that public interest weighs in favor of disclosure and existing protective orders were immaterial.

DISCUSSION

A. Mr. Aguirre’s Appeal is Procedurally Improper

Before addressing the substance of Legal Division’s response to CPRA request #17-583, we note that Mr. Aguirre’s appeal of Legal Division’s review is procedurally deficient. Legal Division’s response letter was sent to Mr. Aguirre on January 2, 2018 via electronic mail. Pursuant to G.O. 66-D, section 5.5(d), a requestor must seek an appeal

within ten days of receiving notice that their request was denied. Mr. Aguirre took twenty days to seek an appeal – twice as long as the allotted time. Additionally, appeals are to be requested by using the “Public Information Appeal Form” attached to G.O. 66-D as Appendix B. Mr. Aguirre did not submit this form but instead sent informal emails to members of the Legal Division management. This appeal is therefore untimely and procedurally deficient and merits being denied on those grounds. The Commission reserves the right to summarily deny such deficient appeals in the future.⁴ However, in this instance, the importance of observing and honoring the grand jury process compels us to discuss the underlying legal principles at issue and establish why the materials in question cannot be released.

B. The Commission Cannot Disclose Grand Jury Material

It is vitally important to state that while most CPRA exemptions are discretionary and the Commission is free to refrain from asserting such exemptions when it finds that disclosure is appropriate,⁵ that is not the case at hand. The CPRA does not apply to documents controlled by the grand jury. Even if the CPRA did apply, grand jury secrecy rules as well as the CPRA’s investigatory files exemption prohibit disclosure here. The Legislature has determined that grand jury material can only be disclosed in three limited circumstances and even courts cannot exceed these limitations. Unlike the CPRA presumption of disclosure, there is no presumed right to public access for records produced in response to grand jury document production demands. Simply put, the Commission cannot disclose grand jury material.

1. The CPRA Does Not Apply Because the Files on the Discs Are in the Possession and Control of the Grand Jury, Which Is Not Subject to the CPRA

Mr. Aguirre seeks all files on the discs which the Commission gave to the grand jury through the Attorney General, its designated custodian. Grand juries have the power to issue subpoenas duces tecums for documents. (Penal Code § 939.2; *M.B. v. Superior Court* (2002) 127 Cal.App.4th 1384, 1391.) These documents are thus in the possession and control of the grand jury, not the CPUC. Grand jury documents, as well as documents seized pursuant to search warrants, are not subject to the CPRA. (See *McClatchy Newspapers v. Superior Court* (1988) 44 Cal.3d 1162, 1183 (CPRA does not create a presumed right to public access for raw evidentiary materials submitted to a grand jury, which is exempted from the CPRA); *Saunders v. Superior Court* (2017) 12 Cal.App.5th Supp. 1, 15 (CPRA does not apply to records seized pursuant to a search warrant because documents remain in the constructive possession and control of the

⁴ This resolution does not constitute precedent that the Commission will waive the procedural requirements of G.O. 66-D in future situations.

⁵ See Gov. Code § 6253(e); *Black Panthers v. Kehoe* (1974) 42 Cal. App. 3d 645, 656.

issuing court, which is exempted from the CPRA); *Oziel v. Superior Court* (1990) 223 Cal.App.3d 1284, 1292 (“To the extent that the court ordered disclosure of the videotapes as public records subject to disclosure under Government Code section 6250 et seq., the court was in error.”).)

The California Supreme Court in *McClatchy* held: “[t]he grand jury’s nature as a judicial entity and the important public interest requiring its institutional secrecy are persuasive indications that the Legislature must have intended the grand jury to be similarly exempted from the [CPRA’s] provisions.” (*McClatchy*, supra, 44 Cal.3d at p. 1183.) Indeed, as discussed below, grand jury documents can only be disclosed in three limited circumstances, as specified by the Legislature.

2. The Records are Exempt from the CPRA Because the California Penal Code Strictly Limits the Disclosure of Grand Jury Material

Even if the CPRA did apply, Government Code section 6254 subsection (k) exempts from disclosure “[r]ecords, 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 incorporates other prohibitions established by law, including those specified in the California Penal Code concerning grand juries. (See Cal. Gov’t. Code §§ 6254, 6276.22; *City of Richmond v. Superior Court* (1995) 32 Cal.App.4th 1430, 1440 (police records not subject to CPRA when penal code statute declared records were confidential and could not be disclosed except under limited exceptions).)

Federal and California law strictly guard grand jury secrecy. The United States Supreme Court has stated, “[w]e consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.” (*Douglas Oil Co. v. Petrol Stops Northwest* (1978) 441 U.S. 211, 218.) Federal courts routinely hold that grand jury materials are exempt from FOIA and other similar state provisions because of grand jury secrecy rules. (See *Fund for Constitutional Gov’t v. Nat’l Archives and Records Serv.* (D.C. Cir. 1981) 656 F.2d 856, 868 (Watergate Special Prosecution Force documents considered by the grand jury fell within broad reach of grand jury secrecy and was exempt from disclosure under FOIA); *Boehm v. FBI* (D.D.C. 2013) 983 F. Supp. 2d 154, 159 (particular records subpoenaed by grand jury were exempt under FOIA due to grand jury secrecy rules particularly when requesting party sought only to learn what occurred before the grand jury); *Gryberg v. U.S. Dep’t of Justice* (S.D.N.Y. Feb. 1, 2018) 2018 WL 679489 at *3 (documents subpoenaed by grand jury exempt from FOIA due to grand jury secrecy rules even if the documents are never showed to the grand jury); *Office of State Prosecutor v. Judicial Watch, Inc.* (Md. Ct. App. 1999) 356 Md. 118, 133 (“Thus, as in the case of the Federal FOIA, [state public records act] does not trump or override the traditional rule of grand jury secrecy.”))

The California Supreme Court has echoed this fundamental principle by acknowledging “[a] number of interests are served by ‘the strong historic policy of preserving grand jury secrecy.’” (*McClatchy*, supra, 44 Cal.3d at p. 1174 (quoting *United States v. Sells Engineering, Inc.* (1983) 463 U.S. 418, 428).) It continued:

As described by the United States Supreme Court, these [strong historic policies] are: ‘First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There would also be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Id. at 1174 (quoting *Douglas Oil Co. v. Petrol Stops Northwest* (1978) 441 U.S. 211, 219 (fn. omitted).)

California grand jury secrecy rules, which are even more restrictive than the federal rules, only allow disclosure of raw evidentiary grand jury materials in three circumstances: “(1) by court order for the purposes of impeaching a witness’ testimony; (2) to be provided to an indicted defendant; and, (3) to be provided to a succeeding grand jury.” (*McClatchy*, supra, 44 Cal.3d at p.1178.; see also Penal Code §§ 924.2; 938.1(b); and 924.4.)

The California Supreme Court has concluded that even courts lack the inherent authority to disclose grand jury material, unless one of these three circumstances, as defined by the Legislature, exists. (See *McClatchy*, supra, 44 Cal.3d at p. 1179 (the grand jury’s broad powers are only those which the Legislature has deemed appropriate); *Daily Journal Corp. v. Superior Court* (1999) 20 Cal.4th 1117, 1128 (“...if superior courts could disclose materials based only on their inherent powers, the statutory rules governing disclosure of grand jury testimony would be swallowed up in that large exception.”); *Goldstein v. Superior Court* (2008) 45 Cal.4th 218, 228 (“The statutory scheme covers disclosure to litigants (§§ 924.2,924.6, 938.1) as well as to the public (§§ 929, 938.1, 939.9).”⁶) The Legislature has also made it a crime to disclose grand jury material. (See Penal Code § 924.1.)

To date, the Commission is not aware of any indictments filed in this investigation. None of the three exceptions exists at hand, nor is it within the Commission’s authority to make

⁶ Code sections refer to the California Penal Code.

a determination as to the existence of these situations. The Commission, like the grand jury itself and a superior court overseeing the grand jury, does not have any inherent power to release grand jury records absent a rationale established by the California legislature. As clearly stated by the California Supreme Court, "...grand jury secrecy is the rule and openness the exception, permitted only when specifically authorized by statute." (*McClatchy*, supra, 44 Cal.3d at p. 1180.)

Moreover, the California Supreme Court has rejected the argument that there is an overarching common law principle of the public's right to know that requires grand jury records disclosure. In reviewing the historical setting of grand jury proceedings, the Court found that the "tradition of secrecy has been traced to the oath taken by grand jurors in the late 12th century" (*McClatchy*, supra, 44 Cal.3d at p. 1173) The Court continued, "[t]hat the Legislature intended to incorporate this well-established heritage of secrecy into the present grand jury system is plainly and amply shown in the governing provision of the Penal Code." (*Id.* at p. 1173.) In fact, the Court also found that the secrecy of grand jury is not overcome by the constitutional guarantee of free expression nor the fact that all political power is inherent in the people per the California Constitution. (See *id.* at pp. 1183-1184.) It stated, "[t]he people, acting through their elected representative or through exercise of the initiative power, may authorize the disclosure attempted here, but they have not done so to date" (*McClatchy*, supra, 44 Cal.3d at p. 1184; see also *Daily Journal*, supra, 20 Cal.4th at p. 1133.)

Courts have found that revelation of subpoenaed documents could compromise the integrity of the grand jury process. (See *In re Grand Jury Proceedings* (6th Cir. 1988) 851 F.2d 860, 866 ("The general rule, however, must be that confidential documentary information not otherwise publicly obtained by the grand jury by coercive means is presumed to be 'matters occurring before the grand jury' just as much as testimony before the grand jury.") The Commission has not received any communication from the Attorney General indicating that the criminal investigation has concluded. Public disclosure of the subpoenaed documents would reveal the scope and secret aspects of the grand jury investigation by showing where the government sought its evidence, the sources of information it relied on to develop the facts of its investigation, and the steps the government anticipated taking or is actually taking in furtherance of its investigation. Moreover, the documents may reveal information concerning individuals who are being investigated but may ultimately be exonerated. One of the purposes of grand jury secrecy is to protect these persons, who may not ultimately be charged, from public ridicule. Thus, the reasons for grand jury secrecy are present here.

3. The Superior Court's Unsealing of Pleadings Regarding Search Warrants Does Not Change the Analysis Regarding the Underlying Documents

Mr. Aguirre argues in his appeal of Legal Division's decision to withhold the requested records that, "The grounds for denial are not valid. The public interest in disclosure

outweighs any interests in concealment. The fact that a protective order was entered into does not change the nature of the records. Judge Ryan has already released to us the relevant CPUC logs related to the records sought as the CPUC knows.”

However, Judge Ryan, of the Los Angeles Superior Court, was not dealing in any way with grand jury material. The Los Angeles Superior Court presided over a debate between the Attorney General and the Commission as to the scope of search warrants. Courts have constructive possession over materials seized pursuant to a search warrant. (*Saunders*, supra, 12 Cal.App.5th Supp. at p. 15.) Courts are not custodians or constructive possessors of grand jury materials.

As detailed above, the public interest balancing test has already been considered by the Legislature when it codified under what circumstances the grand jury records can and cannot be released. The Commission has no authority to re-weigh the interests. (See *Daily Journal*, supra, 20 Cal.4th 1117 at pp. 1124-1125 (“By enacting the statutes governing the “exceptional cases” in which a court may order disclosure of grand jury material, the Legislature has, in effect, occupied the field; absent express legislative authorization, a court may not require disclosure.” (internal citation omitted)).) Mr. Aguirre has not enunciated any reason as to why he seeks the documents other to learn what occurred before the grand jury.⁷ (See *Boehm*, supra, 983 F.Supp.2d at p. 160.)

Moreover, the Court’s order released judicial records which concerned the scope of the search warrants, it does not cover the records requested in CPRA #17-583. The order only unsealed the judicial pleadings filed by the Commission with the Court and sealed affidavits filed in support of the government’s search warrants. It does not address at all whether documents produced to the grand jury or seized pursuant to a search warrant may be released. As discussed above, courts cannot release grand jury material unless one of the three limited circumstances arise. (*McClatchy*, supra, 44 Cal.3d at p. 1180.)

The Court’s protective order also limits the disclosure of privileged documents, the Commission was compelled to produce to the Attorney General, to only designated individuals and specifically prohibits disclosing these documents to outside parties. It grants no authority to provide access to any documents or discs provided pursuant to any grand jury subpoena.

Individuals cannot use the CPRA as a means to obtain confidential and privileged documents that they are not entitled to under other criminal and civil laws. (See *McClatchy*, supra, 44 Cal.3d at p. 1181-182 (statute authorizing grand jury to release

⁷ In his appeal, Mr. Aguirre states the records are of interest “to the public because they relate and will help to explain how the CPUC came to allow the utilities involved charge for the defective steam generators they deployed and the plant closed by their failure”, apparently referencing the shutdown of the San Onofre nuclear power plant in Southern California. However, the grand jury records he seeks concern the northern California investigation and San Bruno explosion, not San Onofre.

materials only to succeeding grand jury is “most compelling indication that the Legislature has not authorized disclosure of [those] materials to the public.”); *City of Richmond*, supra, 32 Cal.App.4th at p. 1440 (“[T]here is little point in protecting information from disclosure in connection with criminal and civil proceedings if the same information can be obtained routinely under the CPRA.”); *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272,1286 (“We cannot conclude that the Legislature intended to enable third parties, by invoking the CPRA, so easily to circumvent the privacy protection under section 832.7.”); *San Diego Police Officers’ Assn v. City of San Diego Civil Service Com.* (2002) 104 Cal.App.4th 275, 284 (“[I]t would be unreasonable to assume the Legislature intended to put strict limits on the discovery of police personnel records in the context of civil and criminal discovery, and then to broadly permit any member of the public to easily obtain those records” through the CPRA.)) Since Mr. Aguirre cannot lawfully obtain these documents from the grand jury nor the Attorney General, he cannot lawfully obtain the same documents from the Commission through a CPRA request. In other words, Mr. Aguirre cannot end run grand jury secrecy rules, investigative rules and other privileges by using the CPRA.

4. The Documents are Exempt from the CPRA Because They Were Compiled for Law Enforcement Purposes

California Government Code section 6254(f) exempts from disclosure “...any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes.” The United States Supreme Court has held that the exemption applies to prevent disclosure of documents not originally created for, but later compiled for law enforcement purposes. (*John Doe Agency v. John Doe Corp.* (1989) 493 U.S. 146, 155 (1989) (company that issued FOIA requests to government audit entity and FBI for documents that were originally created and produced years before was not entitled to documents under the investigatory exemption because at the time of the FOIA request, the government auditor had recently compiled and shared them with the FBI as part of a criminal grand jury investigation).) The U.S. Supreme Court held:

[investigatory] Exemption may be invoked to prevent the disclosure of documents not originally created for, but later gathered for, law enforcement purposes. The plain words of the statute contain no requirement that compilation be effected at a specific time, but merely require the objects sought be compiled when the Government invokes the Exemption. (*Id.*)

California courts similarly exempt records compiled for law enforcement purposes so long as the prospect of enforcement proceedings is concrete and definite. (See, e.g. *Williams v. Superior Court* (1993) 5 Cal.4th 337 (applying exemption where newspaper requested county sheriff’s records of disciplinary proceedings against two deputies);

Rackauckas v. Superior Court (2002) 104 Cal.App.4th 169, 177 (records generated during course of investigation were exempt from CPRA); *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1276 (holding that records of coroner's office were exempt under subsection f, stating "[n]o one can dispute that the office of the coroner, at a minimum, is a local agency... The issue is whether the coroner, as part of his local agency duties, compiles investigatory files for law enforcement purposes. The answer is an emphatic yes."); *State Office of Inspector General v. Superior Court* (2010) 189 Cal.App.4th 695, 709 ("The investigation materials underlying the report of OIG fall within this exemption. They are investigatory files compiled by a state agency for correctional purposes."))

In this case, the Commission has not received any communication from the Attorney General indicating that the criminal investigation has concluded. (See e.g., *Mercury News Article*, supra.) Regardless, this exemption applies even after the investigation has concluded. (*Williams*, supra, 5 Cal.5th at p. 357 ("... a file 'compiled by any other state or local agency for ...law enforcement purposes' continues to meet that definition after the investigation has concluded.")) The rationale behind the investigatory exemption is similar to that supporting grand jury secrecy and courts find close parallels between the issues. (See *Rackauckas*, supra, 104 Cal.App.4th at p. 177 (noting that same reasons supporting the California Supreme Court decision in *Daily Journal*, which refused to produce grand jury material at the conclusion of the investigation, justified withholding police investigation files under the CPRA).)

The Commission specifically searched for, compiled and burned onto the discs documents called for by a grand jury investigating potential criminal conduct. The Attorney General had already initiated its investigation and the grand jury had been convened before the subpoenas issued. The Commission compiled the documents solely for law enforcement purposes, e.g., the grand jury investigation, shortly before the time Mr. Aguirre issued the subject PRA. Thus, the records are also exempt from disclosure pursuant to the investigatory records exemption. (Gov't. Code § 6254(f).)

5. Many of the Records On the Discs Are Exempted Under Other Provisions of the CPRA

Some of the records on the discs produced to the grand jury are subject to the deliberative process privilege, official information privilege, or other exemptions codified in the CPRA. (See, e.g., Cal. Gov't.Code §§ 6254 et seq., 6255 Cal. Evid. Code § 1040.) Other documents include confidential material submitted to the Commission pursuant to PUC 583/General Order 66-C or Commission Rule 12.6. These documents are also not subject to disclosure under the CPRA. The Commission was compelled to produce these documents under criminal process even though it is not required to produce these documents in civil discovery or under the CPRA. The Commission expressly reserved its right to withhold these documents from other civil or CPRA demands. The Los Angeles

Superior Court also found that because the Commission was effectively coerced to produce these documents in response to criminal inquiries, it had not voluntarily waived any privilege. (See also *The Regents of University of California v. Workers' Compensation Appeals Board* (2014) 226 Cal.App.4th 1530, 1536.)

As discussed above, the object of the request, the discs, are exempted from the CPRA because they are in the custody and control of the grand jury, which is not subject to the CPRA. They are subject to grand jury secrecy and also constitute investigative records. However, assuming for the sake of argument that these exemptions did not apply, a large portion of the documents contained on the discs are also exempted under other provisions of the CPRA, including but not limited to the deliberative process privilege, official information privilege, confidential personnel information, other confidential records exemptions.

COMMENTS ON DRAFT RESOLUTION

The Draft Resolution in this matter was mailed on May 22, 2018, in accordance with Cal. Pub. Util. Code § 311(g). Comments were received on _____. Reply comments were received on _____.

FINDINGS OF FACT

1. On December 20, 2017, the Commission received a CPRA request, numbered CPRA #17-583, seeking disclosure of all files on two discs which the Commission compiled and produced to the California Attorney General's office in response to two criminal grand jury subpoenas.
2. CPRA #17-583 does not specifically seek anything other than files on the discs and does not define the documents sought by subject matter, date range, or any other defining attribute.
3. One of the discs is in response to a grand jury subpoena for communications between identified custodians.
4. One of the discs is in response to a grand jury subpoena for documents in regarding how cases are assigned to administrative law judges.
5. The Commission produced the two discs to the California Attorney General, as custodian for the grand jury on August 27, 2015.
6. The discs containing the files requested in CPRA #17-583 are in the possession and control of the grand jury.
7. The Commission complied the documents on the discs for the sole and exclusive purpose of responding to grand jury subpoenas.

8. The Commission was compelled to produce the requested documents by the terms of the grand jury subpoenas.
9. The Commission expressly reserved the right to assert appropriate privileges in response to any third party request for documents produced in response to grand jury subpoenas.
10. The Commission did not waive any privilege, voluntarily or otherwise.
11. The Commission has also received grand jury subpoenas from the United States Attorney's Office.
12. The subject matter of the federal and state grand jury subpoenas overlaps, as does the response to those subpoenas.
13. The Commission has received admonishments from the United States Attorney's Office to not disclose any of the issued subpoenas or the related responses to any third party.
14. On January 2, 2018, the Commission's Legal Division informed the requestor, via electronic mail, that the records sought are exempt from disclosure.
15. On January 22, 2018, the CPRA requester sent an email to Legal Division management requesting full Commission review of the January 2, 2018 response letter.
16. Mr. Aguirre took twenty days to request an appeal of staff determination of CPRA #17-583, which is twice as long as the allotted time to appeal.
17. Mr. Aguirre did not use the "Public Information Appeal Form" mandated under G.O. 66-D.
18. In D.17-09-023 the Commission promulgated General Order 66-D.
19. General Order 66-D requires that a requestor seeking review of a full or partial denial of their request must seek an appeal within ten days of receiving notice that their request was denied.
20. General Order 66-D requires that a requestor seeking review of a full or partial denial of their request must submit a "Public Information Appeal Form."
21. The Los Angeles Superior Court's October 20, 2017 ruling does not grant authority to provide third party access to any documents or discs provided to the California Attorney General pursuant to grand jury subpoenas.
22. The Los Angeles Superior Court's October 20, 2017 ruling held that the Commission was compelled to produce deliberative process privileged documents in a criminal investigation.
23. The Los Angeles Superior Court's October 20, 2017 ruling held that the Commission would not be deemed to have waived any applicable privilege in any other context.

24. The protective order executed by the Commission and the California Attorney General and approved by the Los Angeles Superior Court allows disclosure of privileged documents only by the court, the Attorney General and its staff, necessary witnesses, or as required by criminal discovery rules, should criminal indictments be issued.
25. The judicial record documents ordered unsealed by the Superior Court have all been released by the Clerk of the California Superior Court, County of Los Angeles.
26. As of February 2018 the California Attorney General has publically stated that is criminal investigation is ongoing.

CONCLUSIONS OF LAW

1. Mr. Aguirre's appeal as it is untimely and procedurally deficient and can be denied on these independent grounds.
2. The general policy of the CPRA and California Constitution favors disclosure of records.
3. Unlike the CPRA presumption of disclosure, there is no presumed right to public access for records produced in response to criminal document production demands.
4. The CPRA does not create a right of public access to grand jury documents.
5. The CPRA does not create a right of public access to documents seized pursuant to search warrants.
6. Grand jury records are secret and cannot be disclosed absent express authority from the Legislature.
7. There are strong historical and ongoing policy reasons for the secrecy of grand jury records.
8. There are no common law rights that require disclosure of grand jury records.
9. There are no Constitutional rights that require disclosure of grand jury records.
10. The California Legislature has determined that grand jury records can only be released in limited situations.
11. The Commission, like courts, has no inherent or discretionary power to disclose grand jury records.
12. The California Penal Code makes it a crime to disclose grand jury materials.

13. The Courts have found that the proper functioning of the grand jury system depends on the secrecy of such proceedings.
14. Public disclosure of the subpoenaed documents would reveal the scope and nature of secret grand jury investigations and thus hinder such investigations.
15. Individuals cannot use the CPRA as a means to obtain documents they are not entitled to under other civil and criminal laws.
16. The documents were compiled for law enforcement purposes and therefore are exempt under the CPRA.
17. A number of the documents contained on the discs are subject to other privileges and exemptions including but not limited to the deliberative process privilege, the official information privilege, confidential personnel information, and other Commission confidentiality rules.
18. The Commission was compelled to produce these documents under the criminal investigation process even though it is not required to produce these documents in civil discovery or under the CPRA.
19. The Commission has not waived these privileges in cooperating with investigators.
20. The Los Angeles Superior Court's October 20, 2017 order unsealing judicial pleadings and search warrant affidavits does not apply to the records requested in PRA #17-583.

ORDER

1. The request for disclosure of Commission records provided to the California Attorney General in connection with grand jury subpoenas is denied.
2. The effective date of this order is today.

I certify that the foregoing resolution was adopted by the California Public Utilities Commission at its regular meeting June 21, 2018, and the following Commissioners approved favorably thereon:

ALICE STEBBINS
Executive Director