

HOUSE BILL REPORT

SB 6141

As Reported by House Committee On: Government Operations & Elections

Title: An act relating to confidentiality of certain records filed with the utilities and transportation commission or the attorney general.

Brief Description: Concerning the confidentiality of certain records filed with the utilities and transportation commission or the attorney general.

Sponsors: Senators Roach, Hasegawa, Fain, Hobbs, Hatfield, Honeyford and Tom.

Brief History:

Committee Activity:

Government Operations & Elections: 2/25/14, 2/26/14 [DPA].

Brief Summary of Bill (As Amended by Committee)

- Provides that records filed by a solid waste collection company with the Attorney General's Office or the Utilities Transportation Commission containing valuable commercial information are not subject to public disclosure until notice has been given to the person or persons directly affected by the information.
- Allows a person directly affected by the disclosure of valuable commercial solid waste collection company records, within 10 days of receiving notice, to request a superior court order protecting the records as confidential.
- Authorizes a court to issue an order exempting the valuable commercial records from public disclosure, if the court determines that disclosure would result in an unfair competitive disadvantage and is not necessary for further public review and comment on the appropriate allocation of costs and revenues.

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

Majority Report: Do pass as amended. Signed by 11 members: Representatives S. Hunt, Chair; Bergquist, Vice Chair; Taylor, Ranking Minority Member; Young, Assistant Ranking

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Minority Member; Carlyle, Christian, Kretz, Manweller, Orwall, Robinson and Van De Wege.

Staff: Jasmine Vasavada (786-7301).

Background:

Public Records Act Exemptions for Certain Utility Records.

The Public Records Act (PRA) requires that all state and local government agencies make all public records available for public inspection and copying unless they fall within a statutory exemption. A statutory exemption exists for certain records filed with the Utilities and Transportation Commission (UTC) or the Attorney General's Office by privately-owned utilities providing electric, gas, water, and telecommunications services: records containing valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer-specific usage information. Such records are exempt from disclosure until notice to the public utility has been given and if, within 10 days of such notice, the utility obtains a court order protecting the records as confidential. The court must 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.

Solid Waste Collection Company Regulation.

The rates, services, and practices of transportation companies, including certain solid waste collection companies, are also regulated by the UTC. The UTC is a three-member commission that has broad authority to regulate in the public interest. The UTC regulates the rates of all solid waste collection companies operating in the unincorporated area of a county, and some collection companies operating in cities and towns. The UTC also regulates curbside recycling by residential customers. The UTC does not regulate waste collection by a municipality or commercial recycling.

Regulated solid waste collection companies have exclusive authority to operate in a service area and may recover their costs through rates. Some regulated solid waste collection companies also engage in other business activities, such as commercial recycling, that are not regulated by the UTC. Regulated companies are only authorized to recover in their rates the costs of regulated activities. To ensure that the regulated companies are not cross-subsidizing (recovering through regulated rates the costs or expenses from non-regulated activities or affiliate interests), the UTC obtains and inspects the company's non-regulated activity records, as well as records of affiliated interests, which are companies with ownership interests in the regulated companies. Regulated companies file reports of the affiliated contracts and interest relationships annually and also provide information to the UTC about revenues and costs of affiliated and non-regulated transactions when there is a rate case.

Summary of Amended Bill:

Solid waste collection companies are provided notice if a requestor seeks disclosure of solid waste collection company records, filed with the Attorney General's Office or the UTC, containing valuable commercial information. The solid waste collection company records

are exempt from disclosure under the PRA until notice has been given to the company and if, within 10 days of such notice, the solid waste collection company obtains a court order protecting the records as confidential. The court must issue the order preventing public disclosure if the court determines that disclosure would result in private loss, including an unfair competitive disadvantage, and the court determines that the records are not necessary for further public review and comment on the appropriate allocation of costs and revenues.

Amended Bill Compared to Original Bill:

The striking amendment changes the test a court must use in determining whether solid waste collection company records containing valuable commercial information are confidential and not subject to disclosure. The striking amendment provides that in order to determine that records are not subject to disclosure, the court must determine the records are not necessary for further public review and comment on the appropriate allocation of costs and revenues, in addition to determining that disclosure is likely to result in private loss.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Solid waste collection companies need to file information with the UTC on regulated entities, as well as on those who are not regulated. It is appropriate for the UTC to get these records, in order to properly regulate recovery of costs through rates. This bill creates a process, which has been in place since 1997 for all other utilities regulated by the UTC, to allow notification of a company upon receipt of a public records request. The solid waste collection company can go to court at its own expense to keep the records confidential. The records about the regulated entities remain in the public domain. This bill seeks to protect proprietary documents that should not be subject to public disclosure. The company will have to make a case to the judge and live with the judge's determination. The process is fair and provides the same protection that other utilities have. There is an amendment that simply adds clarifying language that these documents exempt from disclosure must be documents not necessary for public review.

Speaking on behalf of a business that grew from a one-man, one-truck operation to a larger business that addresses shredding, storage, and other enterprises, this bill creates a process that is identical to the same process used by other utilities that are regulated by the UTC. Some solid waste collection companies are family-run businesses that have been in operation for more than three decades. Such businesses are very dependent on passage of this bill to have access to a process to protect valuable commercial information from disclosure. This bill has the support of the UTC, the Washington Refuse and Recycling Association, and the Teamsters.

The UTC regulates rates, routes, and services of these companies. The UTC does not regulate commercial recycling, which is a commodity and exempt from our regulation. There is a difference that has been discussed between Title 80 RCW, which governs other public utilities, and Title 81 RCW, which provides for regulation of transportation. For the most part, the UTC is not an economic regulator of transportation companies, but instead is responsible primarily for safety, licensing, and insurance oversight. However, the UTC is responsible for economic regulation of solid waste companies, airporters, private buses, and commercial private ferries. The UTC is not clear about the existence of a different process in Title 80 RCW that is being cited by opponents of the bill. The Office of the Public Counsel and Attorney General's Office often participate in energy utility rate cases, but their statutory authority is not necessarily so limited. Rather, they prioritize their resources. The UTC is subject to the Administrative Procedures Act (APA) and complaints, rate cases, and rulemakings fall under the APA, for both kinds of proceedings. The UTC's Assistant Attorney Generals represent the commission staff in litigation under Title 81 RCW just as they do for Title 80 RCW. This provides a process for commercially sensitive information to be withheld from disclosure. The UTC's job is to ensure rates are fair, just and reasonable, and sufficient. The UTC carefully reviews the data and often asks for more data to ensure that regulated consumers only pay for what they should pay.

What problem is being solved here? There has never been a finding of cross-subsidization. The UTC has been regulating monopolies for more than 100 years. Once this confidentiality process is put in place, those other things will be in play. Protective orders will come into place, but a protective order is not possible without a confidentiality provision. The committee should vote no if it doesn't fundamentally believe that private businesses should have any proprietary information. Last year the Construction Materials Recycling Association filed another public request. The recession is hurting the unregulated companies and there is not as much construction happening, but that is not a reason to pass the bill.

(With concerns) Dick Hempstead was in private practice and represented regulated companies on the utility side in the 1980s and invented this unique exemption to the PRA because the UTC could not afford the legal costs for defending its decisions related to public disclosure. The procedure of going to Superior Court is very expensive, so costs were shifted over onto the very large utility companies, such as Pacific Northwest Bell, which is now CenturyLink. The existing exemption covers all utilities in Title 80 RCW. The proceedings that go on in Title 80 RCW are covered by the Office of Public Counsel, and the Office of Public Counsel has declined to take any position on this bill because it is outside of his ordinary purview. These utility documents are submitted to the court under a protective order, and professionals are allowed to review them to inspect for cross-subsidization, despite their confidentiality. Documents are routinely reviewed through professionals who can dispute cross-subsidization. You can take a regulated company and impute the costs of the affiliated interests who are not regulated onto the regulated company. This is about the ability of non-regulated companies to compete within an open marketplace without competing with unfair subsidies of regulated companies.

(Opposed) This bill will affect our members' ability to compete in the unregulated marketplace. For about five years, through rate case reviews with the UTC and discussions with the auditor's staff, some unregulated companies have been looking at the issue of cross-

subsidization and such companies are not satisfied that the UTC is identifying all relevant information, because the UTC does not understand the industry as well as industry itself does. This bill removes our ability to look at records to know when cross-subsidization is happening. This information allows competitors to find out if regulated equipment is being used in a non-regulated industry. Without this information, competitors will not be able to find out whether a regulated entity that is governed by the state and has a monopoly is hauling a non-regulated container illegally. Other small haulers are also opposed to this.

Proponents say that this bill is extending protections to the garbage industry that are extended to other utilities in the state. Some provisions in Title 80 RCW, governing other utilities, are absent from Title 81 RCW, where transportation companies are regulated. State-run monopolies necessarily fall under a different category of oversight, and the solid waste collection companies should be regulated under Title 80 RCW where there is a fair and equitable process for regulating them. Utilities under Title 80 RCW can send an expert in to review confidential documents, but that process does not exist under Title 81 RCW. Transparency is critical here to ensuring that competition in the free marketplace is protected, just as the valuable monopolies for garbage service are protected. The UTC is starting to ask tougher questions and there are several recent cases in which records of affiliated interests are being contested by our members. Why is this public records exemption process suddenly necessary?

The market of a small construction and industrial recycling company has shrunk because the company cannot compete with the prices of a regulated entity who charges 20 percent to 40 percent less when serving in the competitive marketplace than the rates charged in the regulated market. The ability to go to a judge to ask for this information exists for the regulated company, because those expenses would be passed on to the ratepayer through the tariff agreement. But the unregulated company does not have that luxury. The unregulated company would have to represent itself or pay an attorney, just to ensure that a level playing field is maintained.

Persons Testifying: (In support) Vicki Christophersen, Washington Refuse and Recycling Association; Charlie Maxwell, LeMay Pierce County Refuse and Waste Connection; Evelyn Nicholson, Sound Disposal; Ann Rendahl, Utilities and Transportation Commission; and Brad Lovaas, Washington Refuse and Recycling Association.

(With concerns) Rowland Thompson, Allied Daily Newspapers of Washington.

(Opposed) John Yoasting, Construction and Demolition Recycling Association; Troy Lautenbach, Lautenbach Recycling; and Mike Armstrong, Recycling Association.

Persons Signed In To Testify But Not Testifying: None.