

Board Administration and Regulatory Coordination Unit

Division 3. Air Resources Board

Chapter 1. Air Resources Board

Subchapter 1.25. Administrative Procedures–Hearings

**Article 3. Administrative Hearing Procedures for
Petitions for Review of Complaints**

Subarticle 5. Prehearing Procedures

§ 60065.26. Discovery.

(a) The provisions of this section provide the exclusive right to, and method of, discovery as to any proceeding governed by these hearing procedures. However, nothing in this section prohibits the parties from voluntarily stipulating to provide discovery deemed appropriate. This section does not authorize the inspection or copying of, any writing, or thing which is privileged from disclosure by law or protected as part of an attorney's work product.

(b) The names and addresses of witnesses; inspection and copying of documents and things.

(1) Unless otherwise stipulated to by the parties, within 45 days of issuance of a complaint or amended complaint, a party may request:

(A) The names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing; and

(B) The opportunity to inspect and make a copy of any thing, document, statement or other writings relevant to the issues for hearing that are in the possession, custody or control of the other party and would be admissible in evidence. This includes the following information from inspection or investigative reports prepared by, or on behalf of, any party that pertain to the subject matter of the proceeding: (i) the names and addresses of witnesses or of persons (other than confidential informants) having personal knowledge of the issues involved in the proceeding, (ii) matters perceived by the investigator in the course of his or her investigation (as opposed to his or her analysis or conclusions), and (iii) statements related to the issues of the proceedings which are otherwise admissible. For purposes of this section, "any thing, document, statement or other writings relevant to the issues for hearing that are in the possession, custody, or control of the other party" would include those items within the possession, custody, or control of a third-party who obtained or used such items while acting as a representative, contractor, or agent of the "other party."

(2) Parties shall arrange a mutually convenient time for the exchanging of the names and addresses of witnesses and the inspecting and copying of relevant things, documents, statements, and other writings identified in subparagraph (B) above, but such date shall not be later than 30 days from the date of receipt of the request made pursuant to subparagraph (b)(1). Unless other arrangements are made, the party requesting the writings shall pay for the copying.

(3) All requests under subparagraph (b) are continuing, and the party receiving the request shall be under a continuing duty to provide the requesting party with the information requested.

(4) Absent a stipulation between the parties, a party claiming that certain writings or things are privileged against disclosure shall, within 15 days of receipt of the request for inspection and copying, serve on the requesting party a written statement setting forth what matters it claims are privileged and the reasons supporting its claims.

(c) Other Discovery.

(1) A party may file a motion requesting that the hearing officer order further discovery. The motion shall specify the proposed method of discovery to be used and shall include affidavits describing in detail the nature of the information and/or documents sought, the proposed time and place of the discovery (if applicable), and the information addressing the findings listed in subparagraphs (A)-(D) below. The hearing officer shall grant the motion upon finding that:

(A) The additional discovery will not unreasonably delay the proceedings;

(B) The information to be obtained from the discovery is most reasonably obtained from the non-moving party, who has refused to provide it voluntarily; or that

(C) The information to be obtained is relevant and has significant probative value on a disputed issue of material fact regarding a matter at issue.

(2) The hearing officer may order the taking of oral depositions only under the following circumstances:

(A) After affirmatively making the findings in subparagraphs (c)(2)(A)-(C), and further finding that the information sought cannot be obtained by alternative methods; or

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(B) There is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(3) If the hearing officer grants the motion for the taking of a deposition, the moving party shall serve notice of the deposition on the person to be deposed with copies served on the other parties at least ten days before the date set for the deposition.

(4) Where the witness resides outside of the state and where the hearing officer has ordered the taking of the testimony by deposition, the hearing officer shall obtain an order of the court to that effect by filing a petition in the superior court in Sacramento County. The proceedings for such a hearing shall be in accordance with the provisions of Government Code section 11189.

(d) Third-Party Notice of Request for Disclosure of Information Identified as Confidential and Opportunity to Participate.

(1) A third-party shall be notified whenever a party receives a request for disclosure of information that is in the possession, control, or custody of the party subject to a claim of confidentiality asserted by the third-party, including, but not limited to, claims of confidentiality asserted pursuant to the California Public Records Act (CPRA). This section creates rights and obligations in addition to, and does not affect, existing rights and obligations under the CPRA and applicable federal regulations.

(2) A third-party shall have the opportunity to be heard on all issues involving requests for disclosure of information that is in the possession, control, or custody of the party subject to a claim of confidentiality asserted by the third-party. Within five days of receipt of notice pursuant to subparagraph (d)(1), a third-party may object to disclosure of the subject information and may seek a protective order pursuant to subparagraph (e). Objections to disclosure may be based on all legal grounds, including, but not limited to, lack of relevance to the issues for hearing.

(e) Protective Orders:

(1) Upon motion by a party from whom discovery is sought, a third-party who has made a claim of confidentiality regarding the information to be discovered or by the hearing officer on his or her own motion, the hearing officer may enter a protective order with respect to this material.

(2) Prior to granting a protective order, it must be established by the moving party that the information sought to be protected is entitled to be treated as a trade secret or is otherwise confidential. A party or person seeking a protective order shall have the opportunity to be heard on all issues relevant to preserving the record's confidentiality, including, but not limited to, the following:

(A) The appropriate scope and terms of any governing protective order;

(B) The terms under which the record may be placed in evidence or otherwise used at a hearing; and

(C) The disposition of the record and any copies thereof after all relevant administrative and judicial proceedings have concluded.

(3) A party or person seeking a protective order may be permitted to make all, or part of, the required showing in a closed meeting. The hearing officer shall have discretion to limit attendance at any closed meeting proceeding to the hearing officer and the person or party seeking the protective order.

(4) A protective order, if granted, shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing. The protective order may order that the trade secret information not be disclosed or that it be disclosed only to specified persons, or in a specified way. Disclosure may be limited to counsel for the parties who shall not disclose such information to the parties themselves. Disclosure to specified persons shall be conditioned on execution of sworn statements that no disclosure of the information will be made to persons not entitled to receive it under the terms of the protective order.

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(5) The protective order shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing; the order may require that the material be kept under seal and filed separately from other evidence and exhibits in the hearing.

(6) Any party subject to the terms and conditions of any protective order, desiring to make use of any documents or testimony obtained in a closed meeting, shall file a motion to the hearing officer and set forth justification for the request. The motion shall be granted upon a demonstration of good cause that the information is relevant and has significant probative value on a disputed issue of material fact in issue. In granting the motion, the hearing officer shall enter an order protecting the rights of the affected persons and parties, who have claimed that the information is confidential, by preventing any unnecessary disclosure of the information. The hearing officer may require that the information be presented in a closed meeting, with attendance limited, as necessary and practicable, to specified representatives of the parties and that the material be sealed and filed separately from other evidence and exhibits in the hearing.

(7) The hearing office shall make a record of all closed meetings that are held under this section. The record shall be sealed and made available, upon appropriate order, to the state board or to the court review of the record.

(8) If the hearing officer denies a motion for protective order or grants a protective order only, in part, the order shall not become effective until ten days after the date the order is served. In the interim, a party to the proceeding or third-party holder of the asserted confidential information adversely affected by the order may seek appropriate interlocutory relief in a court of competent jurisdiction.

(f) Proceeding to Compel Discovery.

(1) Any party claiming that its request for discovery pursuant to this section has not been complied with or that the opposing party has failed to comply with a stipulated agreement to provide discovery may serve and file with the hearing officer a motion to compel the party who has refused or failed to produce the requested or stipulated discovery to comply. The motion shall include the following:

(A) Facts showing the party has failed or refused to comply with a discovery request or stipulation;

(B) A description of the information sought to be discovered;

(C) The reasons why the requested information is discoverable;

(D) Evidence that a reasonable and good faith attempt to contact the noncomplying party for an informal resolution of the issue has been made; and

(E) To the extent known by the moving party, the measures for the noncomplying party's refusal to provide the requested information.

(2) The motion shall be filed within 15 days after the date the requested information was to be made available for inspection and copying or the date a deposition was scheduled to take place and served upon the party who has failed or refused to provide discovery.

(3) The hearing on the motion to compel discovery shall be held within 15 days after the motion is filed, or a later time that the hearing officer may on his or her own motion for good cause determine. The party who has refused or failed to provide discovery shall have the right to serve and file a written answer or other response which shall be due at the hearing office and personally served on all parties at least three days prior to the date set for hearing.

(4) Where the matter sought to be discovered is under the custody or control of the party who has refused or failed to provide discovery and that party asserts that the matter is not a discoverable matter under this section, or is privileged against disclosure, the hearing officer may order that the party in custody lodge with the hearing office the matters identified in subdivision (b) of section 915 of the Evidence Code and the hearing officer shall examine the matters in accordance with those provisions.

(5) The hearing officer shall decide the case on the matters examined in a closed meeting, the papers filed by the parties, and such oral argument and additional evidence as the hearing officer may allow.

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(6) Unless otherwise stipulated by the parties, the hearing officer shall no later than 15 days after the hearing make its order denying or granting the motion. The order shall be in writing setting forth the matters the moving party is entitled to discover. The hearing office shall serve a copy of the order by mail upon the parties. Where the order grants the motion in whole, or in part, the order shall not become effective until ten days after the date the order is served. Where the order denies relief to the moving party, the order shall be effective on the date it is served.

(7) If after receipt of an order directing compliance with the provisions of these rules regarding discovery, a party fails, without good cause, to comply with the order, the hearing officer may draw adverse inferences against that party and may prevent that party from introducing any evidence that had been requested and not produced during discovery into the administrative record.

NOTE: Authority cited: Sections 39600, 39601, 43028 and 43031(a), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43028 and 43031(a), Health and Safety Code; Sections 11189 and 11507.6, Government Code; and Section 915(b), Evidence Code.

REFERENCE