
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
TEL 202.661.2200
FAX 202.661.2299
www.ballardspahr.com

Matthew S.L. Cate
Tel: 202.661.7698
Fax: 202.661.2299
catem@ballardspahr.com

October 4, 2021

Via TrueFiling

Honorable Chief Justice Tani Cantil-Sakauye
& Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Amici Curiae* Letter in Support of Petition for Review
Rittiman, et al. v. Public Utilities Commission, Case No. S270145

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The First Appellate District’s decision in *Rittiman, et al., v. Public Utilities Commission* undermines the California Public Records Act and paves a path for agencies across the state to engineer procedural obstacles to the public’s constitutional right of access to public records and statutory right to enforce it. Accordingly, and under Rule 8.500(g) of the California Rules of Court and for the reasons discussed below, we write on behalf of the First Amendment Coalition (“FAC”), The Associated Press, and The Center for Investigative Reporting (d/b/a Reveal) to urge the Court to grant the Petition for Review and reverse the decision of the Court of Appeal.

Interests of *Amici Curiae*

FAC is a California non-profit corporation dedicated to freedom of speech and government transparency. FAC provides legal information and consultations to journalists, academics, bloggers, and ordinary citizens regarding access rights under the Freedom of Information Act and California’s various open government laws. FAC files amicus briefs in important appeals, both in state and federal courts, including the United States Supreme Court. In addition, FAC files litigation to defend and expand the rights of the public and press under access laws, including the California Public Records Act (“CPRA” or the “Act”). *See, e.g., Becerra v. Superior Court (First Amendment Coalition)* (2020) 44 Cal. App. 5th 897.

The Associated Press and The Center for Investigative Reporting are news media organizations that rely on access to public records to keep the public informed about how the government conducts the people’s business in California and beyond. The Associated Press is a global news agency organized as a mutual news cooperative under the Not-for-Profit

Corporation Law of New York. Its members and subscribers include news organizations and Internet content providers across California and the world. The Center for Investigative Reporting, based in Emeryville, California, is the nation’s oldest nonprofit investigative newsroom. Reveal often works in collaboration with other newsrooms across the country.

Reasons to Grant The Petition For Review

A. The PUC Has A History Of Engaging In The Unlawful Delays Seen In This Case. Those Violations Of The CPRA Will Continue Unless The Court Grants The Petition And Reverses The Decision Below.

The Legislature has commanded that if an agency like Public Utilities Commission (“PUC”) establishes regulations relating to the processing of public-records requests, those regulations must be consistent with *all* of the requirements of the CPRA. *See* Gov. Code § 6253.4(c). That means, among other things, that any such regulations must (1) provide for a determination of whether the PUC will disclose requested records within no more than 24 days, (2) ensure the PUC “promptly” discloses such records, and (3) remain consistent with the Legislature’s insistence that a person seeking records is entitled to a judicial decision on any dispute over the right to receive those records “at the earliest possible time.” *Id.* §§ 6253(c), 6258.

Despite that directive, the PUC has promulgated General Order 66-D (“GO 66-D”). Here, then, is how the PUC insists—in every case—a public-records dispute must be addressed before a requestor is entitled to judicial review as provided by the CPRA:

- After receiving a staff denial of a records request, the requestor must appeal within 10 calendar days. No extensions are provided for, and failure to meet the deadline is fatal to the appeal. GO 66-D § 5.5(d); PUC Rule of Practice & Proc. 1.15 (counting calendar days); *see also* PUC Resolution L-565 at 5, 13, 2018 Cal. PUC LEXIS 269, *9-10 (Cal. P.U.C. June 21, 2018) (submission of appeal 10 days late was “untimely and procedurally deficient” and thus worthy of “being denied on those grounds”). The PUC has declared that it “reserves the right to summarily deny” appeals that are not requested within the 10-day deadline. *Id.*

- In meeting that 10-day deadline, the requestor must find and use the correct “Public Information Appeal Form.”¹ GO 66-D § 5.5(d). The PUC has ruled that failure to use the correct form to initiate an appeal may constitute grounds to deny an appeal. *See* PUC Resolution L-565 at 5 (finding such procedural deficiency sufficient grounds for denial).
- The requestor must then await not only staff preparation of a draft resolution for the Commission’s consideration, on whatever timeline it takes to prepare that document, but also a 30-day public comment period after the draft resolution is finally circulated. *See* GO 66-D § 6.1; Pub. Util. Code § 311(g)(1).
- After public comment closes, the requestor must await a PUC vote on the draft resolution—scheduled at a time of the PUC’s choosing and in compliance with the timing and procedural requirements governing consideration of items during regularly scheduled Commission meetings. GO 66-D § 6.1; PUC Rule 15.1.
- If the Commission affirms the staff’s denial of a public records request, the requestor must file an Application for Rehearing within 30 days. GO 66-D §6.2. The application must carefully raise every possible basis for her belief that the PUC’s denial was improper under the CPRA; any argument not raised here cannot be asserted in court.² *See* GO 66-D § 6.2.

As the PUC would have it, it is only after the requestor navigates all of these steps, completely and exactly, that she may ask a court to review the denial of her records request. The PUC’s procedures flout the Legislature’s command that public-records disputes be

¹ As of the date of this letter, the “Public Information Appeal Form” required to initiate an appeal is not available from the PUC’s “Public Records Act Requests” web page, or its FAQ page for public records requests; neither resource provides any information about the PUC’s supposedly mandatory administrative-appeals procedures or what a person should do if PUC staff denies a request. *See* <https://bit.ly/3I8TpnC> (shortened link to CPUC “Public Records Act Requests” page); <https://bit.ly/3D9mA08> (FAQ page).

² Most requestors would thus need legal counsel at this stage (if not sooner) to adequately preserve their rights. Meanwhile, the rehearing procedures improperly shift the burden to the requestor to explain why the records should be disclosed. *Compare* GO 66-D § 6.2 with *e.g., Am. Civil Liberties Union of N. Cal. v. Superior Court* (2011) 202 Cal. App. 4th 55, 67 (“The agency opposing disclosure bears the burden of proving that an exemption applies”).

resolved “at the earliest possible time,” Gov. Code § 6258, and this Court’s instruction that resolution of a CPRA dispute be reached “expeditiously,” *Filarsky v. Superior Court* (2002) 28 Cal. 4th 419, 427. They also impose burdens, costs, and traps for all but the most sophisticated records requestors that substantially infringe on the constitutional right of access.

Petitioners’ situation is illustrative of the type of undue delay and burden arising from GO 66-D. They have been precluded for nearly a year (and counting) from receiving their Section 6253(c) determination and from seeking judicial relief rectifying the PUC’s unwarranted delay and refusal to produce the public records to which Petitioners are entitled. *See* Pet. for Review at 9 (noting November 19, 2020 submission of requests). And the purported “target” date of November 18, 2021, for holding the long-awaited and repeatedly requested PUC vote on Petitioners’ requests, *see* PUC Sept. 27, 2021 Letter to Court, merely would set the stage for the *next* round of procedure; if the PUC affirms the staff decision on their records request, Petitioners would still need to apply for rehearing.

Indeed, unlawful delays arise as a matter of course. Months-long delays in obtaining the initial PUC vote on a staff denial are common, if not routine. *See, e.g.*, PUC Resolution No. L-565, 2018 Cal. PUC LEXIS 269 (Cal. P.U.C. June 21, 2018)³ (affirming staff denial of request six months after request made); PUC Resolution No. L-572, 2019 Cal. PUC LEXIS 1 (Cal. P.U.C. January 10, 2019)⁴ (affirming decision 10 months after request); Resolution No. L-522, 2017 Cal. PUC LEXIS 187 (Cal. P.U.C. April 27, 2017) (four months).⁵ Additional lengthy delays follow during the “application for rehearing” stage. In the matter adjudicated by PUC Resolution No. L-522, for example, the PUC took an additional *four months* to deny the requestor’s application for rehearing. *See, e.g.*, PUC Decision 17-08-033, 2017 Cal. PUC LEXIS 371 (Cal. P.U.C. August 24, 2017).⁶

This case thus presents an important question of law requiring the Court’s resolution because the Court of Appeal has condoned the PUC’s continued deprivation of records requestors’ right to receive the disclosability determination within the time required by Section 6253(b) and their entitlement to the speedy judicial review pursuant to Section 6258. The Court should thus grant the Petition for Review and reverse the decision below.

³ Available at <https://bit.ly/39WuUDV> (link to PDF available from PUC website, last accessed Oct. 4, 2021).

⁴ Available at <https://bit.ly/3olGbpL> (same).

⁵ Available at <https://bit.ly/2YgzqLe> (same).

⁶ Available at <https://bit.ly/3A0vStr> (same).

B. Granting The Petition And Reversing The Decision Below Would Ensure Other Agencies Do Not Follow PUC’s Lead.

The CPRA allows any state or local agency to adopt regulations for “making its records available” and requires 37 specified agencies to “establish written guidelines for the accessibility of records.”⁷ Gov. Code § 6253.4(a)-(b). The PUC primarily points to these provisions as the reason that people seeking public records in its possession must exhaust the onerous procedures of General Order 66-D. *See* PUC Sept. 27, 2021 Letter at 3; *but see* Gov. Code § 6253(d) (providing that no provision of the CPRA “shall be construed to permit an agency to delay or obstruct the inspection or copying of public records”). Because the Court of Appeal has ordered Petitioners to exhaust those procedures, notwithstanding their obvious incompatibility with the CPRA, state and local agencies wishing to delay (or avoid) judicial review of their denials of public-records requests for months, years, or even indefinitely can now take a page from the PUC playbook and erect the same hurdles the Court of Appeal has now approved.

The Court should therefore grant the petition, reverse the decision below, and make it clear to all public agencies that Section 6253.4 means what it says: Any regulations or guidelines relating to the processing of public-records requests must be consistent with the rest of the CPRA and designed to *advance* rather than hinder the public’s right to know.

C. The Court Should Grant The Petition And Clarify That The Exhaustion Of Remedies Doctrine Cannot Apply To Cases Brought To Vindicate The Constitutional And Statutory Right To Public Records.

The decision below depends on the troubling premise that the judicial review necessary to enforce and protect the public’s constitutional right to know is subject to an exhaustion-of-remedies requirement. *See* Petition Attachment A. That theory, urged by the PUC and summarily adopted by the Court of Appeal, is manifestly incorrect and seriously undermines the public’s right to know as enshrined in the state constitution and the CPRA.

As a general rule, when administrative procedures are available to challenge or appeal an agency decision on matters placed under the agency’s authority, a party must exhaust those procedures before seeking judicial relief. There is no published case holding

⁷ The Legislature meant the terms “guidelines” and “regulations” to apply to separate concepts. *See* Gov. Code § 6253.4(c) (requiring the “[g]uidelines *and* regulations” adopted under the section to be consistent with the CPRA) (emphasis added). It thus did not *require* any public body, including the PUC, to establish regulations governing the disclosure of public records, much less regulations that undermine the right to expeditious judicial relief. The PUC’s assertion to the contrary, *see* PUC Sept. 27, 2021 Letter at 3, is contradicted by the clear language of the statute.

that the exhaustion-of-remedies doctrine applies in CPRA cases.⁸ In Petitioners' case, however, the Court of Appeal considered the exhaustion requirement a given, declined to consider any briefing on the subject by Petitioners, and ruled for the first time in any published or unpublished decision that *amici* can identify, that exhaustion of administrative procedures is a prerequisite to suing a public agency for relief under the CPRA. That ruling, of immense consequence, is flawed for several reasons.

First, imposition of an exhaustion-of-remedies requirement in actions brought under the CPRA places a substantial burden on the public's constitutional and statutory rights of access to public records—not least through the months- or years-long delay such procedures may require and the potentially unrecoverable costs of retaining counsel to navigate arcane procedures filled with potential traps for the unwary. Simply put, making the right of judicial review of an agency's public-records decision contingent on the exhaustion of a gauntlet of regulatory process like that detailed in General Order 66-D completely violates the legislative command for expedient access to public records and the constitutional mandate, *see* Art. I, § 3(b)(2) of the California Constitution, that any authority limiting the right of access must be narrowly construed.

Second, this Court has explained that the CPRA provides the “exclusive” procedures for adjudicating a dispute over whether public records must be disclosed. *Filarsky*, 28 Cal. 4th at 433. The Legislature insisted that those exclusive judicial remedies be carried out as expeditiously as possible. *Id.* at 427. Had the Legislature wanted to make that expeditious judicial review contingent on completion of onerous and confusing administrative procedures such as those detailed in General Order 66-D, it would have said so explicitly instead of repeatedly expressing its intent for speedy responses to requests and resolutions of disputes.

Third, the rules governing the doctrine preclude its application to CPRA cases. For one, exhaustion is not required when the administrative remedy “is cumulative to other, judicial remedies.” *McKee v. Bell-Carter Olive Co.* (1986) 186 Cal. App. 3d 1230, 1240 (citing *City of Susanville v. Lee C. Hess Co.* (1955) 45 Cal. 2d 684, 689). Further, this Court has held that exhaustion of remedies is not required “where the civil action that the Legislature has authorized is not one to review the administrative decision but rather a completely independent remedy.” *State Bd. of Chiropractic Exam'rs v. Superior Court (Arbuckle)* (2009) 45 Cal. 4th 963, 972-73. The Legislature has provided an independent (and exclusive) remedy for violations of the CPRA in Sections 6258-6259. In other words, as relevant to Petitioners' case, exhaustion of PUC procedures cannot be a prerequisite to

⁸ The question, specifically involving the PUC's procedures, was presented in *Public Utilities Commission v. Superior Court* (2016) 2 Cal. App. 5th 1260. While citing the general rule requiring exhaustion, however, the court found it did not need to decide the question. 2 Cal. App. 5th at 1274 n.13.

judicial relief because the right to obtain and sue for access to public records arises from the CPRA and state constitution, not the Public Utilities Code or PUC regulation.

Nonetheless, the Court of Appeal decision below summarily accepted the sweep of the PUC's unlawful procedures and ordered Petitioners—who had already repeatedly tried, with the help of experienced counsel, to follow those procedures—to exhaust the requirements of General Order 66-D. Because the exhaustion-of-remedies doctrine has no place in cases brought under the CPRA, and because imposing it constitutes substantial infringements of the constitutional right of access to public records and the statutory right to enforce that right, the Court should grant the petition.

Conclusion

The PUC has created a set of procedures completely contrary to the letter and spirit of the CPRA and the constitutional right of access to public records. With the Court of Appeal's unfortunate blessing and its order that Petitioners exhaust those procedures, those procedures threaten to serve as a model for other agencies who may seek to frustrate the public's right to know. Because of the far-reaching and troubling implications arising from the ruling below, that decision should be reviewed and reversed.

Respectfully submitted,

BALLARD SPAHR LLP



Matthew S.L. Cate (SBN 295546)

*Counsel for Amici Curiae
First Amendment Coalition;
The Associated Press; and The Center
for Investigative Reporting*

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is BALLARD SPAHR LLP, 1909 K Street, NW, 12th Floor, Washington, DC 20006. On October 4, 2021, I electronically served the foregoing ***Amici Curiae Letter in Support of Petition for Review*** by transmitting a copy via the Court's TrueFiling portal to:

Steven David Zansberg
Law Office of Steven D. Zansberg, L.L.C.
100 Fillmore Street, Suite 500
Denver, CO 80206

Counsel for Petitioners

Rachel Ann Peterson
Public Utilities Commission of the State of
California
505 Van Ness Avenue
San Francisco, CA 94102

David Arthur Urban
Liebert Cassidy Whitmore
135 Main Street, 7th Floor
San Francisco, CA 94105

Counsel for Respondent

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

Executed on October 4, 2021, at Oakland, California.



Matthew S.L. Cate

Document received by the CA Supreme Court.