

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

Rulemaking to Consider Possible Corrections
and Changes in Rules in WAC 480-07,
Relating to Procedural Rules.

DOCKET A-130355

TENTH COMMENTS OF PUBLIC COUNSEL

July 11, 2018

I. INTRODUCTION

1. Pursuant to the Commission's Notice of Opportunity to Submit Written Comments, dated June 8, 2018, Public Counsel submits the following comments regarding the draft procedural rules for WAC 480-07-160 Confidential Information. Public Counsel supports the Commission's efforts to revise WAC 480-07-160 to clarify the rules governing information that is exempt from disclosure under the Public Records Act (PRA), Revised Code of Washington (RCW) section 42.56. Public Counsel, however, has concerns with the language in proposed rule WAC 480-07-160(3) and offers the following comments and recommended modification.

II. PROPOSED WAC 480-07-160(3) WAIVER

2. The existing language in WAC 480-07-160(4) properly treats a failure to designate confidential material as a waiver of confidentiality and states, "[f]ailure to properly designate information as confidential also may result in the information not being treated as confidential." Proposed rule 480-07-160(3) Waiver, which would replace this language, expands this concept to information that would be considered exempt from public disclosure under the PRA and states, "[f]ailure to properly designate information . . . may result in disclosure of information in

response to a request for public records or in discovery.” This language improperly shifts the burden of meeting the requirements of the PRA to parties practicing before the Commission.

3. Under Washington law, the entities responsible for complying with the requirements of the PRA are government agencies. The PRA states:

4. *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 subsection (8) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record...*¹

5. The statute places the duty to comply with the disclosure requirements as well as the duty to maintain the confidentiality of exempted material squarely with the Commission, not with parties to proceedings before the Commission. Parties are obligated to provide the Commission with adequate and necessary information upon which the Commission can fulfill its regulatory duties. If a party fails to designate material as “exempt” as required under the proposed rules, the Commission must still protect material from disclosure as required by RCW 42.56.330² and other sections of RCW 42.56.

6. Nothing in the PRA suggests that parties that practice before a government agency are responsible for meeting the agency’s obligations under the PRA. While parties have related responsibilities to clearly designate and protect information deemed confidential under RCW

¹ RCW 42.56.070(1) (emphasis added); *see also* RCW 42.56.010(1),

“Agency” includes all state agencies and all local agencies. “State agency” includes every state office, department, division, bureau, board, commission, or other state agency. “Local agency” includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

² RCW 42.56.330 lists types of information that are exempt from disclosure specifically relating to public utilities and transportation.

80.04.095, RCW 81.77.210, and Commission protective orders, these responsibilities are distinct from and do not supersede the agency's own obligation to maintain the confidentiality of material exempt from public disclosure requests. Similarly, creating a new requirement for parties to designate material as "exempt" does not relieve the Commission of its statutory requirements. Public Counsel understands the Commission proposes these draft rules in an attempt to clarify when such exempt materials exist and is not intentionally shifting the responsibility of complying with the PRA. Public Counsel views this result as an unintended consequence of the proposed rule language.

7. The language of proposed rule 480-07-160(3) also suggests that the privacy protections afforded by the exemptions to the PRA are waivable by parties. The draft rules change the title of this section to "Waiver" and broadens the potential waiver of confidentiality in the existing rule to state that "failure to properly designate information . . . may result in disclosure of the information in response to a request for public records or discovery." Public Counsel recognizes that this modification may have been intended to capture the expanded scope of the rules that now specifically discuss exemptions to the PRA, but this language is improper because it suggests that the privacy protections inherent in the exemptions to the PRA are waivable by parties and the Commission.

8. First, while failure to properly designate information as confidential or exempt could result in the information being disclosed in a public manner, the proposed language fails to acknowledge that the ultimate burden of complying with a PRA request, as well as maintaining the statute's exemptions, falls on the Commission. Parties do not have the right or ability to waive the protections provided by the exemptions to the PRA. Second, the duty to maintain the confidentiality of exempt information under the PRA cannot be waived by the Commission

whether or not a party adheres to the newly proposed requirements to designate information as “exempt.”

9. For the above stated reasons, Public Counsel recommends that the proposed language be modified as follows.


10. **(3) Waiver.** A provider may claim the protection of this rule only by strict compliance with its requirements. The commission may refuse to accept for filing any document that fails to comply with these requirements. Failure to properly designate information as required in this rule, WAC 480-07-420, or a commission protective order may result in ~~disclosure of the information in response to a request for public records or in discovery~~ not being treated as confidential.

III. CONCLUSION

11. Public Counsel appreciates the opportunity to submit these comments and the continued efforts to revise the Commission’s procedural rules. We look forward to reading the comments of other stakeholders and participating in workshops, if necessary, on these proposed rules.

Dated this 11st day of July, 2018.

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