



WASHINGTON REFUSE & RECYCLING ASSOCIATION

September 29, 2017

Mr. Steve King
Executive Director
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250

Re: Comments: Docket A-130355 Draft Revised WAC 480-07-160

WRRA would like to thank the Commission and Commission staff for soliciting stakeholder feedback on this portion of the rule and the work done to balance stakeholder and Commission concerns. Overall, the rule proposal appears to strike a balance between issues raised by the Commission based on recent Public Records Act cases and stakeholder concerns expressed in comments and at the January, 2017 workshop. Particularly, the rule proposal does a much better job of distinguishing confidential information from exempt information than the current rules and more clearly describes how each classification of information will be treated by the Commission.

WRRA offers the following comments related to both the current rule proposal, and recent trends regarding the application of confidentiality under RCW 81.77.210:

Proposed WAC 480-07-160 raises procedural questions and has some potential for abuse, particularly regarding solid waste applicants:

WRRA works with a number of practitioners who all have expressed some question as to how the new rule would work in practice where confidentiality is subject to challenge and no protective order is in place for the Commission to make an initial determination. Presumably, the proceedings would be suspended or parties would attempt a work around on the issue in question while the matter is addressed in superior court. However, WRRA would appreciate more specific guidance as to how the Commission envisions a matter proceeding under these circumstances.

The procedures outlined in the rule proposal also unfortunately appear to facilitate abuse or “strategic delays” in situations where the Commission does not make an initial determination on confidentiality and parties must resolve the matter in superior court. In solid waste collection, often certificate applicants also have a long history of enforcement and noncompliance with Commission statutes and regulations. In practice, most such applications are withdrawn at the last minute after regulated companies have made significant investments in representation to research, evaluate, and formally protest an application. Based on this history, it seems likely that, in the future, an unscrupulous applicant might use the change in Commission rules to delay a case and proceed to superior court, increasing time and expense particularly for the regulated companies.

WRRRA well understands the Commission's rationale in the proposed changes, but also notes the challenges the proposed rules pose in solid waste certificate application settings, challenges which may not be present in other industries regulated by the Commission.

RCW 81.77.210 confidentiality should not apply to applicants:

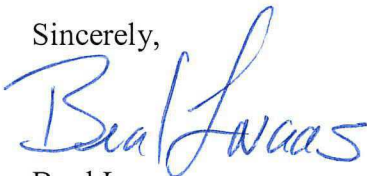
As you recall, WRRRA actively supported this legislation which resulted in the enactment of 81.77.210 in 2014. The legislation was intended to allow regulated solid waste collection companies to designate certain valuable commercial information as confidential in filings with the agency.

Since that time, RCW 81.77.210 appears to have been applied beyond the scope intended by the legislature by granting confidentiality to any applicant. This practice was not anticipated in the drafting of the legislation that resulted in 81.77.210, nor is it present in the legislative history and verbiage of the statute. RCW 81.77.020 reads "[r]ecords, subject to chapter 42.56 RCW, filed with the commission or the attorney general from any person that contain valuable commercial information..." The intended meaning of "person" for 81.77.210 is any person or entity already regulated under 81.77. The legislative intent of this bill is clear and WRRRA can provide that legislative history if necessary. A portion of this history is even present in this rulemaking docket in comments opposing confidentiality in 81.77 by entities which have invoked the same confidentiality protection in recent certificate applications (See Comments on behalf of the Construction Demolition Recycling Association (CDRA) dated 10/31/13). The parties cannot have it both ways.

Extending 81.77.210 confidentiality to mere applicants lacking permanent certificate authority is contrary to the intent of the law and poses unintended difficulties for regulated companies in contesting an application. Regulated companies are unable to conduct an objective review of applicant fitness without access to relevant information. WRRRA understands that, in the past, Commission staff has signaled the fitness inquiry is a role primarily performed by Commission staff. However, with solid waste applications, the recent trend involves a number of applicants with long enforcement histories before the Commission. Particularly in these circumstances, it is necessary for a regulated company intervenor or protestant, as well as staff, to have a comprehensive view of an applicant's current financial and compliance record in order to properly evaluate or present its case in an application.

The current confidentiality rule update is the ideal place to resolve this apparent misapplication of the original bill and we strongly urge the Commission to adopt a rule consistent with the true intent of the law.

Sincerely,



Brad Lovaas
Executive Director