

**BEFORE THE
MARYLAND PUBLIC SERVICE COMMISSION**

Retail Gas and Electric Supply Offers to Low
Income Customers

RM 78

**THE MARYLAND OFFICE OF PEOPLE’S COUNSEL’S OPPOSITION TO
MOTION REQUESTING CONFIDENTIAL TREATMENT**

The Retail Energy Supply Association (“RESA”) and NRG Energy, Inc. (“NRG”) are seeking to keep the names of retail suppliers appearing in Commission-ordered data requests hidden from public view. The Commission should deny the request because suppliers’ names are not competitively sensitive and the public interest in keeping Commission records open to public review outweighs any reputational interest RESA and NRG are seeking to protect.

INTRODUCTION

Section 4-308 of the Public Utilities Article governs electricity and gas retail supply offers to Maryland households that receive energy assistance.¹ The law restricts the offers retail suppliers may make to energy assistance customers and limits the prices retail suppliers may charge those customers.² Each year, the Maryland Public Service Commission must publish on its website a detailed report concerning six enumerated metrics, including the names of retail suppliers and their efforts to solicit energy

¹ Md. Code Ann., Pub. Utils. Art. (“PUA”) § 4-308(a).

² *Id.* at § 4-308(b).

assistance households (“EAH”).³ On November 28, 2023, to satisfy these statutory reporting requirements and monitor compliance with Commission regulations, the Commission issued an order requiring all retail suppliers and utilities with retail suppliers in their service area to provide responses to specific data requests (“DR”) issued by Commission Staff.⁴ Ten days later, RESA⁵ and NRG⁶ asked the Commission to “afford confidential treatment to the names of the individual suppliers identified in the various responses to the data requests” claiming that the information is “competitively sensitive.”⁷ Specifically, RESA and NRG opposed public disclosure of: (1) suppliers’ names in the retail suppliers’ responses to Staff DR 2 to Retail Suppliers, seeking the number of grandfathered EAH contracts, the commodity type associated with those contracts, and the contracts’ expiration quarter; (2) suppliers’ names in the utilities’ responses to Staff DR 1-1(b) to Utility Companies, seeking the name of each supplier that rejected or approved enrollments to service EAHs; and (3) suppliers’ names in the utilities’ responses to Staff DR 2-1 to Utility Companies, seeking the number of EAHs served by each retail supplier in a utility’s service area.⁸ As explained below, the Commission should find that the suppliers’ names provided in responses to the DRs do not warrant confidential treatment.

³ *Id.* at § 4-308(d).

⁴ Retail Gas and Electric Supply Offers to Low Income Customers, *Order on Data Requests for Utilities and Suppliers Low Income Supply Offers*, ML No. 306342 (RM 78, Nov. 28, 2023) (“Order”).

⁵ RESA is a “group of retail energy suppliers” with “members...throughout the United States.” Retail Gas and Electric Supply Offers to Low Income Customers, *Motion Requesting Confidential Treatment*, ML No. 306564 (RM 78, Dec. 8, 2023), 1 (“Motion”).

⁶ NRG and its retail affiliates serve customers “across 24 states, including Maryland.” Motion, 1.

⁷ *Id.*

⁸ *Id.* at 2.

LEGAL BACKGROUND

The Commission’s decisions regarding whether information may be withheld from the public as confidential are controlled by the Maryland Public Information Act (“MPIA”).⁹ Under the MPIA, “[a]ll persons are entitled to have access to information about the affairs of government.”¹⁰ To ensure that access, the MPIA is “construed in favor of allowing inspection of a public record” unless “an unwarranted invasion of the privacy of a person in interest would result.”¹¹ Accordingly, when the Commission is faced with a question of whether to disclose information to the public, “[w]ithout a doubt, the bias of the [MPIA] is toward disclosure.”¹²

There are limited exemptions from public disclosure. Relevant here, the MPIA exempts from disclosure “a part of a public record that contains...confidential commercial information.”¹³ Because the MPIA favors disclosure, however, this exemption is to be interpreted narrowly.¹⁴

The Maryland Supreme Court has held that when interpreting MPIA exemptions, Maryland courts “generally give significant weight to the federal courts’ interpretation of similar [Freedom of Information Act] provisions.”¹⁵ When a party attempts to shield

⁹ Md. Code Ann., Gen. Prov. § 4-101(k)(1) (defining records that are subject to disclosure under the MPIA); see Order No. 90915, Baltimore Gas and Electric Company’s Application for an Electric and Gas Multi-Year Plan (Case No. 9692, Nov. 27, 2023) (“Conduit Order”).

¹⁰ *Id.* at § 4-103(a).

¹¹ *Id.* at § 4-103(b).

¹² *Cranford v. Montgomery Cnty.*, 300 Md. 759, 771 (1984).

¹³ Md. Code Ann., Gen. Prov. § 4-335.

¹⁴ *Off. of the Governor v. Wash. Post Co.*, 360 Md. 520, 545 (2000) (citing *Fioretti v. Bd. of Dental Examiners*, 351 Md. 66, 77 (1998)) (declaring that “courts must interpret the [MPIA] exemptions narrowly.”).

¹⁵ *Amster v. Baker*, 453 Md. 68, 79 (2017).

public information based on the confidential commercial information exemption under FOIA, it is subject to a two-part test established in *National Parks and Conservation Association v. Morton*.¹⁶ Under this two-part test, information is only considered confidential if disclosure is likely to either: “(1) impair the [g]overnment’s ability to obtain the necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.”¹⁷

When a party is required to provide information to the government, *National Parks* found that there is “presumably no danger that public disclosure will impair the ability of the [g]overnment to obtain this information in the future.”¹⁸ The “government impairment” analysis in situations where commercial information is being compelled is therefore concerned with the “continued reliability” rather than simply the availability of the information in the future.¹⁹ In the few cases considering the second part of the test, courts have limited “substantial harm” to instances where disclosure of sensitive pricing or workforce analysis information would provide competitors with an unfair advantage.²⁰ Under either part of the test, a party asserting that a disclosure should not be made under

¹⁶ *Id.*

¹⁷ *Nat’l Parks & Conserv. Assoc. v. Morton*, 498 F. 2d 765, 770 (D.C. Cir. 1974). In *Food Marketing Inst. v. Argus Leader Media*, the United States Supreme Court abrogated *National Park’s* “substantial competitive harm” component. 139 S. Ct. 2356 (2019). The Maryland Supreme Court has not stated whether the *Argus* standard replaces the *National Park* standard applied in *Amster*.

¹⁸ *Id.* at 771.

¹⁹ *Amster v. Baker*, 453 Md. at 78 (observing that the federal cases interpreting the confidential commercial exemption under FOIA use a slightly different test for information voluntarily provided to the government as distinguished from information that the government has compelled an individual to provide.).

²⁰ See *Rubbermaid, Inc. v. Kleppe*, 1976 WL 731 (D. Md.) (finding “substantial harm” when disclosure of workforce analysis and salary information could cause competitors to lure away employees); *Morales v. Pension Ben. Guar. Corp.*, 2012 WL 253407 (D. Md.) (finding “substantial harm” when disclosure of service contracts could lead competitors to undercut prices).

the MPIA’s confidential commercial information exemption must provide more than mere “generalities and conclusory testimony that one or more of the exemptions apply.”²¹ Otherwise, “generalized evidence” will lead courts to apply the “exemption too broadly.”²²

ARGUMENT

The Commission should not treat individual supplier names as confidential. Disclosure of the information will neither impair the Commission’s ability to obtain necessary information in the future, nor cause substantial harm to legitimate interests of retail suppliers. Further, should the Commission decide to treat individual supplier names as confidential, that treatment should be limited only to the retail suppliers that have specifically sought confidential treatment.

I. The public interest weighs in favor of public disclosure of individual retail supplier names provided to satisfy the reporting requirements under PUA Section 4-308.

The MPIA embodies the State’s strong interest in wide-ranging access to public information.²³ The Commission has recognized this interest and “has long endeavored to base its decisions on [information] that is publicly available.”²⁴ In the law underlying this case, the Maryland legislature empowered the Commission to make decisions regarding supply offers directed to households that receive energy assistance funds through a

²¹ *Cranford v. Montgomery Cnty.*, 300 Md. 759, 781 (1984).

²² *Id.*

²³ *Fioretti*, 351 Md. at 73.

²⁴ Conduit Order, 4.

program administered by the Office of Home Energy Programs (“OHEP”).²⁵ The law serves two important public purposes. First, it protects energy assistance customers from exorbitant energy bills resulting from contracts with retail suppliers that charge above utilities’ default rates. Second, it maximizes the value of the public’s spending on energy assistance through OHEP. To satisfy statutory reporting requirements and ensure regulatory compliance, the Commission required retail suppliers and utilities to provide specific information to Commission Staff.²⁶ Without a clear showing that this information is exempt from public disclosure, the public is entitled access to the names of retail suppliers providing information to the Commission for the preparation of this report. The public therefore has the right to view unredacted responses to the Staff DRs that RESA and NRG are seeking to hide.

II. The individual retail supplier names are not confidential commercial information as contemplated by the MPIA.

As explained above, confidential protection for commercial information serves two purposes. First, it ensures the continued availability of information provided to the government. Second, it protects parties providing the information from substantial competitive harm.²⁷ Here, neither issue contemplated by the MPIA exemption would result from the disclosure of individual retail suppliers’ names.

There is no indication that the disclosure of individual retail suppliers’ names would impair the Commission’s ability to obtain reliable information in the future. Like

²⁵ PUA § 4-308(a).

²⁶ Order, 1.

²⁷ *Nat’l Parks & Conserv. Assoc.*, 498 F. 2d at 770.

the commercial entities in *National Parks*, the retail suppliers and utilities in this matter are required to provide the relevant information about EAH supply offers to the Commission. Furthermore, the Commission is mandated under PUA § 4-308 to regulate retail supply offers made to EAHs under very specific directives. The disclosure of retail suppliers' names will not affect the ability of the Commission to obtain reliable information from suppliers that are, have, or seek to serve EAHs in the future.

Disclosure of individual retail suppliers' names will also not cause substantial competitive harm of the type protected under the MPIA's exemption for confidential commercial information. "Substantial harm" is limited to circumstances where information would provide competitors with an unfair advantage.²⁸ None of the information RESA and NRG are seeking to hide from the public involve sensitive pricing or other information that could conceivably give a competitor an unfair advantage. In the one DR marked for confidential treatment by RESA and NRG that is directed to the retail supplier's themselves, the motion only asks for confidential treatment of the "*names of the individual suppliers identified*" in the response.²⁹ The motion does not ask for confidential treatment of the supplier company *license numbers*, which are also included as a separate field in the same DR.³⁰ The "Md Electric Choice" website, used by Maryland customers to shop for retail suppliers, includes a comprehensive list of retail suppliers and their license numbers.³¹ A retail supplier name is unlike the sensitive

²⁸ *Rubbermaid*, supra note 20; *Morales*, supra note 20.

²⁹ Motion, 1.

³⁰ See Order, attachment "Staff Data Request 2 to Retail Suppliers."

³¹ MD Electric Choice, *All Suppliers* (Dec. 20, 2023, 2:15 PM), <https://www.mdelectricchoice.com/shop/suppliers/>

pricing or workforce analysis information given confidential treatment under the *National Parks* test. Disclosing the names does not provide competitors, whose names will also appear in DR responses, with any unfair advantage. The primary—if not exclusive—interest possibly protected by affording confidential treatment to individual retail supplier names, then, is an affected supplier’s reputational interest in not being identified as a supplier selling high-priced supply contracts to Maryland’s most vulnerable households.

Ultimately, to justify nondisclosure of information, a party asserting an MPIA exemption must provide specific evidence that the exemption applies. Broad generalities and conclusory statements are insufficient.³² Here, RESA and NRG simply state that certain information in the DR responses is “clearly competitively sensitive” or “should be redacted and marked as Confidential” without any additional support for the claims.³³ Those assertions are therefore baseless and insufficient to sustain a designation of confidentiality under the MPIA because they do not establish how the Commission’s ability to obtain necessary information from suppliers in the future would be impaired, or demonstrate that suppliers will suffer a legally-cognizable harm substantial enough to warrant the extraordinary action of shielding this information from public view.

III. RESA and NRG do not have standing to gain blanket confidential treatment for all retail supplier names.

A party must have standing to “invoke the judicial process.”³⁴ Standing depends on “whether one is ‘aggrieved,’ which means whether a [party] has ‘an interest such that

³² *Cranford*, 300 Md. at 781.

³³ Motion, 2.

³⁴ See *Adams v. Manown*, 328 Md. 463, 480 (1992).

he [or she] is personally and specifically affected in a way different from...the public generally.”³⁵ RESA and NRG do not have standing to request blanket confidential treatment for every retail supplier name provided in response to Staff’s DRs. At most, they only represent the interests of retail suppliers who are RESA members or NRG affiliates.³⁶ In fact, one retail supplier, CleanChoice Energy, Inc., already submitted its responses to Staff’s DRs without redacting its name.³⁷ Therefore, to the extent that retail supplier names warrant confidential treatment—which as explained is not warranted—the Commission should limit that treatment to RESA members and NRG affiliates.

CONCLUSION

RESA and NRG broadly request confidential treatment of retail suppliers’ names included in response to Staff’s DRs. Their generalizations and conclusory statements, however, do not overcome Maryland’s strong presumption in favor of disclosure of public records. RESA and NRG have failed to show that disclosure of individual retail supplier names will either impair the Commission’s ability to obtain reliable information from suppliers in the future or substantially harm the legitimate commercial interests of retail suppliers. The public has a right under the MPIA to access this information, and the Commission should therefore deny RESA and NRG’s motion.

³⁵ *Kendall v. Howard Cnty.*, 431 Md. 590, 603 (2013) (quoting *Jones v. Prince George’s Cnty.*, 378 Md. 98, 118 (2003)).

³⁶ In the motion, RESA qualified its representation by specifically stating that the views regarding confidentiality “may not represent the views of any particular member of RESA.” Motion, 1.

³⁷ See CleanChoice Energy, *EAH Retail Choice Annual Reporting*, ML No. 306520 (RM 78, Dec. 7, 2023).

To the extent that the Commission does decide to shield the names of certain suppliers from public view, RESA and NRG have failed to establish that blanket confidential treatment of all retail supplier's names is warranted in this case. The Commission should therefore limit any ruling favorable to the movants only to the suppliers represented in RESA and NRG's motion.

Respectfully submitted,

DAVID S. LAPP
PEOPLE'S COUNSEL

Juliana Bell
Deputy People's Counsel

/electronic signature/

Brock L. Miller
Assistant People's Counsel
Jacob Ouslander
Assistant People's Counsel
Maryland Office of People's Counsel
6 St. Paul Street, Suite 2102
Baltimore, Maryland 21202
(410) 767-8166

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