



STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION
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MEMORANDUM

January 25, 2017

TO: David W. Danner, Chairman, and Philip B. Jones, and Ann E. Rendahl,
Commissioners

FROM: Greg Kopta, Director, Administrative Law Division

SUBJECT: Docket A-130355, Analysis of Staff Proposed Revisions to WAC 480-07-160
Governing Information Designated as Confidential

The Commission has proposed revisions to Parts I, II, and IIIA of its procedural rules, WAC Chapter 480-07. On January 13, 2017, the Commission received comments on those proposals, and several stakeholders expressed similar concerns about the proposed revisions to WAC 480-07-160, the rule governing information designated as confidential. Specifically, these stakeholders object to the revised definition of “confidential information” and to the procedures the Commission follows if a party to a Commission adjudication challenges a confidentiality designation. This memorandum responds to those concerns and describes the basis of Staff’s recommendations.

Background

The Public Records Act (PRA), RCW 42.56, governs access to public records and provides, “Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of ... this chapter, or other statute which exempts or prohibits disclosure of specific information or records.”¹ Among those specific exemptions is “[r]ecords filed with the utilities and transportation commission or attorney general under RCW 80.04.095 or 81.77.210 that a court

¹ RCW 42.56.070(1).

has determined are confidential under RCW 80.04.095 or 81.77.210.”² Those statutes are virtually identical and state as follows:

Records, subject to chapter 42.56 RCW, filed with the commission or the attorney general from any person which contain valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer-specific usage and network configuration and design information, shall not be subject to inspection or copying under chapter 42.56 RCW: (1) Until notice to the person or persons directly affected has been given; and (2) if, within ten days of the notice, the person has obtained a superior court order protecting the records as confidential. The court shall determine that the records are confidential and not subject to inspection and copying if disclosure would result in private loss, including an unfair competitive disadvantage. When providing information to the commission or the attorney general, a person shall designate which records or portions of records contain valuable commercial information. Nothing in this section shall prevent the use of protective orders by the commission governing disclosure of proprietary or confidential information in contested proceedings.³

This statutory scheme is unique under Washington law. The statutes authorize a person to designate information as a utility’s or solid waste collection company’s “valuable commercial information” when providing documents to the Commission that include such information. The Commission may not disclose the designated information under the PRA until the Commission provides 10 days’ notice to affected persons to obtain a court order prohibiting such disclosure. A court, not the Commission, determines whether the designated information is exempt from disclosure under the PRA.

WAC 480-07-160(2) – Definition of Information Designated as Confidential

The proposed revisions to WAC 480-07-160 would limit its applicability to information designated as confidential pursuant to RCW 80.04.095 or RCW 81.77.210. Several stakeholders disagree with these revisions and argue that this limitation would fail to protect other confidential information, such as information protected under federal law or “addresses, telephone numbers, electronic contact information, and customer-specific utility usage and billing information in increments less than a billing cycle of the customers of a public utility contained in the records or lists held by the public utility of which they are customers.”⁴ These arguments, however, confuse the term “confidential” as used in the statute and the rule with “exempt” under the PRA.

The customer-specific and other information the stakeholders describe is exempt from public disclosure. The Commission has the obligation to identify and redact or otherwise withhold that information when producing documents that are responsive to a request for public records. The

² RCW 42.56.330(1).

³ RCW 80.04.095; *accord* RCW 81.77.210.

⁴ RCW 42.56.330(2).

Commission's decision is subject to judicial review, but the Commission determines whether the information is exempt under the PRA.

Information designated as confidential pursuant to RCW 80.04.095 or RCW 81.77.210 is treated differently. The utility or solid waste collection company, not the Commission, identifies that information, and it is not exempt from disclosure unless and until a court makes that determination. The Commission precludes public access to the information in the meantime, but the Commission cannot lawfully refuse to disclose it upon request in the absence of a court order.

The proposed revisions to WAC 480-07-160 clarify the process for how the Commission will handle information designated as confidential pursuant to RCW 80.04.095 or RCW 81.77.210. That process does not apply to customers' personal, financial, and contact information and other information that is exempt from disclosure under the PRA. Including such information in the definition of "confidential information" in WAC 480-07-160 actually provides *less* protection than the law requires. The Commission should withhold exempt information from disclosure without further action, not notify the provider of the request and require a court order. Subjecting exempt information to the process in WAC 480-07-160 unnecessarily exposes the Commission to liability under the PRA for disclosing exempt information under the mistaken belief that a court order is required to prohibit such disclosure.

Staff shares the stakeholder concerns that the Commission needs to identify and protect from disclosure all customer-specific and other exempt information. The Commission currently undertakes to do so as a matter of practice, rather than rule, but Staff would be willing to work with interested persons to develop and codify a more formal process as part of this rulemaking. Staff, however, recommends that the Commission not include any exempt information within the definition of "confidential information" in WAC 480-07-160.

WAC 480-07-160(5) – Challenges to a Designation of Confidentiality in Adjudications

Proposed revisions to WAC 480-07-160 would eliminate the current procedure of having the Commission resolve party challenges to a designation of confidentiality in an adjudication. The revised subsection would require the Commission to follow the same procedures it employs in response to a request for public records made outside the context of an adjudication. Several stakeholders contend that a challenge to a designation of confidentiality in an adjudication is not a request for public records under the PRA, and that it would be inappropriate to require a company to seek a court order prohibiting public disclosure of information in response to a request for that information in an adjudication.

Staff disagrees. The PRA does not define "request," but consistent with their broad interpretation of the Act, courts have construed the term to require only fair notice to the government agency that a person seeks a public record.⁵ A challenge to a confidentiality designation effectively

⁵ *E.g.*, *Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000).

provides notice to the Commission that a party seeks public access to a public record that includes information a company claims is confidential under RCW 80.04.095 or RCW 81.77.210.⁶ Once the Commission receives such notice, the PRA and those statutes require the Commission to disclose that information after ten days unless a court prohibits such disclosure. The current procedure requiring Commission resolution of the dispute is inconsistent with this requirement and poses an unacceptable risk that a court would assess fines and fees on the Commission for violations of the PRA in failing to disclose requested information within the requisite time period.

Puget Sound Energy asserts that “[a] public record request is limited to requests to a **public agency**” and thus is inapplicable to challenges to confidentiality designations in Commission adjudications.⁷ Every document a company provides to the Commission, its employees, or its counsel is a public record. A challenge to the confidential designation in any such document is effectively a request for public records, regardless of whether that document has been provided in the context of an adjudication. A document exchanged between parties in an adjudication other than Staff and Public Counsel (*e.g.*, through discovery) may not be a public record, but it would become a public record as soon as one of those parties submits it to the Commission, including as part of a challenge to its confidentiality. Any challenge to the designation of information as confidential is a request to the Commission as a public agency for public access to that information and thus is within the purview of the PRA.

Northwest Natural Gas Company quotes the last sentence of RCW 80.04.095, which preserves Commission authority to enter protective orders, as a legislative recognition that the PRA “is separate and distinct from the information exchange between parties to an adjudicatory proceeding.”⁸ This provision, however, should be interpreted in the context of the statute of which it is a part. As such, it merely preserves the Commission’s authority to enter protective orders,⁹ specifically to allow persons other than Commission and Attorney General personnel to have access to information designated as confidential without violating the statute. That authority cannot reasonable be construed to supersede the requirements of the PRA.

The concerned stakeholders nevertheless argue that the Commission is in the best position to determine whether a designation of confidentiality complies with Commission rules and the applicable protective order. Commission rules and protective orders, however, govern the procedural aspects of confidentiality designations. Challenges to such designations are substantive, alleging that the information is not, in fact, confidential within the meaning of the statute. The Commission could render an advisory opinion on that issue, but only the courts can determine whether “disclosure would result in private loss, including an unfair competitive

⁶ Even if a party already has access to the information pursuant to a Commission protective order, a challenge to the confidentiality designation is a request for *public* disclosure of that information.

⁷ PSE Sixth Set of Comments at 1 (Jan. 13, 2017) (emphasis in original).

⁸ Northwest Natural Gas Company Comments at 3 (Jan. 13, 2017).

⁹ RCW 34.05.446(1).

disadvantage.”¹⁰ Staff recommends that the Commission render no such opinion in light of the risk that a court could find the Commission violated the PRA by delaying production of requested public records.

Staff nevertheless shares the stakeholders’ concerns that as applied to Commission adjudications, the process required under RCW 80.04.095 and RCW 81.77.210 is disruptive and burdensome. Staff notes, however, that challenges to confidentiality designations are rare, and the Commission expects parties be cooperative and engage in good faith efforts to resolve such disputes informally before bringing them to the Commission. Staff has proposed language in WAC 480-07-160(5) to maximize the parties’ ability to resolve these disputes, including providing for the challenger to waive the 10 day requirement to facilitate negotiations. The Commission’s primary obligation, however, is to comply with the PRA, and Staff recommends the Commission adopt the proposed revisions to do just that.

¹⁰ RCW 80.04.095; *accord* RCW 81.77.210.