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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)
**REPLY TO STAFF OBJECTION TO
MOTION TO SHOW CAUSE
AND;
FOR A NEW CLAIRFING ORDER
TO COMPEL DISCOVERY**

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

Complainant Reply's to Staff Objection's to Motion to Show Cause. The Staff complains that Mr. Ledford's motion "presumes that he is entitled to "discovery" of the types provided in civil cases". That is not so, Complaint presumes that the staff will comply with the Order of the Committee, which acknowledges among other things that the discovery period is short."

Staff attempts to rely on "*Haynie v. Superior Court* (2001) 112 Cal.Rptr.2d 80, in which the California Supreme Court determined that Haynie unlike *Uribe*, or the present case, involved the construction of section 6254(f)'s exemption for "investigatory . . . files compiled by any . . . local agency for correctional, law enforcement, or licensing purposes" (Italics added.)

This case is clearly distinguishable from both of the aforementioned cases. First, the action is a "Complaint", the Complaint alleges facts that HDPP is not following conditions of approval. Complainant initially requested that the CEC conduct its own investigation based on factual allegations made by the Staff of the CEC. The Commission entered its order denying Complainants request for an investigation therefore one can assume there is no investigation underway by the Commission.

As the Supreme Court noted in *Uribe* ". . ., as we have previously observed, "that the exemption for 'files' applies 'only when the prospect of enforcement proceedings is concrete and definite. [Citation.] It is not enough that an agency label its file "investigatory" and suggest that enforcement proceedings may be initiated at some unspecified future date or were previously considered. . . . [¶] . . . To say that the

exemption created by subdivision (f) is applicable to any document which a public agency might, under any circumstances, use in the course of [an investigation] would be to create a virtual *carte blanche* for the denial of public access to public records. The exception would thus swallow the rule.’ (*Uribe, supra*, 19 Cal.App.3d at pp. 212-213, citing *Bristol-Myers Company v. F.T.C.* (D.C. Cir. 1970) 424 F.2d 935, 939 [138 App.D.C. 22].)” (*Williams, supra*, 5 Cal.4th at pp. 355-356.) Based on subsequent decisions, which had followed *Uribe*’s holding “on this point,” we said in *Williams* that “it now appears to be well established that ‘information in public files [becomes] exempt as “investigatory” **material only when the prospect of enforcement proceedings [becomes] concrete and definite.**’ ” (*Id.* at p. 356.) Such a qualification is necessary to prevent an agency from attempting to “shield a record from public disclosure, *regardless of its nature*, simply by placing it in a file labeled ‘investigatory.’ ” (*Id.* at p. 355, italics added.)

The Staff has made no showing of; " . . . 'whether the disclosure of materials would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.' " In fact, the legal staff preparing for this case is not allowed to communicate with the decision makers, it must prepare and provide evidence in a public forum. Complainant is informed that “decision-making” takes place in another area of the building. In fact, the Commissioners [“decision-makers”] in this case are not allowed to talk to the staff without a noticed meeting or via a written document, filed and served on the other parties.

Complainant is not asking for access to the decision-makers records, instead, Complainant only desires to see the notes of the INDEPENDENT STAFF charged with doing an independent analysis, who should be representing the vast majority of the public’s interest. The regulatory scheme under which the Commission operates clearly makes the Staff a party charged with an independent analysis. Thus, any records that show the staff did in fact conduct an independent analysis should be available under the Public Records Act. Legal Staff is not allowed to hide the ball.

Staff’s statements are pure conclusions and not supported by case law or fact.

In *Haynie* the Supreme Court noted “ . . . The Court of Appeal also ruled that, upon receiving *Haynie*’s Demand for Public Records, the County was obligated to determine whether the records exist, “enumerate or describe the records so discovered, identify exemptions applying to any enumerated or described records, and disclose the remaining records.” In the Supreme Court, the County did not dispute its obligation to determine whether requested records exist and whether exemptions apply to those records nor did it deny its duty to disclose nonexempt records that it has found.

The County in *Haynie* objected only to the ruling of the Court of Appeal that it should have provided *Haynie* with an enumeration or description of all responsive records, regardless of whether those records were exempt from disclosure. Complainant has made no such request.

Section 6255 states that if records within the ambit of the request are withheld based on a statutory exemption, the agency must disclose that fact.

The Commission sits as an adjudicatory body and the instant Motion is tantamount to a Motion in Civil Court to Compel Disclosure, [or under the Commission Rules to Compel Production] however, the CEC Staff claims the records are protected by an exemption. Complainant requests the records be transmitted to the Commission for an “in camera” review to evaluate the claim.

As the Supreme Court noted; “After the petition had been filed in *Williams*, for example, the superior court ordered the Sheriff of San Bernardino County to lodge under seal the records for which an exemption was claimed and provide the petitioner with an index of the records being lodged. (*Williams, supra*, 5 Cal.4th at p. 344.) In *State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, the board complained that the burden of complying with the petitioner’s CPRA request far exceeded the benefits. The Court of Appeal approved the solution of the superior court, which was to direct the board to prepare a list of responsive documents to permit the petitioner to refine its request to exclude unwanted documents. (*Id.* at pp. 1183-1184, 1191-1192.)

CEC staff does not allege the number of documents is burdensome only it’s conclusionary statement that they are somehow privileged.

The law mandates that public records be “open to inspection at all times during the office hours of the state or local agency” (§ 6253, subd. (a)), recognizes that “every person has a right to inspect any public records” not exempted by the act (*ibid.*), and obliges the public agency to provide copies of its nonexempt records at the expense of the person requesting copies. (§ 6253, subd. (b).) In so doing, the Legislature has endeavored both to maximize public access to agency records and minimize the burden and expense that opening the records to inspection and copying imposes on public agencies.

Section 6255, subdivision (a), which provides: “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.” The Supreme Court has previously referred to this provision as “a catch-all exemption.” (*Williams, supra*, 5 Cal.4th at p. 347, fn. 9.) It outlines the circumstances under which an agency may withhold a record: by demonstrating that the record falls within a statutory exemption or that the public interest in nondisclosure clearly outweighs the public interest in disclosure. When an agency, in compliance with section 6255, articulates one or more of these exemptions, it will necessarily reveal the general nature of the documents withheld.

As the Supreme Court concluded: “The Legislature, which has carefully detailed

the components of the agency's denial of a CPRA request, even to the point of requiring the agency to "set forth the names and titles or positions of each person responsible for the denial" (§ 6253, subd. (d)), is fully capable of requiring agencies to include a log of withheld documents."

The case law, as stated, has never approved or even mentioned a public agency's obligation to create a list and description of documents **withheld at the pre-petition stage**. This is not the pre-petition stage, it is a Complaint, which has a hearing date and a shortened discovery period and for which the CEC Staff, while burdened by this chore is not willing to respond to in a forthcoming fashion.

The only ruling that the Supreme Court made on the creating of lists in Haynie was; "We therefore conclude that the Court of Appeal erred in holding that such inventories or lists must be created as a matter of course **as part of the agency's initial response to CPRA requests**. Since the initial requests are over, the Motion is a Motion to Compel it should be properly heard, staff should provide the documents for an "in camera" review and the Commission should appropriately rule.

Complainant has repeatedly asked only to interview staff, the CEC internet site says that anyone having questions about "Compliance" of HDPP should talk to Steve Munroe, however when Complainant called him he advised that he may not be able to talk about HDPP compliance issues without approval of counsel. The question begs itself; How do you find out all of the facts?

Legal Staff argues it does not have the time to conduct the document review process, respond to Mr. Ledford's repeated motions and other communications, prepare its case and the filings ordered by the committee and also chaperone interviews. Of course, Complainant would not be filing Motions, if the staff was more cooperative. Perhaps the Committee should provide more time so that everyone can "properly do their jobs".

Complainant would not have filed the complaint if he did not have "evidence" that the project was not in compliance, and if he had not conducted some preliminary discussions with staff, which at the time were willing to discuss the issues with him.

Staff's allegations that Complainant's legitimate discovery is; ". . .cobbling it together from the results of a post filing fishing expedition in the Commission's records." is absurd and smacks of the kind of unprofessional conduct on the part of the Commission Staff that Complainant has been faced with.

Complainant believes that the case law previously clearly supports his position, the records requested are not a part of any investigation, not a part of the "Decision Makers" files, and are records that are kept in the ordinary course of business on the part of the CEC. All documents should be made available or the staff should "justify" its reasons for withholding the documents.

CONCLUSION

- (1) The Committee or the Full Commission should require staff to identify each document withheld and to Show Cause and “justify” the withholding on each document.
- (2) The Committee or the Full Commission should 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 27th, 2001

/s/ Signed Original

Gary A. Ledford
Complainant

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

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

I, **Gary A Ledford** declare that on December 27th, 2001, I deposited copies of the attached **REPLY TO STAFF OBJECTION TO 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
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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

