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In Pro per

STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

COMPLAINT OF GARY LEDFORD)
ON HIGH DESERT POWER PROJECT)
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)
Docket No. 97-AFC-1C (C1)
EX PARTY
MOTION TO SHOW CAUSE
AND;
FOR A NEW CLAIRFING ORDER
TO COMPEL DISCOVERY
DECLARATION OF GARY LEDFORD

TO: THE CALIFORNIA ENERGY COMMISSION [CEC] AND TO ALL PARTIES
HEREIN AND THEIR COUNSEL OF RECORD:

Complainant in this action properly served a Subpoena for records on December 14th, 2001 to obtain discoverable documents in the herein pending complaint. On December 14th 2001 the Committee issued an "Order" in lieu of Subpoena.

The "Order" directed ". . Staff to provide the documents identified in Exhibit A to Complainant's "Subpoena for Documents" that Complainant requested. At no time did the staff request a clarification as to the withholding of documents under the "deliberative process privilege".

Nevertheless, during the two days that Complainant was in Sacramento, he was advised that each file was first searched by a staff lawyer and that certain documents were removed from the files.

Complainant requested an identification of what documents were removed and a justification that each document removed from the files in question is exempt under the express provision of Government Code Section 6255 that the public interest served by not making the record available clearly outweighs the public interest served by disclosure of the record. His request was denied.

On December 20th, 2001, Complainant received a letter from Paul Kramer; Exhibit "A", acknowledging that certain documents had been removed from the files, citing the "Deliberate Process Privilege" and "attorney client privilege" under

Government Code Section 6255. His letter however falls far short of “providing facts” to justify the withholding.

“During the course of your review of our documents, **we have excluded documents** which are not subject to disclosure under the Public Records Act. Those excluded documents are protected under the attorney-client and deliberative process privileges or because they are drafts or contain confidential information.”

Staff filed objections to making witnesses available for interview after first acknowledging that such interviews would be allowed. Staff did this in the form of a letter from Paul Kramer on December 14th 2001, before the Committee issued its original order specifying the interviews of the staff witnesses. The legal staff never asked for a protective order or clarification on providing all documents requested. Therefore the alleged “privilege” is waived as provided in Evidence Code Section 912.¹

Further staff has failed to “justify” the withholding of any record or what the Public interest served, by not disclosing the record.² The burden of producing the records is on the CEC after a proper request has been made for the records that support the facts.³ The California Public Records Act (Gov. Code, §6250 et seq.) was enacted in 1968 to safeguard the accountability of government to the public, for secrecy is antithetical to a democratic system of "government of the people, by the people [and] for the people."⁴

The Public Records Act (Gov. Code, §6250 et seq.) was intended to safeguard the accountability of government to the public. To this end, the act makes public access

¹ Evidence Code Section 912. “(a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), . . . is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, **including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.**”{emphasis added}

² Government Code Section 6255. (a) 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.

(b) A response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, shall be in writing.

³ Evidence Code: 550. (a) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence.

⁴ San Gabriel Tribune v Superior Court (1983, 2d Dist) 143 Cal App 3d 762, 192 Cal Rptr 415.

to government records a fundamental right of citizenship. Implicit in the democratic process is the notion that government should be accountable for its actions and, in order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.⁵

A citizen's right to inspect preliminary estimates and details in connection with the acquisition and construction of a municipal water supply system as "other matters" within the meaning of this section is not affected by the fact that the city engineer had communicated them to the city attorney as confidential matter in pending and anticipated litigation affecting the project.⁶

Where preliminary estimates and details in connection with the acquisition and construction of a municipal water supply project were permitted by the city engineer to be inspected by some citizens, other citizens' inspection right cannot be refused on the ground that the matter was of a confidential character.⁷

The trial court in Citizens for a Better Environment v. The Department of Food and Agriculture, erred in finding the reports exempt from disclosure. "Although the records sought were preliminary drafts of agency memoranda, and although the trial court properly found most of the writings in issue would customarily be discarded by the department after the preparation of a final report, the department failed to show that memoranda of the environmental protection agency were not retained in the ordinary course of business. Thus, these records were required to be disclosed in their entirety. . . .the factual reports of the investigations and what was found were required to be disclosed. **In so ruling, the court held that these were grave public matters in which the public has a substantial interest in disclosure, and that memoranda consisting of factual material or severable factual material along with deliberative material may be disclosed without doing violence to the public interest in withholding such records.**"⁸

Complainant made a prima fascia case with the memo from Lorraine White as CEC staff member that indicated that the HDPP was out of compliance on two specific

⁵ Rogers v Superior Court (1993, 2nd Dist) 19 Cal App 4th 469, 23 Cal Rptr 2d 412.

⁶ Coldwell v Board of Public Works (1921) 187 C 510, 202 P 879.

⁷ Ibid.

⁸ [CITIZENS FOR A BETTER ENVIRONMENT v. DEPARTMENT OF FOOD & AGRICULTURE (1985) 171 Cal.App.3d 704, page 705]

points.⁹ The question is “who” is the water staff that does not agree?. Complainant is entitled as a matter of law to conduct discovery to determine the full and complete nature of the non-compliance issues and to further prove his allegations.^{10 - 11}

Both Caryn Holmes and Lorraine White signed the July memo concluding that more than one member of the CEC staff agrees with the Complainant that the Conditions, and evidence in the record demonstrates that the VVWD and the HDPP are not complying with conditions and the sworn testimony in the record. Hand written notes of meetings with staff that could shed light on this issue when there is clear evidence that a “Meeting” was held is clearly discoverable evidence.¹² There is little question from the “Agenda” what the substance of the meeting was about.

It is incumbent on the CEC to be honest and forthcoming on the issue at hand and to take the appropriate corrective action, and not provide any unreasonable delay in the coping of records or providing access to witnesses.¹³

⁹ Exhibit “B” to the Verified Complaint “ . . water staff does not agree with the arguments made by the project developer that the proposed water treatment system will “approach” the quality levels of the receiving aquifer.”

¹⁰ Evidence Code Section 600. (a) A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action.

¹¹ Government Code Section: 6254.5. Notwithstanding any other provisions of the law, whenever a state or local agency discloses a public record which is otherwise exempt from this chapter, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law.

(b) Made through other legal proceedings or as otherwise required by law.

¹² Evidence Code Section: 623. Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

¹³ Government Code Section 6255 (d) nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records. The notification of denial of any request for records required by Section 6255 shall set forth the names and titles or positions of each person responsible for the denial.

And:

Government Code Section 6257.5. This chapter does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure.

Government Code Section 6258. Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter. The times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time.

CONCLUSION

- (1) The Committee require staff to identify each document withheld and to Show Cause and "justify" the withholding on each document.
- (2) The Committee independently examine the records in camera to determine whether or not the documents are "privileged"
- (3) The Committee issue a new clarifying Order to Compel Discovery and require Staff shall copy and serve on the Complainant any and all documents not previously provided, which the committee determines are not privileged, at its own cost and expense, to be delivered by overnight mail to arrive not later than January 2, 2001, and:
- (4) That identified Staff witnesses or non identified Staff who may be witnesses be advised they are allowed to talk to the complainant on the status of the compliance issues before the commission.
- (5) For such other relief as the Committee deems just and proper.

Respectfully Submitted:

Dated: December 24th, 2001

/s/ Signed Original

Gary A. Ledford
Complainant

Government Code Section 6259. (a) Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, **the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so.**{emphasis added} The court shall decide the case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and any oral argument and additional evidence as the court may allow.

And:

Evidence Code Section 911. Except as otherwise provided by statute:

- (a) No person has a privilege to refuse to be a witness.
- (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.
- (c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing.

DECLARATION OF GARY A. LEDFORD

I, Gary A. Ledford, declare as follows:

1. I intervened in 97-AFC-1 and am a bonafide party.
2. I am the Complainant in the above entitled action.
3. The Commission has set January 16th as the date for a hearing in this matter.
4. I received Notice of the hearing on December 10th, 2001 and immediately called Susan Gefter, and discussed the “Fast Track” schedule and requested informal meetings with potential staff witness and documents to be produced. She indicated that could be arranged and gave me Dan Rios as a contact. I immediately placed a call to Dan. I received no reply.
5. I subsequently placed three calls to Dan on Tuesday the 11th. I received no reply.
6. I placed two calls on Wednesday the 12th. He called me back during the lunch hour and left a message on my voice mail advising me that I had five minutes to get back to him or that he would be in meetings for the balance of the day. I called back within the five minutes but again only received his voice mail. I left him my home phone number so that I could coordinate discovery. I received no reply.
7. On Thursday, the 13th I left two additional voice mail with Dan’s voice mail, again advising him of the urgency and that I had made plane reservation to come to the CEC on Tuesday December the 18th to review documents on compliance and to informally interview witnesses.
8. Dan called me at about 12:50 pm when I was about to enter an MWA meeting and advised me that he could not assure that he could find the files that contained the compliance documents and there may not be any such files identified that way or that may be just too voluminous to get to one location. He would have to locate the appropriate people and find a conference room. He stated that I would have to a “Public Records Request”, and then he would have 10 days to respond. I told him there was not time to deal with these issues like that.
9. As to interviewing witnesses, Dan advised me that I should put my questions in writing and he would determine if they could be answered.

10. I came to the CEC on Tuesday Morning December the 19th at 9:00 a.m. where I was shown to a conference room, and I began looking at one file at a time. After the file was reviewed, an intern made copies of the documents that I marked, taking from a minimum of 30 minutes to over an hour and a half between files.
11. I was handed a letter to the Committee at about 10:00 am objecting to my interviewing staff witnesses, after receiving a letter from Paul Kramer on December 14th stating they would be allowed and a confirming order from the Committee.
12. When I inquired about the delay between files I was advised the reason for the delay was that a lawyer was reviewing each file and removing “privileged” documents.
13. When I inquired what documents were removed I was advised that I was not entitled to that information.
14. As about 4:00 pm, I was advised that I had seen all of the files that were available that day and there may some additional files in the morning. I was then given the Clarifying Order not allowing the interviewing of witnesses.
15. I started reviewing additional files on the morning of the 20th of December, when I discovered an Agenda of a “Staff” meeting to review HDPP conditions of approval and specifically *“corrective actions addressing findings from Lorraine Whites inspection”*. See Exhibit “B”
16. When I specifically asked for minutes or notes from a meeting held on December the 14th specifically to address the issues raised by Lorraine White, I was advised I could not see that information as it was privileged. It is clearly evidence that the project is or was out of compliance and that there was an inspection to determine “corrective action”.
17. Since the Staff clearly allowed me to see the “Agenda” any privilege on the nature and content of the meeting is no longer privileged.
18. Time is clearly of essence in this matter; I the right to review all of the compliance documents as well as any and all correspondence between HDPP, SWRCB, MWA and CEC Staff relative to Compliance with the conditions and make copies and interview the potential witnesses, without the need of a formal deposition.
19. I have also Noticed formal Depositions of some witness; the Committee has denied me the right to take these depositions.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 24th day of December 2001, at Apple Valley, California.

/s/ Signed original

Gary A. Ledford
Complainant
Intervener

EXHIBIT "A"

STATE OF CALIFORNIA – THE RESOURCES AGENCY

GRAY DAVI

December 21, 2001

BY OVERNIGHT DELIVERY

Gary A. Ledford
11401 Apple Valley Road
Apple Valley, CA 92308

Re: High Desert Power Project; 97-AFC-1 (C1)

Dear Mr. Ledford:

As the Committee has suggested, I write to summarize the current status of discovery.

On December 18 and 19, you reviewed documents in the Energy Commission's files pertaining to your requests for documents. Prior to your arrival and during our discussions while you were here, we told you that we did not have sufficient time to gather, review and make all of the documents available. Under the Public Records Act, we would have 10 days to do so. You scheduled your trip before making your request and without consulting us to see if we could have the records available when you arrived in Sacramento. Nonetheless, we were able to bring together the bulk of the documents and you were able to review them and receive copies of those of interest to you.

During the course of your review of our documents, we have excluded documents which are not subject to disclosure under the Public Records Act. Those excluded documents are protected under the attorney-client and deliberative process privileges or because they are drafts or contain confidential information.

We did not allow you to conduct interviews of potential staff witnesses, formal or informal. As you know, the Committee rescinded that portion of its order.

I enclose some additional documents that have come to our attention since your visit. There were no "minutes" from the meeting of December 14, 2001; the notes of the staff participants are protected from disclosure under the deliberative process privilege.

We discussed the extent to which you wished to review the documents in possession of the City of Victorville--the Chief Building Official for this project. You indicated an interest in seeing any drawings for the water treatment plant or facilities, including pipelines and "probably not" anything else. I said that we would obtain those documents from the CBO and forward them to you. We made that request of the CBO but are not expecting to receive a package of copies from them until next Wednesday; at best we will be able to quickly review it for privileged documents and have it delivered to you on Thursday or Friday. I am puzzled by your Public Records Act request to the City, however, which appears to duplicate our effort.

Once we have finished making copies on your behalf, I will send you the bill.
Sincerely,

Paul A. Kramer Jr.
Staff Counsel

Enclosures

Cc: Docket, POS list (w/o copies)

EXHIBIT "B"

Draft AGENDA

Various HDPP Compliance Issues

Friday, December 14, 9:00 a.m., CEC Office, Sacramento CA

- Alignment Deviation Report (*CPM and bio/cul/paleo staff*) -
- Proposed scope change to Historic Properties Treatment Plan (*CPM and cul/paleo staff*)
- BIO-10 amendment addressing use of Laydown Areas C and G (*CPM and bio staff*)
- Adjustment of mitigation land required for 32-mile gas pipeline due to overlap with SCG pipeline (*CPM and bio staff*)
- Air photo quality issues (BIO-6) (*CPM and bio staff*)
- Presentation of approach/schedule of various plan submittals for the water/gas lines (*CPM*)
- Status of pending approvals (e.g., Soil & Water 1 for test well A and S&W 8 for all wells) (*CPM*)
- Status of HDPP corrective actions addressing findings from Lorain Whites inspection (*CPM*)

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA

COMPLAINT OF GARY LEDFORD ON)
HIGH DESERT POWER PROJECT)
WATER ISSUES)
_____)
DOCKET No. 97-AFC-1C (C1)
PROOF OF SERVICE
[REVISED 12/04/01]

I, **Gary A Ledford** declare that on December 26th, 2001, I deposited copies of the attached **MOTION TO SHOW CAUSE AND FOR NEW CLAIRFING ORDER** in the United States mail in Apple Valley, CA with first class postage thereon fully prepaid, registered mail, return receipt requested and addressed to the following:

DOCKET UNIT

The original signed document plus the required 12 copies to the Energy Commission Docket Unit:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 97-AFC-1 (C1)
Docket Unit, MS-4
1516 Ninth Street
Sacramento, CA 95814-5512

Individual copies of all documents to the parties:

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I declare that under penalty of perjury that the foregoing is true and correct.

/s/ Original Signed

(Signature)

*Revisions to POS List, i.e. updates, additions and/or deletions

HIGHDESERT/97-AFC-1.POS

