

DOCKETED

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April 21, 2022

VIA EMAIL

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Application for Confidential Designation:
Biological Resources Assessment
Russell City Energy Center (01-AFC-07C)

Dear Samantha Neumyer:

The California Energy Commission (CEC) has received Russell City Energy Company, LLC's (RCEC/applicant) application for confidential designation, dated April 12, 2022. The application covers the Biological Resources Assessment following the May 2021 incident.

The application states that the records should be kept confidential for the operating life of RCEC and that the pictures cannot be aggregated. The applicant states that the assessment is accessible only to employees or consultants providing essential services to RCEC.

The applicant asserts the following primary bases for confidential designation: 1) personnel information under Government Code section 6254(c), and 2) public interest in disclosure also known as the public interest "balancing test" under Government Code section 6255.

An application for confidential designation shall be granted under the California Code of Regulations, title 20, section 2505(a)(3)(A), ". . . if the applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the Commission to keep the record confidential." The executive director determination made in response to an application for confidential designation is subject to a reasonableness standard. It is the applicant's burden to make a reasonable claim for confidentiality based on the California Public Records Act and other applicable laws.

Confidentiality Claims

Personnel Information

Government Code section 6254(c) allows an agency to withhold personnel, medical, or similar files that, if disclosed, would constitute an unwarranted invasion of privacy.

The applicant notes that the Biological Resources Assessment contains employee and contractor names, positions, contact information, emails, and information that constitutes an unwarranted invasion of privacy. The applicant also notes that given threats of cyberattacks, employees' names and credentials could be used as part of ransomware, spyware, or other attacks that use employee names to design an illicit entry method.

The documents provided do not contain information related to facility personnel such as medical records, employee files, military records, or other information generally considered private. An employee's name and position title within a company is not typically information that constitutes an unwarranted invasion of privacy.

Even the release of information to the detailed level of a resume is not typically considered an unwarranted invasion of privacy. In *Eskaton Monterey Hospital v. Myers* (1982) 134 Cal.App.3d 788, 794, the court, in granting the release of documents reflecting the qualifications of a state auditor, noted that information such as education, training, experience, awards, previous positions, and publications is information that is routinely presented in both professional and social settings, is relatively innocuous, and implicates no applicable privacy or public policy exemption.

Therefore, considering the limited scope of an employee's name and title, Government Code section 6254(c) is not applicable. As noted in the discussion on the applicant's public interest claim, internal email information associated with an employee and internal phone numbers may be withheld under Government Code section 6255.

Public Interest in Disclosure Section 6255(a)

Government Code section 6255(a) allows an agency to withhold records from public disclosure where the public interest served by not disclosing the record "clearly outweighs the public interest served by disclosure of the record." This is referred to as the "balancing test."

The balancing test can be used to support the non-disclosure of information related to public safety. However, mere claims of potential mischief are insufficient, and facts demonstrating that specific harm is likely to result to the public or individuals are required to justify withholding information. "The critical point is that a court applying section 6255(a) cannot allow '[v]ague safety concerns' to foreclose the public's right of access. (Citations omitted)" (*American Civil Liberties Union Foundation v. Superior Court* (2017) 3 Cal.5th 1032, 1046 [221 Cal.Rptr.3d 832, 843, 400 P.3d 432, 441].)

For example, the Court of Appeal rejected a claim by the County of Santa Clara that GIS information showing the location of easements for Hetch Hetchy water pipelines should be withheld despite the county's claim that doing so was necessary to minimize the threat of terrorist attack. The court noted that the claim was overbroad and undermined because the county had released the information, albeit under a non-disclosure agreement. "While we are sensitive to the County's security concerns, we agree with the trial court that the County failed to support nondisclosure on this ground." (*County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1329 [89 Cal.Rptr.3d 374, 395], as modified (Feb. 27, 2009).)

The applicant raises concerns that protecting internal facility information such as employee contact information is particularly important, given emerging threats of cyberattacks where employees' names and credentials are spoofed for exploitation. Ransomware, trojans, spyware viruses, worms, and other attacks that leverage software in a malicious way most often use employee names and email addresses to help design illicit entry methods.

The applicant states that the public interest served by not disclosing the employees' names and contact information clearly outweighs the public interest served by the disclosure, as nondisclosure will protect against potential misuse of the information for illicit purposes

The applicant notes that attacks on energy infrastructure are a real, contemporary threat. In recent years, high-powered rifles were used to destroy

power transformers at a substation in California, and attacks on physical electric infrastructure, such as power plants, remain a concern.

Specifically, the applicant references a January and March 2022 Cybersecurity & Infrastructure Security Agency report on Russian-based hackers targeting the energy sector. These Russian state-sponsored advanced persistent threat actors conducted a multistage intrusion campaign to gain remote access to U.S. and international energy sector networks, deploy focused malware, collect and exfiltrate enterprise and related data, and target industrial control system infrastructure.

With respect to the photographs contained in the Biological Resources Assessment, the applicant states the public interest in nondisclosure is outweighed by the public interest in disclosure. The pictures contain images of the RCEC site, personnel, and off-site areas. Such project and site-specific information could be exploited for illicit activities.

The applicant notes that this information is similar to photographs that have been previously granted confidential designation by the CEC (See, TN#: 241378), and should be granted confidential designation for the same reasons.

To the extent that RCEC employee and consultant contact information, including internal email addresses, facility phone numbers, and consultant resumes are not already in the public domain, the applicant has made a reasonable claim that RCEC employees' internal email addresses and internal phone numbers are exempt from disclosure under the balancing test of Government Code section 6255.

While agencies cannot allow vague safety concerns to foreclose the public's right of access, in this case, the applicant has identified specific and documented threats and cybersecurity attacks on the energy sector that could utilize internal employee email addresses and facility or company information to target attacks through spear phishing. The public interest served by not disclosing this information clearly outweighs the public interest served by disclosure.

The applicant has not made a reasonable claim that photos 1, 2, 4, 5, 6, 8, or 9 are in the public interest to withhold. Unlike the photos previously designated as confidential that were of plant equipment, not related to the May 2021 event, and potentially usable in an attack, these photos do not show plant equipment related to the May 2021 event but relate to potential offsite contamination of tidelands from oil releases.

Photos 1 and 2 show offsite stormwater outlet channels and plants growing in the channels. No facility equipment is in the pictures. Photos 4 and 5 are taken from public vantage points outside of the facility and show small sections of exterior equipment with the primary focus on drainage ditches. Photo 6 shows a tidal channel taken from outside the facility. The buildings in the picture are of a contractor supply store and a food distributor, not RCEC. Photos 8 and 9 show onsite waterways, but no equipment, and the person cleaning up the waterway is unidentifiable.

The applicant has made a reasonable claim that photos 10 and 12 are exempt from disclosure under the balancing test of Government Code section 6255. These photos show details of facility equipment and site-specific information that could be exploited for illicit activities.

Executive Director's Determination

For the reasons stated, the following records, which include detailed information about the design and operation of RCEC, are granted confidential designation for the life of the facility or until such time as they may be publicly released:

- 1) Contact information of facility employees
- 2) The resume of the consultant
- 3) Photos 10 and 12

For the reasons stated, the following records are not granted confidential designation and may be publicly released:

- 1) Photos 1, 2, 4, 5, 6, 8, and 9

Be advised that under the California Code of Regulations, title 20, section 2506, one may petition to inspect or copy records that the CEC has designated as confidential. A decision on a petition to inspect or copy confidential records is issued by the CEC's chief counsel. Under the California Code of Regulations, title 20, section 2507, the executive director may disclose or release records previously designated as confidential, in certain circumstances. The procedures for acting on a petition and criteria for disclosing or releasing records previously designated as confidential are set forth in the California Code of Regulations, title 20, sections 2506-2508.

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You may request that the CEC determine the confidentiality of records that the executive director denied confidential designation. You have 14 days to request that the CEC determine the confidentiality of the record. If you make such a request, the CEC will conduct a proceeding pursuant to the provisions in California Code of Regulations, title 20, section 2508.

You may seek a confidential designation for information that is substantially similar to information for which an application for confidential designation was granted by the executive director by following the procedures set forth in California Code of Regulations, title 20, section 2505(a)(4).

If you have any procedural questions concerning this matter, please email Jared Babula at jared.babula@energy.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Drew Bohan', with a long horizontal flourish extending to the right.

Drew Bohan
Executive Director