NO. 36057-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NORTHWEST GAS ASSOCIATION, et al.,

Appellants,

v.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, et al.,

Respondents,

07 MAY 30 PM 1:39
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY
DEPUTY

BRIEF OF RESPONDENT WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ROBERT M. MCKENNA
Attorney General

Robert D. Cedarbaum
Senior Counsel
WSBA No. 11770
1400 S. Evergreen Pk. Dr. S.W.
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1188

TABLE OF CONTENTS

I. INTRODUCTION 1

II. COUNTERSTATEMENT OF THE ISSUES 2

III. COUNTERSTATEMENT OF THE FACTS 3

A. The Commission's Regulatory Role Over Pipeline Safety 3

1. Intrastate pipeline safety regulation 3

2. Interstate pipeline safety regulation 4

B. The Commission's Information-Gathering Role In Public Safety 5

C. The GIS Public Records Requests 8

IV. ARGUMENT 11

A. Standard Of Review 11

B. Washington's Public Records Act Provides A Strong Mandate In Favor Of Disclosure Of Information To The Public 12

C. The Federal Pipeline Safety Act Does Not Bar Or Preempt Public Disclosure Of Pipeline GIS Data By The Commission 13

1. The Federal Pipeline Safety Act does not prohibit public disclosure of pipeline GIS data by the Commission 13

2. The Federal Pipeline Safety Act does not preempt public disclosure of pipeline GIS data under the state Public Records Act 15

D. It Was Appropriate For The Commission To Decline To Take A Position On The Merits Of Whether Pipeline GIS Data Should be Released To The Public Given the Unique Circumstances Of This Case 18

1. Sensitive security information under RCW 42.56.420(1) 20

2. Valuable commercial information under RCW 80.04.095 21

3. Valuable research data under RCW 42.56.270(1) 21

E. Designation Of Pipeline GIS Data As Valuable Commercial Information Is Not A Prequisite To Application of RCW 80.04.095 22

V. CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Confederated Tribes of Chehalis Reservation v. Johnson,
135 Wn.2d 734, 958 P.2d 260 (1998) 12, 13

Dawson v. Daly,
120 Wn.2d 782, 845 P.2d 995 (1993) 11

Gilda Industries, Inc. v U.S. Customs & Border Protection Bureau,
457 F.Supp. 2d 6 (D.D.C. 2006) 14

Judicial Watch, Inc. v. Food & Drug Admin.,
407 F.Supp.2d 70 (D.D. C. 2005) 14

Olympic Pipe Line Co. v. City of Seattle,
316 F.Supp.2d 900 (W.D. Wash. 2004) 17

Olympic Pipe Line Co. v. City of Seattle,
437 F.3d 872 (9th Cir. 2006) 4, 16

Progressive Animal Welfare Soc'y v. University of Wash.,
125 Wn.2d 243, 884 P.2d 592 (1994) 10, 12, 14, 15

Rabon v. City of Seattle,
135 Wn.2d 278, 957 P.2d 621 (1998) 13

Tyler Pipe Indus., Inc. v. Department of Revenue,
96 Wn.2d 785, 638 P.2d 1213 (1982) 11, 12

Statutes and Rules

RCW 19.108 15

RCW 19.122 5

RCW 42.56 ..... 1, 12, 22

RCW 42.56.030 13

RCW 42.56.070(1) 12, 13

RCW 42.56.270(1) 1, 2, 21, 22

RCW 42.56.330(1) 1, 23

RCW 42.56.420 22

RCW 42.56.420(1) 1, 2, 20, 22

RCW 42.56.540 ..... 8, 10, 12, 19, 24

RCW 43.44.130 16

RCW 80.04.095 ..... 1, 2, 21, 22-25

RCW 80.28.205 4

RCW 80.28.210 3

RCW 81.88 3

RCW 81.88.010 16

RCW 81.88.040 16

RCW 81.88.050 16

RCW 81.88.060(1) 16

RCW 81.88.060(2)(a) 3

RCW 81.88.080 ..... 5, 6, 14, 16

RCW 81.88.080(1) 5

RCW 81.88.080(2) 5

RCW 81.88.090 ..... 4, 16

RCW 81.88.100 16

WAC 44-14-040(4) 9

WAC 44-14-160 23

WAC 480-07-160(7) 24

WAC 480-75 4

WAC 480-93 4

5. U.S.C. § 552 14

15 U.S.C. § 717 17

16 U.S.C. § 824 17

18 U.S.C. § 1905 15

49 U.S.C. § 60101 ..... 2, 13

49 U.S.C. § 60104(c) 4

49 U.S.C. § 60105(a) 3

49 U.S.C. § 60117(c) 4, 16

49 U.S.C. § 60117(d) 14-15

Administrative Authorities

Critical Energy Infrastructure Information,
68 Fed. Reg. 9857 (March 3, 2003) 18

Other Authorities

www.wutc.wa.gov 7

www.ferc.gov/legal/ceii-foia/ceii/state-agen-nda.pdf 18

I. INTRODUCTION

The Washington Utilities and Transportation Commission ("Commission") compiles detailed Geographic Information System ("GIS") data regarding the physical and operational attributes of natural gas and hazardous liquid pipeline facilities in Washington State. This case addresses whether that particular data are subject to public disclosure under the Public Records Act, RCW Chapter 42.56 ("PRA").

Several pipeline companies ("Appellants") argue that the data are likely exempt from public disclosure as: (1) sensitive security information under RCW 42.56.420(1); (2) "valuable research data" under RCW 42.56.270(1); and (3) "valuable commercial information" under RCW 42.56.330(1) and RCW 80.04.095. They also argue that federal law prohibits public disclosure of this pipeline GIS data by the Commission and preempts disclosure of that data under the PRA.

The Commission demonstrates in this brief that Appellants' application of federal law should be rejected. The Commission, however, does not take a position on the merits of the PRA exemptions that Appellants advocate. This is an appropriate response given the unique circumstances of this case.

II. COUNTERSTATEMENT OF THE ISSUES

1. Is the Commission's disclosure of pipeline GIS data under the PRA preempted and prohibited by the federal Pipeline Safety Act, 49 U.S.C. § 60101, *et seq.*, where the data are collected by the Commission to assist local governments and first responders under a state law that does not impose safety regulation on pipeline facilities or their owners?

2. Should the superior court have granted Appellants' motion for a preliminary injunction because public disclosure of pipeline GIS data:

- "would have a substantial likelihood of threatening public safety" under RCW 42.56.420(1) for sensitive security information;
- "would produce private gain and public loss" under RCW 42.56.270(1) for valuable research data; or
- "would result in private loss, including an unfair competitive disadvantage" under RCW 80.04.095 for valuable commercial information?

3. Is the designation of pipeline GIS data as valuable commercial information a prerequisite to the application of the exemption in RCW 80.04.095?

III. COUNTERSTATEMENT OF THE FACTS

A. The Commission's Regulatory Role Over Pipeline Safety

The Commission's authority to regulate hazardous liquid pipeline safety is found in RCW Chapter 81.88. Its authority to regulate natural gas pipeline safety is found in RCW 80.28.210. The authority granted in these statutes concerns the manner in which pipeline companies design, construct, operate and maintain their facilities.[1]

The Commission's authority over pipeline safety is also affected by federal law. That law differentiates between interstate and intrastate pipelines.

1. Intrastate pipeline safety regulation

Under federal statutory preemption standards, a state authority may regulate intrastate pipeline safety only if it has submitted to the federal Office of Pipeline Safety of the Department of Transportation ("DOT") a current certification under 49 U.S.C. § 60105(a). A certified state

---

[1] For example, RCW 81.88.060(2)(a) requires the Commission to adopt rules to ensure that hazardous liquid pipelines are designed, constructed, operated and maintained in a safe and efficient manner. RCW 80.28.210 states that:

> Every person or corporation transporting natural gas by pipeline, or having for one or more of its principal purposes the construction, maintenance or operation of pipelines for transporting natural gas, in this state, . . . , shall be subject to regulation by the utilities and transportation commission *insofar as the construction and operation of such facilities shall affect matters of public safety*, and every such company *shall construct and maintain* such facilities as will be safe and efficient . . . (Emphasis added.)

On July 22, 2007, the Commission's authority to regulate natural gas pipeline safety will be found in RCW Chapter 81.88. Chapter 142, Laws of 2007.

authority may adopt intrastate pipeline safety standards that are additional to or more stringent than federal standards, but only if those standards are "compatible" with the minimum safety standards promulgated by DOT. 49 U.S.C. § 60104(c).

DOT has certified the Commission to regulate intrastate pipeline operators and facilities in this state. *See, Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 879 (9th Cir. 2006). The Commission has adopted comprehensive rules covering pipeline safety in WAC Chapter 480-75 (hazardous liquid pipelines) and WAC Chapter 480-93 (natural gas pipelines).

2. Interstate pipeline safety regulation

A state authority "may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). However, DOT may designate an agent with delegated authority to conduct inspections of interstate pipeline operators and facilities in order to ensure their compliance with federal safety standards. 49 U.S.C. § 60117(c).

Since 2000, the Commission has been designated an agent of DOT for the purpose of inspecting interstate pipelines.[2] CP 97 (Rathbun Affid. at ¶ 3).

[2] Commission was required to apply for that designation by RCW 80.28.205 for natural gas pipelines and RCW 81.88.090 for hazardous liquid pipelines.

B. The Commission's Information-Gathering Role In Public Safety

In 2000, the Legislature passed the Pipeline Safety Act, which is codified, in part, in RCW 81.88.080. Laws of 2000, ch. 191, § 7. RCW 81.88.080 does not impose safety regulations on pipeline facilities, their owners or operators. Nor does the Commission act as an agent of DOT in implementing that section.

Rather, RCW 81.88.080 requires the Commission to collect information from pipeline operators for use by first responders, local governments, and one-number locator services.[3] The Commission is directed to collect maps from hazardous liquid pipeline companies and natural gas pipeline companies with interstate pipelines, gas transmission pipelines, or gas pipelines operating over 250 pounds per square inch gauge. RCW 81.88.080(1). The maps are to be of sufficient accuracy to meet the needs of first responders. *Id.*

The Commission is also directed to consolidate the maps into a statewide GIS that depicts the entire system of hazardous liquid and natural gas pipelines in the state of Washington. RCW 81.88.080(2). The GIS that the Commission developed consists of Environmental Systems Research Institute ("ESRI") centerline "shapefiles," which are digital

[3] The "One-Call" locator system was established by RCW Chapter 19.122. It requires excavators to request the marking of the exact location of underground facilities (including pipelines) prior to excavation in order to avoid damage to those facilities.

representations of pipeline locations, showing pipeline pressure regulators, compressor stations, metering facilities, taps, mileposts, cathodic protection test sites, and valves. CP 97 (Rathbun Affid. at ¶ 5). The shapefiles also detail pipeline diameter, operating pressure, wall thickness and other pipeline specifications, and whether the commodity transported is natural gas or a hazardous liquid. CP 98 (Rathbun Affid. at ¶ 5). A user with the appropriate software and training may manipulate the shapefiles to identify sensitive and critical parts of the state's pipeline system. CP 35 (Kirschner Decl. at ¶ 13; CP 49 (Latimer Decl. at ¶ 9); CP 310 (Huber Decl. at ¶ 7); and CP 306-307 (Golden Decl. at ¶ 7).

The Commission makes the GIS available to first responders and local governments. Twenty such entities have received the GIS from the Commission. CP 98 (Rathbun Affid. at ¶ 6). However, releasing the detailed pipeline GIS data to the general public increases the risk of pipeline damage from excavation because the public may rely on that data rather than contacting one-number locator services. CP 307 (Golden Decl. at ¶ 9) and CP 556 (Beggs Decl. at ¶ 6).

The GIS required by RCW 81.88.080 was also used by the Commission to create county pipeline atlases. These atlases show the general locations and routes of pipelines. However, they do not contain the detailed information included in the GIS regarding the exact locations

of other pipeline facilities. CP 98 (Rathbun Affid. at ¶ 7). Nor do the atlases delineate pipeline operational features and attributes that are contained in the GIS. CP 98 (Rathbun Affid. at ¶ 7). For example, the atlases do not include pressure regulators and valves. Nor do they include precise pipeline operating pressures and wall thickness.

The Commission has distributed over 500 atlases to fire departments and local governments. CP 98 (Rathbun Affid. at ¶ 7). The atlases are also available to the general public. CP 555 (Beggs Decl. at ¶ 4) and CP 42 (Ford Decl. at ¶¶ 5-6).

In fact, the Commission has commenced posting the atlases on its Website to allow full public access to pipeline location and route information.[4] CP 98 (Rathbun Affid. at ¶ 7). However, because the atlases do not show the exact location of pipeline facilities, excavators must still consult with a one-number locator service to determine that information.[5] CP 562 (Snyder Decl. at ¶ 7).

---

[4] *See*, www.wutc.wa.gov, then click "Quick Links-Pipeline" and then "Pipeline Safety-Pipeline Maps". Currently posted are atlases for Whatcom, King, Thurston, Benton and Spokane counties.

[5] The Commission's Website warns the public that the atlases "must NOT be used to determine where you can dig safely." CP 142 (Suppl. Nesterofff Decl. at Ex. A).

C. The GIS Public Records Requests

On February 6, 2007, the Commission received a public records request for the statewide GIS data from Jean Buckner of Bellevue, Washington. The request stated:

> I'm requesting all the Pipeline/Facility GIS data that was provided to the Pipeline Safety Trust through the freedom of information act. I am requesting the electronic database that contains Pipeline/ Facility information. Not just the maps, but all the underlying Pipeline/Facility data.[6]

CP 106-107 (Rathbun Affid. at Exhibit B).

On February 7, 2007, the Bellingham Herald also submitted to the Commission a public records request for pipeline GIS data. Its request was limited to Whatcom County:

> . . . all geographic information system data compiled by the [Commission] regarding hazardous liquid and gas pipelines in Whatcom County as well as underground location information and maps of pipelines from hazardous liquid pipeline companies and gas pipeline companies with interstate pipelines, commercial gas pipelines, or gas transmission pipelines in Whatcom County.

CP 109 (Rathbun Affid. at Exhibit B).

The Commission immediately notified all pipeline owners in Washington State of these requests. The Commission provided this notice pursuant to RCW 42.56.540:

---

[6] The Seattle Post-Intelligencer made a similar request on February 22, 2007, as did the Seattle Times and Tri-City Herald on March 1, 2007. CP 98-99 (Rathbun Affid. at ¶ 9).

> An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of the record has been requested.[7]

The Commission's notice also stated its intent to release the shapefiles containing the pipeline GIS data on February 20, 2007, unless restrained by court order. CP 99 (Rathbun Affid. at ¶ 9) and CP 107, 109-110 (Rathbun Affid. at Exhibit B). The propriety of the Commission's procedure was acknowledged by the superior court:

> Although in the end it is the court's decision, and not the agency's, as to what is exempt, it is the agency that makes the initial determination. They did that here. They determined that they would honor the request and release the material and informed the pipelines of their decision.

CP 176.

In response to the Commission's notice, complaints in Thurston County Superior Court were filed by Appellants Northwest Gas Association, Olympic Pipe Line Company, Chevron Pipe Line Company, Northwest Terminaling Company, BP West Coast Products, LLC, Intalco Aluminum Corporation, McChord Pipe Line Company, Yellowstone Pipe Line Company, Conoco Phillips Pipeline Company, Terasen Pipelines (Puget Sound) Corporation, Valero L.P., Portland General Electric, B-R Pipeline Company and KB Pipeline Company. Appellants also sought

[7] The notice allows persons whose rights may be affected by disclosure of the record to protect their rights by seeking a court order preventing disclosure. WAC 44-14-040(4) (model rules for the PRA).

temporary restraining orders and preliminary injunctions that would prevent the Commission from disclosing their pipeline GIS data to persons that are not first responders, local governments, or locator services.

Appellants and the Commission agreed to temporary restraining orders, which the superior court entered. The superior court also consolidated the complaints and set a hearing on March 16, 2007 for Appellants' motions for preliminary injunctions. The Bellingham Herald and Allied Daily Newspapers presented motions to intervene (CP 637-645), which the superior court granted. CP 161.

Before the superior court, the Commission disputed Appellants' argument that disclosure of pipeline GIS data by the Commission conflicts with and is preempted by federal law. CP 93-95. However, the Commission did not take a position on the merits of the PRA exemptions advocated by the Appellants.[8] RP 35-36.

---

[8] The superior court was critical of the Commission's failure to take a position on the applicability of a PRA exemption. RP 32-34. However, that criticism is misplaced. As explained in Section IV.D., in limited circumstances, an agency may not be well-situated to advocate whether a specific exemption from public disclosure applies to a particular record. This may be because the exemption depends on information not available to the agency or because the evaluation of available information requires expertise and is not within the realm of the agency's specialized knowledge.

By contrast, the third parties that have provided the requested information to the agency or to whom the information otherwise pertains may be in a better position to understand the consequences of disclosure, in light of the interests a particular exemption is designed to protect. RCW 42.56.540 provides a procedural mechanism for those third parties to enjoin the release of requested records. *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 257-58, 884 P.2d 592 (1994). That mechanism is appropriate for the specific circumstances presented in this case.

The superior court ruled that no exemption from disclosure under the PRA applied to the pipeline GIS data and that no federal preemption applies to bar disclosure.[9] Thus, the superior court denied the motions for preliminary injunction and ordered the Commission to follow through with its initial determination to release the pipeline GIS data. CP 159-78.

On March 19, 2007, Appellants filed their notice of appeal to this Court. The Court has stayed the superior court's ruling pending appeal.

IV. ARGUMENT

A. Standard Of Review

Appellants state that this Court reviews the superior court's denial of a preliminary injunction *de novo*.[10] Appellants' Opening Br. at 21, citing, *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993). The Commission agrees.

The criteria governing the issuance of a preliminary injunction are set forth in *Tyler Pipe Indus., Inc. v. Department of Revenue,* 96 Wn. 2d 785, 792, 638 P.2d 1213 (1982). In that

---

[9] The superior court relied, in part, on fact that the county atlases showing general pipeline locations and routes were already available to the public. CP 165 and 169. This case, however, does not concern the disclosure of that information. Appellants' Opening Br. at 8. Rather, it concerns the disclosure of the comprehensive and detailed data in the GIS regarding pipeline physical and operational attributes.

[10] Nevertheless, considerable effort in Appellants' Opening Brief is devoted to a critique of the trial court's decision. Appellants take this approach not because they disagree that this Court's review is *de novo*. They refer to the trial court's decision only to highlight the difference between a preliminary injunction and a permanent injunction with respect to the sufficiency of evidence. *See*, Appellants' Opening Br. at 36, n.11.

context, the court examines the likelihood that the moving party will prevail on the merits, *Tyler Pipe*, 96 Wn.2d at 793. The court also balances the relative interests of the parties and, if appropriate, the interests of the public. *Id.* at 792.

The *Tyler Pipe* criteria for an injunction are reflected in the PRA itself. To obtain an injunction preventing disclosure of a particular record, it must be shown that disclosure of the record "would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." RCW 42.56.540.

B. Washington's Public Records Act Provides A Strong Mandate In Favor Of Disclosure Of Information To The Public

The state's Public Records Act is contained in RCW Chapter 42.56. The primary command of the PRA is that agencies must disclose any public record upon request unless the record falls within a specific exemption to the PRA. RCW 42.56.070(1). The State Supreme Court has said, "The Washington public disclosure act is a strongly worded mandate for broad disclosure of public records." *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 745, 958 P.2d 260 (1998); *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

The PRA's provisions are to be liberally construed and its exemptions narrowly construed. RCW 42.56.030. The party seeking to prevent disclosure of the record bears the burden to prove application of one of the PRA's specific exemptions. *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d at 744.

C. The Federal Pipeline Safety Act Does Not Bar Or Preempt Public Disclosure Of Pipeline GIS Data By The Commission

Appellants argue that the federal Pipeline Safety Act, 49 U.S.C. § 60101 *et seq.*, prohibits public disclosure of pipeline GIS data by the Commission and preempts disclosure of that data under the state PRA.[11] Appellants' Opening Br. at 44-46. These arguments raise purely legal issues that should be addressed by the Court on the merits, *Rabon v. City of Seattle*, 135 Wn.2d 278, 285-86, 957 P.2d 621 (1998), and rejected because they do not have merit.

1. The Federal Pipeline Safety Act does not prohibit public disclosure of pipeline GIS data by the Commission

Under RCW 42.56.070(1):

> 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. (Emphasis added.)

[11] Appellant Northwest Gas Association did not share this opinion before the superior court. It conceded that federal law does not preempt the Commission's authority to manage pipeline GIS data. CP 23 (Memorandum of Law at 8, n.1).

Appellants claim that 49 U.S.C. § 60117(d) is an "other statute" that prohibits public disclosure of pipeline GIS data by the Commission.[12]

49 U.S.C. § 60117(d) states that:

> Information related to a confidential matter *referred to in section 1905 of title 18* that is obtained by the Secretary or *an officer, employee, or agent in carrying out this section* may be disclosed only to another officer or employee concerned with carrying out this chapter or in a proceeding under this chapter. (Emphasis added.)

That section does not apply here because the Commission did not obtain the pipeline GIS data at issue as "an officer, employee or agent of the federal DOT carrying out" 49 U.S.C. § 60117(d). Rather, the Commission was acting in its own right as directed by state law under RCW 81.88.080.

Moreover, the pipeline GIS data requested does not relate to a confidential matter "referred to in section 1905 of title 18." That section identifies information consisting only of:

> . . . trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law . . .

---

[12] Appellants concede that the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, is not an "other statute" that prohibits disclosure of the pipeline GIS data by the Commission under the PRA. *See*, Appellants Opening Br. at 44, citing, *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d at 265-66. Thus, Appellants' reliance on, *Gilda Industries, Inc. v. U.S. Customs & Border Protection Bureau*, 457 F.Supp.2d 6 (D.D.C 2006) and *Judicial Watch, Inc. v. Food & Drug. Admin.*, 407 F.Supp.2d 70 (D.D.C. 2005), is misplaced since both cases address exemptions from disclosure under FOIA. *See*, Appellants' Opening Br. at 45.

18 U.S.C. § 1905. Appellants never attempted to demonstrate that pipeline GIS data fall within any of these specific categories of protected information. Indeed, Appellants do not even allege that pipeline GIS data is exempt from public disclosure as a trade secret under RCW Chapter 19.108.[13]

2. The Federal Pipeline Safety Act does not preempt public disclosure of pipeline GIS data under the state Public Records Act

Appellants argue that, as an agent of DOT's Office of Pipeline Safety ("OPS"), the Commission is subject to the same prohibition in 49 U.S.C § 60117(d) against public disclosure of pipeline GIS data that applies to OPS. They say that to conclude otherwise would erase federal statutes that limit the scope of the Commission's regulatory authority over interstate pipelines. Appellants' Opening Br. at 45-46.

Obviously this argument is irrelevant to GIS data relating to intrastate pipelines in this state.[14] In any event, Appellants misapply 49

---

[13] RCW Chapter 19.108 is an "other statute" that may serve as a PRA exemption. *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d at 262.

[14] Appellants' intrastate pipeline facilities include those operated by Northwest Gas Association members Avista Corporation, Cascade Natural Gas Corporation, Northwest Natural Gas Company, and Puget Sound Energy. CP 32 (Kirschner Decl. at ¶ 3). Olympic Pipe Line operates delivery laterals that serve customers within the state of Washington. CP 237-38 (Maudlin Decl. at ¶ 2). McChord Pipeline Company operates an intrastate pipeline from a refinery in Tacoma to McChord Air Force Base. CP 334 (Hills Decl. at ¶ 3). Valero L.P. operates an intrastate pipeline in Pasco. CP 492-93 (Fogarty Decl. at ¶ 2). BP West Coast Products and Intalco Aluminum Company operate

U.S.C § 60117(c), the statute under which the Commission became the agent of DOT. That section allows the Commission, as an agent of DOT, to ensure compliance by interstate pipelines with federal safety regulations:

> An officer, employee, *or agent of the Department of Transportation designated by the Secretary*, on display of proper credentials to the individual in charge, may enter premises to inspect the records and property of a person at a reasonable time and in a reasonable way *to decide whether a person is complying with this chapter and standards prescribed or orders issued under this chapter.* (Emphasis added.)

By contrast, the activity taken by the Commission under RCW 81.88.080 does not involve safety regulation of interstate (or intrastate) pipeline facilities. The Commission is merely collecting information from pipeline owners regarding their facilities and making that information available to first responders and local governments to support their efforts in protecting the public safety.[15]

This conclusion is supported by a case cited by Appellants: *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006).[16]

---

jointly an intrastate pipeline in Ferndale, and BP also operates two other intrastate pipelines that serve the Cherry Point Refinery. CP 306 (Golden Decl. at ¶¶ 2-3).

[15] In fact, RCW 81.88.060(1) states that:

> A comprehensive program of hazardous liquid pipeline safety is authorized by RCW 81.88.010, 81.88.040, 81.88.050, 81.88.090, 81.88.100, 43.44.130, and this section to be developed and implemented consistent with federal law. The commission shall administer and enforce all laws related to hazardous liquid pipeline safety"

RCW 81.88.080 is omitted from this list related to pipeline safety.

[16] *See*, Appellants' Opening Br. at 45.

There, the trial court considered a requirement of the City of Seattle that Olympic Pipe Line maintain liability insurance coverage. The trial court held that the requirement for liability insurance coverage was not safety regulation preempted by federal law. *Olympic Pipe Line Co. v. City of Seattle*, 316 F.Supp.2d 900, 907 (W.D. Wash. 2004). The court also implied that a "mere request for information" would not constitute state safety regulation preempted by federal law. *Id.*

Further support for the conclusion that the Commission is not engaged in preempted safety regulation is found in the rulemaking cited by Appellants.[17] There, the Federal Energy Regulatory Commission ("FERC") adopted procedures for gaining access to critical energy infrastructure information, such as pipeline GIS data.[18] FERC rejected the notion that a state commission must enter an agreement prohibiting public disclosure of critical energy infrastructure information the state commission obtains from FERC:

> On the other hand, release of [critical energy infrastructure information] to State Commissions will normally be subject to signing [a Non-Disclosure Agreement]. It does not make sense for [FERC] to release the information to the State Agencies with no agreement to protect the information, at least to the extent permitted by law. The [FERC] has no intention of asking a state agency to ignore state law, but merely to give the [FERC] notice

---

[17] *See*, Appellants' Opening Br. at 12.

[18] .FERC does not regulate hazardous liquid pipelines. It regulates the interstate transportation and wholesale sale of natural gas, 15 U.S.C. § 717, *et seq.*, and the interstate transmission and wholesale sale of electric energy. 16 U.S.C. § 824, *et seq.*

> and an opportunity to take action to prevent release of the information.[19]

Critical Energy Infrastructure Information, 68 Fed. Reg. 9857 at 9866 (March 3, 2003). FERC's conclusion that state law cannot be disregarded applies with even greater force when the information considered for public disclosure is provided by non-federal entities such as Appellants.[20]

D. It Was Appropriate For The Commission To Decline To Take A Position On The Merits Of Whether Pipeline GIS Data Should be Released To The Public Given the Unique Circumstances Of This Case

Generally speaking, agencies faced with requests for public records must and should determine whether a specific exemption under the PRA limits the disclosure of such records. This is particularly the case when the requested public records do not involve specific individuals or

---

[19] This requirement is reflected in the non-disclosure agreement FERC requires state agencies to enter when requesting disclosure of critical energy infrastructure information:

> The State agency Requestor agrees to notify the Federal Energy Regulatory Commission's Associate General Counsel for General and Administrative Law immediately upon state agency receipt of a request for the information provided under this agreement.

See, www.ferc.gov/legal/ceii-foia/ceii/state-agen-nda.pdf.

[20] FERC also rejected the notion that its rules would limit state agency access to GIS data from pipelines:

> As [the National Association of Regulatory Utility Commissions] correctly points out, "the [Notice of Proposed Rulemaking] itself declares that FERC's rule does not propose to alter the traditional ability of State Commissions to obtain such data directly" from the companies. Therefore, as requested by NARUC, [FERC] confirms that it does not intend that public utilities may rely on this rule to refuse to provide information directly to State Commissions.

Critical Energy Infrastructure Information, 68 Fed. Reg. 9857 at 9865 (March 3, 2003).

entities whose interests are implicated by the exemption at issue, and when the agency has adequate information and expertise to evaluate how the exemption at issue relates to the requested documents.

However, in some circumstances, an agency may not be able to provide an appropriately informed position on the applicability of a particular exemption from public disclosure. This may occur, for example, when the existence, nature or extent of private or public interests implicated by disclosure is within the particular understanding of a third party either "named in the record or to whom the record specifically pertains." RCW 42.56.540. This may also be the case where the applicability of an exemption depends on specialized knowledge in assessing information that relates to the requested records, and the agency lacks such expertise.

The Legislature has provided for notice to persons who have a specific interest in the confidentiality of information, and who, thus, may have a unique understanding of the consequences of its disclosure. In such circumstances, it may well be appropriate for an agency to leave litigation of the applicability of an exemption to those parties. RCW 42.56.540 provides a mechanism to help insure that full and informed advocacy is provided to the court. That is the case here.

1. Sensitive security information under RCW 42.56.420(1)

RCW 42.56.420(1) exempts from public disclosure portions of certain records that: (1) have been "assembled, prepared or maintained to prevent, mitigate, or respond to a criminal terrorist act," when (2) disclosure "*would* have a *substantial likelihood* of threatening public safety." (Emphasis added.)

The Commission has been involved with the first part of this exemption. It prepared the pipeline GIS data to assist law enforcement and other first responders to respond to a variety of disasters. It is reasonable to conclude that this would include responding to a criminal terrorist act. It is also reasonable to conclude that RCW 42.56.420(1) does not require the documents to be used exclusively by first responders to respond to a criminal terrorist act. Therefore, the fact that the pipeline GIS data may also be used to respond to simple vandalism, for example, does not eliminate the potential applicability of that exemption.

However, whether disclosure of the pipeline GIS data satisfies the second part of the exemption under RCW 42.56.420(1) would require the Commission to obtain and evaluate sensitive and critical information regarding the likelihood and nature of terrorist threats, and the extent to which the requested records would bear on those threats. Even if such information were accessible to the Commission, appropriately evaluating

it would exceed the scope of the Commission's expertise in administering laws related to pipeline safety. The Appellants have much greater insight into the relevant issues and are in a much better position to advocate on them.

2. Valuable commercial information under RCW 80.04.095

RCW 80.04.095 exempts from public disclosure valuable commercial information when disclosure "*would* result in private loss, including an unfair competitive disadvantage." (Emphasis added.) The Commission certainly has knowledge about issues related to competition, but it is not privy to pipeline information that addresses the nature and extent of any private loss.

However, RCW 80.04.095 expressly requires the Commission to give notice to persons that may be affected by the public release of certain documents in order to allow the real parties in interest the opportunity to litigate the issue in court. The Commission satisfied comparable procedures in this case.

3. Valuable research data under RCW 42.56.270(1)

RCW 42.56.270(1) exempts from public disclosure valuable research data when disclosure "*would* result in private gain and public

loss." (Emphasis added.) In the context of this case, the public loss at issue relates to threats to public safety under RCW 42.56.420(1).[21]

The standard for valuable research data under RCW 42.56.270(1) is more rigorous than the standard in RCW 42.56.420(1) for sensitive security information ("would have a substantial likelihood of threatening public safety"). Therefore, even though Appellants advocate the exemption for valuable research data, the Court need not consider it. If the exemption for sensitive security information in RCW 42.56.420(1) applies to pipeline GIS data, the data may not released by the Commission irrespective of RCW 42.56.270(1). If the exemption for sensitive security information in RCW 42.56.420(1) does not apply, the exemption for valuable research data in RCW 42.56.270(1) cannot be proven.

E. Designation Of Pipeline GIS Data As Valuable Commercial Information Is Not A Prequisite To Application of RCW 80.04.095

RCW 80.04.095 states that:

> 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

[21] Appellants Opening Br. at 18 ("Plaintiffs' evidence of the threat to public safety applicable to the terrorism exemption in RCW 42.56.420 also established the 'public loss' element of RCW 42.56.270(1).")

> 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. (Emphasis added.)

Appellants argue that pipeline GIS data is valuable commercial information that is likely exempt from public disclosure under RCW 80.04.095.[22] Appellants' Opening Br. at 30-32. However, only Terasen Pipelines complied with the requirement of RCW 80.04.095 and corresponding Commission rule (WAC 480-07-160) to designate specifically the records that contain protected confidential information. CP 435 (Harden Affid. at ¶ 4).

The requirement for a person to designate a record as valuable commercial information is *not* a condition precedent to the availability of the exemption itself.[23] It is only a procedural requirement that alerts the

---

[22] RCW 80.04.095 is incorporated into the PRA through RCW 42.56.330(1), which exempts from public disclosure:

> Records filed with the utilities and transportation commission or attorney general under RCW 80.04.095 that a court has determined are confidential under RCW 80.04.095.

[23] The superior court held otherwise. It rejected the applicability of this exemption from public disclosure because Appellants did not designate their records as protected confidential information. CP 166 ("Here the test the court is to employ is 'if disclosure would result in private loss, including an unfair competitive advantage.' However, to trigger the application of this test, the entity providing the information 'shall designate which records or portions of records contain valuable commercial

Commission to a claim of confidentiality so that it may satisfy the notice requirements of RCW 80.04.095.

This interpretation is consistent with the plain language of the statute that does not make the Commission responsible for determining whether records are exempt from public disclosure under RCW 80.04.095. That responsibility is, instead, placed squarely on the superior court.

This interpretation has also been reflected by the Commission in its rules:

> The commission will provide written notice of any request for information designated confidential to the provider and any person identified by the provider as a person who might be directly affected by release of the information. *This is to permit any person asserting confidentiality or who might be affected by the release of the information to invoke the statutory procedures for securing a court order to protect the records from disclosure* or to take similar steps in compliance with a protective order in an adjudicative proceeding. The commission will issue such notice not more than two days after the requested materials are located and it determines that they contain information claimed to be confidential. The commission will send a copy of the notice to the requester at the same time it sends a copy to the provider. (Emphasis added.)

WAC 480-07-160(7).

Here, the procedures for notice and superior court review were satisfied, albeit through RCW 42.56.540, rather than through RCW 80.04.095 and WAC 480-07-160(7). Simply because Appellants did not

---

information.'. . . Plaintiffs who do not follow this strict procedure cannot claim this exemption.")

mark these records as confidential under RCW 80.04.095 does not eliminate that exemption from this Court's consideration.

V. CONCLUSION

For the reasons set forth above, the Court should hold that federal law neither prohibits public disclosure of pipeline GIS data by the Commission nor preempts disclosure of that data under the Public Records Act. The Court should also hold that designation of pipeline GIS data as confidential is not a perquisite to application of the exemption in RCW 80.04.095.

RESPECTFULLY SUBMITTED this 30th day of May, 2007.

ROBERT M. MCKENNA
Attorney General

ROBERT D. CEDARBAUM
Assistant Attorney General
WSBA No. 11770
Counsel for Washington Utilities and Transportation Commission
1400 S. Evergreen Park Dr. SW
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1188

FILED
COURT OF APPEALS
DIVISION II

07 MAY 30 PM 1:39

STATE OF WASHINGTON
BY_____
DEPUTY

NO. 36057-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NORTHWEST GAS ASSOCIATION, et al. , Plaintiffs/Appellants, v. WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION , Defendant/Respondent.	CERTIFICATE OF SERVICE

I hereby certify that I have this day served the Brief of Respondent Washington Utilities and Transportation Commission upon the persons and entities listed on the Service List below as noted.

RESPECTFULLY SUBMITTED this 30th day of May, 2007.

ROBERT D. CEDARBAUM

Michael Nesteroff
Lane Powell
1420 5th Ave #4100
Seattle, WA 98101
Via Legal Messenger

Vanessa Power
Stoel Rives
600 University St #3600
Seattle WA 98101
Via Legal Messenger

Shelley Hall
Stokes Lawrence
800 5th Ave #4000
Seattle, WA 98104
Via Legal Messenger

Christopher Wion
Arthur Harrigan
Danielson Harrigan Leyh
999 3rd Ave #4400
Seattle, WA 98104
Via Legal Messenger

Jason Kuzma
Sheree Carson
Perkins Coie
10885 NE 4th St #700
Bellevue, WA 98004
Via Legal Messenger

Jennifer Tanya Barnett
Stephen J. Tan
Cascadia Law Group
606 Columbia St NW #212
Olympia, WA 98501
Via Legal Messenger

Donald Courser
805 Broadway St #725
Vancouver WA 98660
Via Federal Express

Timothy McMahan
Stoel Rives
900 SW Fifth Ave #2600
Portland OR 97204
Via Federal Express

William Lehman
1001 SW Fifth Ave #2000
Portland OR 97204
Via Federal Express