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California Recognizes "Constructive Denial" Doctrine Under Public Records Act

Utilities Commission Must Comply with Strict Response Deadlines

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On June 17, 2022, California's Court of Appeals (First District) held that the California Public Utilities Commission is not exempt from complying with the mandatory 24-day deadline for issuing its "determination" regarding public records requests, and that any records requester who does not receive such "determination" within that timeframe has the right, on the twenty-fifth day. to file a petition for review, under the "constructive denial" doctrine.

The landmark ruling, that theoretically applies to every state and local agency in California, came in a case brought by investigative reporter Brandon Rittiman of the Sacramento television station ABC10/KXTV-TV (owned by TEGNA Inc.). Although the Court determined, on the merits, that Rittiman was not entitled to inspect the particular records he had sought, the court's holding that the reporter was entitled to bring his lawsuit challenging the non-response has far-reaching consequences and has been hailed as a major victory for transparency in California.

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California's PUC Routinely Ignores Public Records Requests

Brandon Rittiman was awarded a 2022 Dupont Columbia Award for his series of hard-hitting reports, "FIRE-POWER-MONEY," documenting the devastating Camp Fire of 2018 which destroyed the entire town of Paradise, California, more than 14,000 residential homes, and caused 86 deaths. A significant focus of that reporting was the failure of the state's Public Utilities Commission ("CPUC") to hold accountable PG&E, the nation's largest utility operator, that pleaded guilty to 84 counts of felony negligent homicide. CPUC had originally imposed a (meager) $200 million fine on the company, but in a unanimous vote of the Commissioners, with no public comment permitted, CPUC decided to forgive PG&E's transgressions and "permanently suspended" its obligation to pay the monetary fine.

In investigating what role, if any, Governor Gavin Newsom may have played in influencing that decision, in mid-November 2020, Rittiman filed four Public Records Act ("PRA") requests with the CPUC, in which he sought all communications between then CPUC President Marybel Batjer and/or her principal executive staff and members of the Governor staff, since the date of Batjer's appointment in mid-August 2019.

Ten days later, on November 30, the CPUC notified Rittiman of its "determination" that the requested records were statutorily exempt from disclosure under Government Code 6254(l), referred to as "the Governor's Correspondence Exemption," and would not be made available.

On December 4, Rittiman filed his internal administrative appeal of that "determination," in compliance with CPUC's General Order 66-D ("GO-66D"), which requires any records requester dissatisfied with a PRA decision from the CPUC to exhaust the internal administrative appeal process before proceeding to court to challenge a records denial.

Under GO-66D, the next step in the CPUC's internal appeal process requires its legal division to prepare a proposed "Resolution" responding to the issue(s) raised by the requestor's appeal. Proposed resolutions are made available for public review and comment, and are then acted on by the Commissioners themselves at the next scheduled voting meeting. GO-66D does not include any deadline for completing and posting of Proposed Resolutions, or for the Commissioners to actually vote on any Proposed Resolution of a PRA appeal. And the PUC had routinely sat on such internal appeals for months and months, as Rittiman and other California journalists had personally experienced.

By mid-April 2021, 4 ½ months after he'd filed his appeal, the CPUC had not posted a Proposed Resolution. Frustrated, Rittiman notified the CPUC that if a Proposed Resolution was not brought for a decision by the Commissioners on or before its next voting meeting April 22, he would deem its lack of action a "constructive denial" of his PRA requests and would seek judicial review under subdivision 6258 of the Public Records Act.

Five days later, the CPUC responded to Rittiman by letter and apologized for its delay in preparing the Proposed Resolution, citing unusually high "workload issues." The CPUC legal staffer stated that she was "targeting" posting the Proposed Resolution on the Commission's website on or before May 21, for public comment, after which the Commissioners would "target" setting the Proposed Resolution for a vote by the Commissioners at its June 24 meeting.

No such Proposed Resolution was posted on May 21. So, Rittiman's counsel e-mailed the same CPUC attorney on May 24 and 25 asking for an explanation. The CPUC staff attorney apologized again and stated that the Proposed Resolution of Rittiman's appeal was now "targeted" to be publicly posted by July 2 and would be "targeted" for a vote at the Commission's August 4 board meeting.

Rittiman Files Suit Before His Internal Appeal Has Been Resolved

Two weeks later, on June 14, Rittiman filed his PRA Petition for Review in the Court of Appeals (because a prior ruling from that Court held that PRA petitions against the CPUC can not be filed in Superior Court, but only in the Court of Appeals or the California Supreme Court). Rittiman alleged that given that seven months had passed since he timely filied his administrative appeal, and no action had been taken by CPUC on it, his appeal had been "constructively denied." He argued, on the merits, that the Governor's Correspondence Exemption had previously been construed by the Court of Appeals as restricted exclusively to correspondence from private parties outside of government to the Governor's office, and therefore was inapplicable to his PRA requests for communications between the CPUC's President and/or her executive staff, and the Governor's staff.

As was typical of how CPUC had responded to several other such "pre-emptive" PRA suits, it filed an "Initial Response" to the petition urging that the requested writ be summarily dismissed because Rittiman had failed to exhaust his administrative remedies. Rittiman replied stating that administrative exhaustion is not necessary under the PRA, which expressly requires every California agency to "transmit" its written "determination" of whether it will provide or withhold requested public records within a maximum 24 days after receiving the request, and further provides for expedited judicial review of that "determination" immediately thereafter.

On July 20, 2021, the Court of Appeal summarily denied Rittiman's petition for review and dismissed his writ petition, without prejudice. The Court of Appeals accepted CPUC's argument that Rittiman failed to exhaust his administrative remedies and therefore he filed suit prematurely, before the Commissioners had voted on the Proposed Resolution, and before the Commissioners had later resolved his Application for Rehearing of it decision, which, CPUC contended, is a jurisdictional prerequisite to Court of Appeals' review of a final agency decision.

California's Supreme Court Reverses the COA's Dismissal for Lack of Jurisdiction

Firmly committed to challenging CPUC's position (and its actual practice) that it can unilaterally delay its resolution of all PRA internal appeals indefinitely, and thereby preclude judicial review of such "denial by inaction," Rittiman (backed by TEGNA Inc.) filed a Petition for Review of the Court of Appeals' dismissal order to the California Supreme Court. That petition was buttressed by a powerful and persuasive Amicus Brief in support of the petition filed by the California First Amendment Coalition, The Associated Press, and the Center for Investigative Reporting (and its program "Reveal") which urged the justices to take the case and reject CPUC's position that it can delay indefinitely a records requester's "day in court" by having unilaterally adopted an internal appeal procedure that does not comply with the explicit response deadline set forth in section 6253(c) of the Government Code.

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Even though the Court of Appeals' order dismissing Rittiman's appeal was a cursory, two-page unpublished (non-precedential) ruling, on October 20, 2021 (weeks before the CPUC was next "targeting" addressing Rittiman's appeal), California's Supreme Court voted unanimously to grant Rittiman's petition for review; in a one-page Order, the state's highest court transferred the case back to the Court of Appeals with directions to vacate its dismissal order and issue an Order to Show Cause (OSC) directing CPUC to explain why the public records Rittiman had requested should not be provided to him.

Shortly after the California Supreme Court sent the case back to the Court of Appeals, on November 18, 2021 the Commissioners formally voted (with no public comment permitted) to adopt Resolution No. L-612, in which it categorically denied Rittiman's administrative appeal, finding that the Governor's Correspondence Exemption applied to all of the emails he had requested.

On November 30, 2021, Rittiman's counsel sent an e-mail to several CPUC e-mail addresses, including that of the legal support supervisor who had served him by e-mail with a copy of the CPUC's adopted Resolution, and the CPUC's administrative appeal docketing clerk, attaching Rittiman's Application for Rehearing. Rittiman's counsel later obtained confirmation that the Application for Rehearing had been received by those email addresses. Nevertheless, because it was not submitted through the CPUC's official online portal for filing Applications for Rehearing, CPUC determined (without notifying Rittiman) that he had not actually filed an Application for Rehearing. CPUC maintained that Rittiman's failure to file such an Application rendered the Court of Appeals without jurisdiction to hear his appeal.

The CPUC filed a return to the Court of Appeals' OSC in the form of a demurrer. The CPUC argued that (1) Rittiman failed to fully exhaust his administrative remedies, specifically by failing to file an Application for Rehearing, which deprived the court of jurisdiction; (2) the CPUC's adoption of Resolution No. L-612 had mooted his appeal, and (3) the CPUC had properly denied Rittiman's PRA requests on the basis of the Governor's Correspondence Exemption.

Court of Appeals: CPUC's Internal Administrative Appeal Process Null and Void

Following further briefing and oral argument on May 3, 2022, the Court of Appeals issued its 42-page published opinion on June 17, 2022. The bulk of the opinion addresses the merits of the case, and finds that the Governor's Correspondence Exemption, on its plain text, allows for withholding of any and all communications sent to or received by the Governor or his/her staff. But the first 17 pages of the opinion, in which the Court rejects CPUC's argument that neither Rittiman nor any other record requester is entitled to seek judicial review of a PRA request denial unless and until (s)he has "exhausted" CPUC's administrative appeal process under GO-66D, is a tremendous step forward for all future records requesters in California.

Examining what appear to be irreconcilable provisions of the California Public Utilities Code (requiring the filing and resolution of an Application for Rehearing as a prerequisite for judicial review) and those of the Public Records Act (authorizing the filing of a Writ of Review on the 25th day after the agency's receipt of a records request), the Court held that the latter provisions, having been enacted subsequently to the former ones, trump the Public Utilities Code. Therefore, the CPUC must comply with the plain language of section 6253(c) of the Government Code: it must either issue its final reviewable "determination" of all PRA requests within the maximum statutory "time limit" of 24 days, or its failure to do so will be deemed a "constructive denial" giving rise to immediate judicial review.

While the ruling is limited, on its face, to the Public Utilities Commission (which argued that its unique constitutional authority and the specific Public Utilities Code provisions rendered it immune from the more general provision of the PRA), it logically applies to all California agencies (state, county, city, and town – based government offices) that are subject to the PRA and its strict response deadline. In other words, like Rittiman, any PRA requester who does not receive a written "determination" from an agency within 24 days whether it will, in the future, provide or withhold the requested public records, henceforth has the right, under this binding precedent on all Superior Courts, to file a Petition for Writ of Mandate on the 25th day.

On July 5, 2022, the CPUC filed a Petition for Partial Rehearing in the Court of Appeals, urging the court not to "impliedly repeal" section 1731 of the Public Utilities Code, and to rule, instead, that PRA requesters can seek judicial review before exhaustion of their administrative remedies under "ordinary mandamus" review.

Steve Zansberg of The Law Office of Steven D. Zansberg, L.L.C. in Denver, CO, represented Brandon Rittiman and TEGNA Inc. (Steve is also licensed to appear in California state and federal courts). The Public Utilities Commission of the State of California was represented by its inside counsel, Christofer Nolan, and by Suzanne Solomon, David A. Urban, and Chelsea M. Desmond of Liebert, Cassidy, and Whitmore in Los Angeles, CA.