Service Date: March 29, 2024

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. MURREY'S DISPOSAL COMPANY, Respondent.	DOCKET TG-230778 ORDER 04 GRANTING COMMISSION STAFF'S MOTION FOR LEAVE TO AMEND STAFF'S MOTION FOR A SPECIAL PROTECTIVE ORDER; GRANTING COMMISSION STAFF'S MOTION FOR A SPECIAL PROTECTIVE ORDER; BENCH REQUESTS 1-3

BACKGROUND

1 On December 21, 2023, the Washington Utilities and Transportation Commission (Commission) suspended this matter, which concerns Murrey's Disposal Company's (Murrey's or Company) most recent rate case, pending an investigation into whether the filed rates were fair, just, reasonable, and sufficient.

2 On February 5, 2024, the Commission issued Order 02, which authorized the use of discovery pursuant to the Commission's rules.[1]

3 On March 4, 2024, the Company served Commission staff (Staff) with Data Requests No. 1-8. Specifically, these requests are for (1) records related to the Commission's internal practices (including severance, meal expenses, and handling of temporary staffing), and (2) records published by the Commission, such as its decisions.[2]

4 Following discussions between opposing counsel, on March 12, 2024, Staff filed a Motion for a Special Protective Order regarding Murrey's Data Requests 1, 2, 3, 4, 7(a), 7(b), and 8 to Staff.

5 On March 14, 2024, Staff filed a Motion for Leave to Amend Staff's Motion for a Special Protective Order, along with a copy of the Amended Motion for a Special Protective

[1] Prehearing Conference Order 2 ¶ 4.

[2] March 12, 2024, Declaration of Jeff Roberson, Attachment A.

Order Clarification. Staff argues that it should not be made to conduct opposing party's legal research for them, and that discovery should be limited to seek admissible evidence or be reasonably calculated to lead to admissible evidence.[3] Staff posits that information concerning the Commission's internal practices is not relevant to the decision making process regarding a private entity, which the Commission regulates.[4]

6 Murrey's responded to this motion on March 21, 2024. In its response, Murrey's withdrew requests 2 and 4. Murrey's response offered a strongly worded rejection of Staff's interpretation of the governing legal principles – asserting that the Company was entitled to the requested information and that discovery requests need only be deemed relevant by the propounding party.[5] Further, Murrey's response invokes the Public Records Act (PRA).[6]

DISCUSSION

7 This Order will address and render a decision on the following requests and issues: (1) Staff's Motion for Amended Motion, (2) discovery requests for publicly published records, (3) the inapplicability of the Public Records Act to this proceeding, and (4) the relevance of the data requests to the present action.

Motion for Amended Motion

8 Under Washington Administrative Code (WAC) 480-07-395(5), "[t]he commission may allow amendments to pleadings, motions, or other documents on such terms as promote fair and just results."

9 Staff wishes to amend its motion in order to raise additional, timely objections. Staff represents that the proposed additions do not constitute wholly new arguments or objections. Instead, the amendment extends existing arguments so as to apply to additional data requests which were also identified in the original motion.

10 Murrey's has not objected. The Commission finds that Staff's request is reasonable and does not prejudice any party. Staff's motion will be granted.

Requesting Opposing Party to Compile Records Readily Accessible to Proponent

11 Staff claims that it should not be made to expend resources gathering documents which are equally accessible to the propounding party – as that would be burdensome and amount to conducting "company's legal research for it."[7] Specifically, Staff objects to

[3] Staff's Amended Motion for Special Protective Order ¶ 15.

[4] Staff's Amended Motion for Special Protective Order ¶¶ 18-21.

[5] Murray's Response to Motion for Special Protective Order ¶ 2.

[6] We do not interpret the motion as a records request under the PRA. *See* WAC 480-04-090.

[7] Staff's Amended Motion for Special Protective Order ¶ 23.

those portions of requests that ask for records publicly published in the Commission's dockets – as they are equally accessible to both parties.

12 Murrey's response cites to the plain language of WAC 480-07-400(3), to make the argument that "if the burden is felt equally . . . then the discovery rules still require Staff to produce those records."[8]

13 Murrey's has acknowledged the similarity of the federal civil rules to Washington's and has noted the persuasiveness of federal decisions discussing Federal Rule of Civil Procedure 26.[9]

14 A local federal district court has recently reiterated, "[t]o the extent Plaintiff seeks production of publicly available documents already in her possession, the Court will not, and cannot, compel production of these documents." *Neal v. City of Bainbridge Island*, 2023 U.S. Dist. LEXIS 31203, *10.[10]

15 Murrey's does not seem to dispute that it could find this information.[11] It denies that it is equally situated to search for publicly available information.[12]

16 The Commission agrees with Staff and finds that Murrey's is equally capable of conducting keyword searches of accessible internet databases[13] for decisions made by public utility commissions – both in and out of state. Moreover, the Commission has every confidence that Murrey's is capable of filtering those results by relevant year.

17 Once it has performed this baseline research of readily available records, Murrey's could then issue targeted discovery, so as to obtain any not-already-published records which are relevant to this litigation.

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[8] Murray's Response to Motion for Special Protective Order ¶ 18.

[9] *Id.* at ¶ 16.

[10] *Id.* ("*Valenzuela v. Smith*, Case No. S 04-0900, 2006 U.S. Dist. LEXIS 6078, 2006 WL 403842 at *2 (E.D.Cal. Feb. 16, 2006) ("Defendants ... will not be compelled to produce documents that are equally available to plaintiff."); *Baum v. Village of Chittenango*, 218 F.R.D. 36, 40-41 (N.D.N.Y.2003) ("[C]ompelling discovery from another is unnecessary when the documents sought are equally accessible to all."); *Bleecker v. Standard Fire Ins. Co*., 130 F.Supp.2d 726, 738 (E.D.N.C.2000) ("Discovery is not required when documents are in the possession of or are readily obtainable by the party seeking a motion to compel."); *S.E.C. v. Samuel H. Sloan & Co*., 369 F.Supp. 994, 995-996 (S.D.N.Y.1973) ("It is well established that discovery need not be required of documents of public record which are equally accessible to all parties.")").

[11] MURRAYS RESPONSE, *supra* note 5, at ¶ 15-18.

[12] *Id.* at 15, 18.

[13] As Murray's is not proceeding *pro se*, the Commission will not assume it lacks access to the types of legal research databases regularly utilized by legal professionals.

18 We thus find that requests 1(e), 2, 3(c), 7(a), 7(b), and 8(c) are unnecessarily burdensome, and therefore Staff should be excused from responding further.

The Inapplicability of the Public Record Act in This Matter

19 Murrey's correctly states in its brief, that the Company is not prohibited by statute from making similar requests under the Public Records Act (PRA), Revised Code of Washington (RCW) Ch. 42.56.[14] This is irrelevant to the issue of Staff's responsibility to respond to data requests in the adjudicative setting.

20 The Commission's internal policies place the burden of administrating the PRA on the Administrative Law Division. Therefore, we find it appropriate to clarify some of the principles of open disclosure law alluded to in the Response. Moreover, we note that the parties may consider the below comparative analysis when evaluating any arguments left unresolved in the below discussion of "Relevance," *infra* ¶ 40.

21 The connection between the two processes is superficial and not legal. They both deal with the production of records, and the application of privilege, but are entirely different legal processes,[15] which (among other things) have differing (1) time limitations, (2) scope, (3) penalties, and (4) remedies.

22 In a public records request, there are few absolute deadlines, and broad requests can take years to process.[16] This proceeding has a timeline – with a clear end date.[17]

23 Requests under the Public Records Act have no meaningful limitation in scope.[18] It is true, that local courts, like the federal courts, have discouraged requests for legal research (as some of the requests at issue here present as), but generally speaking overbroadness is not a basis to reject public records requests.[19]

24 Instead, the system relies on the good faith of requesters to engage in a clarification process, that narrows the universe of responsive records (the size of which is relevant to the human beings who are obligated to individually review and cross-check each record against dozens of laws, rules, regulations, and governing agreements). *See supra* ¶¶16-17.

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[14] MURRAYS RESPONSE, *supra* note 5, at ¶ 19.

[15] *Compare* RCW Ch. 42.56 *with* RCW 80.01.040.

[16] *See* WAC 44-14-04003(3) ("In general, an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an 'excessive interference' with the agency's 'other essential functions.' RCW 42.56.100. The agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others.").

[17] Prehearing Conference Order 2, Attachment A.

[18] *See* WAC 44-14-04002.

[19] *See* WAC 44-14-04002; *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409 (act "does not require agencies to research or explain public records, but only to make those records accessible to the public").

This process is, of course, voluntary and hypothetically there is little to stop a litigant from casting broad record requests to a government agency with which it is litigating.

25 On the other hand, requests in discovery are limited to either admissible evidence, or requests reasonably calculated to lead to admissible evidence.[20] Where a Public Records Officer must respond to nearly any request it receives, from anyone in the world, about any topic – the presiding officer, as discussed below, has discretion to limit discovery between the parties to the matter at hand.[21]

26 Agencies which wrongly withhold records subject to the PRA may face hefty per page, per day financial penalties.[22] Here, a party which wastes the Commission's adjudicative resources on low merit arguments, could hypothetically be made to remove the legal bills for such imprudent actions from the rate base.

27 PRA decisions are reviewed by a superior court de novo.[23] In contrast, discovery decisions in administrative proceedings are reviewed under a more deferential standard.[24]

28 In short, they are separate processes. That a PRA request can be more burdensome than a discovery request does not mean that a discovery request is not burdensome.

29 Staff has stated that all responsive records would appear in documents that are available online.[25]

30 The Commission finds that Murrey's claim that Staff's motion "Flies in the face of the public records act" to be incorrect as a matter of law.[26]

Relevance

31 "[T]he spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this

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[20] WAC 480-07-400(3).

[21] RCW 34.05.449. WAC 480-07-400(3).

[22] RCW 42.56.550(4).

[23] RCW 42.56.550(3).

[24] RCW 34.05.570(3).

[25] STAFF'S MOTION FOR PROTECTIVE ORDER, *supra* note 1, at ¶ 24.; *see also* RCW 42.56.520; S.B. 6367, 61st Leg., Reg. Sess. (Wa. 2010). ("When an agency has made records available on its website, members of the public with computer access should be encouraged to preserve taxpayer resources by accessing those records online.").

[26] MURRAYS RESPONSE, *supra* note 5, at ¶ 19.

results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake."[27]

32 "Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay . . .. As a result, it has been said that the rules have 'not infrequently [been] exploited to the disadvantage of justice.' *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring). These practices impose costs on an already overburdened system and impede the fundamental goal of the 'just, speedy, and inexpensive determination of every action.' Fed.R.Civ.P. 1."[28]

33 "The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action."[29]

34 The question presented by this action is the prudency of the tariffs filed by a company regulated under RCW Ch. 81.77.[30]

35 The Company bears the burden.[31]

36 Discovery requests that are relevant to this action are either for (1) admissible evidence of prudence, or (2) reasonably calculated to lead to admissible evidence of prudence.

37 The prudency determination is focused on what the Company knew or reasonably should have known, at the time of its decision making. *But see* Murrey's Response at ¶ 9("will assist Murrey's in justifying these expenses . . .").[32]

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[27] FED. R. CIV. P. 26 note – 1983 Amendment.

[28] *Id.*

[29] *Id.*

[30] STAFF'S MOTION FOR PROTECTIVE ORDER, *supra* note 3, at ¶ 21 ("*Wash. Utils. & Transp. Comm'n v. Puget Sound Pilots,* Docket TP-190976, Order 09, 9-11 ¶¶ 36, 38-39 (Nov. 25, 2020); *e.g. Wash. Utils. & Transp. Comm'n v. Waste Control, Inc., Dockets* TG-140560, Order 12, June 8, 2015); *King County Dep't of Pub. Works, Solid Waste Division v. Seattle Disposal Co.,* Docket TG-940411, Third Supplemental Order (Sept. 14, 1994).").

[31] MURRAYS RESPONSE, *supra* note 5, at ¶ 2.

[32] Staff's Amended Motion for Special Protection Order ¶ 21 (*Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Inc.,* Docket UE-031725, Order 14, ¶ 65 (May 13, 2004).)

38 The Company has made several, strongly worded, *ipse dixit* claims about the nature of these requests in its response, which all beg the question of relevance.

- "Murrey's accordingly is entitled to cast a broad net in surveying the frequency and breadth of employer practices in that regard in both the private and public sector." (emphasis added).[33]
- "[I]t is appropriate for Murrey's to seek to determine whether that is a practice used by its own employer [sic]." (emphasis added).[34]
- "Murrey's is entitled to analyze whether the Commission incurs similar expenses." (emphasis added).[35]
- The Commission's, "expense policy likely faces a *higher* standard than that of Murrey's."[36]

39 The presiding officer has reviewed the cases cited by Murrey's in its response and does not find them to support or form a legal basis for the legal conclusions listed in the preceding paragraph.

40 Murrey's has not adequately explained how employment or financial practices of an independent government agency would relate to reviewing the prudence of the tariffs filed by a privately owned corporate entity.

41 Requests 1, 3, and 8 are not relevant, and therefore Staff shall be excused from responding further at this time.

FINDINGS AND CONCLUSIONS

42 (1) The Commission finds good cause to grant Staff's motion for leave to amend. Ensuring all relevant arguments are fully adjudicated is vital to the just disposition of the discovery dispute at issue.

43 (2) The Commission finds at this time that requests 1, 3, and 8 are not relevant[37] to this proceeding, and therefore Staff shall be excused from responding further.

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[33] Murrey's Response, *supra* note 5 at ¶ 4.

[34] *Id.*

[35] *Id.* at ¶ 3.

[36] *Id.* at ¶ 13.

[37] *Supra*, ¶¶ 31-41.

44 (3) The Commission finds that requests 1(e), 2, 3(c), 7(a), 7(b), and 8(c) are unnecessarily burdensome,[38] and therefore Staff shall be excused from responding further.

ORDER

THE COMMISSION ORDERS:

45 **(1) Commission Staff's Motion for Leave to Amend the Motion for a Special Protective Order is granted.**

46 **(2) Commission Staff's Motion for a Special Protective Order is granted – Staff is relieved from responding to data requests 1, 2, 3, 7(a), 7(b), and 8.**

DATED at Lacey, Washington, and effective March 29, 2024.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/ *Bijan Hughes*
BIJAN HUGHES
Administrative Law Judge

cc: All Parties

[38] *Supra*, ¶¶ 11-18.