

It is incumbent on The Dalles to show that disclosure has in some way hurt Google's competitive position – and not only that, but that water use in The Dalles is in some way different from water use in those other communities where the company's use is readily available to competitors.

It has failed to do so.

Moreover, the city appears to be primarily concerned with *Google's* interests, not the public's. It references the company's "highly competitive global market" and its "competitive advantage." (reply, page 2, "Background").

Those are not in any way the public interest. The concerns of a highly successful and lucrative private business are not what are at issue here. The public interest is plainly whether or not Oregonians are getting a good deal from a company whose sole interest is enriching itself.

The Dalles' entire response seems to amount to little more than "trust us." But that is not how government in Oregon works. We have public disclosure laws because we believe citizens ought to be informed about how the business of government works and whether officials who represent them are good stewards of the public's resources.

Even if the information is of value to competitors, which we do not concede, it is entirely plausible that the public interest would be better served by more competition for Google. Competition might drive the company to sweeten the bargain for The Dalles taxpayers and water users, for example.

Nondisclosure agreements

The city in its response (page 3) notes that "... (D)esign has been clear it considers its water use data exempt from public disclosure under the trade secrets exemption." Again, the city has provided no evidence of this.

The Oregonian/OregonLive has obtained three nondisclosure agreements The Dalles executed with Google. Not one of them mentions "water," "use," "usage" or "consumption."

In fact, they explicitly say "This Agreement imposes no obligation upon Participant with respect to Confidential Information that: (a) *was known to Participant* before receipt from Google, as evidenced by Participant's files and records in existence before the time of disclosure." (Emphasis added)

The city knows the information and did not receive it from Google. If the company had intended for it to be covered by the NDA, it would have explicitly said so.

The city says Google uses the information in the course of conducting its business and "(T)his information is known only to a limited number of people within Design's organization and certain contractors who need to know this information to provide services to Design."

But how many workers in the Department of Public Works know this information? How many others within city government at large know this information? Were each and every one of those workers asked to sign a confidentiality agreement? The city has offered no evidence any city worker is bound by some confidentiality agreement. The city in its response (bottom of page 3) says it has required

employees and contractors to sign nondisclosure agreements, but the only agreements The Dalles provided to us do not cover the information we seek.

Public interest

Turning to the city's public interest analysis, we find very little discussion of the public.

Point (a), for example, says "Google would suffer." That is a private interest, not a public one.

Similarly, point (b) says "Google enjoys the spoils of its innovation ..." and the "enjoyment would be jeopardized." Google's private interests are not a factor in the public interest in disclosure of public information.

As to point (c), the city says it entered into nondisclosure agreements to "bring Google to the negotiating table" to invest in a major public works project. Again, Google's interest in expanding in The Dalles is a narrow private one. The public interest is what the city gets in return – and what it gives up.

The city says Google will transfer water rights to The Dalles for incorporation into its municipal water system. But the public is unable to assess whether this is a good deal or a bad one unless they also know how much of that water, a public resource, Google plans to consume.

The residents of The Dalles are keenly concerned about this issue. Some of them testified at the city council's last meeting, and at prior meetings, about the importance of disclosure at this point. A member of The Dalles' city council told us, in fact, that "At this point, nobody has enough information to make any kind of decision." She said residents deserve to have as much information about the deal as Google does.

Plainly, there's a public interest in this case. The public and elected officials think so, in any case.

Last, on Part B, the city rightly notes it is not required to create a new record. However, the attorney general says quite explicitly it is required to obtain information from its databases. "... (A) *a public body is required to retrieve pre-existing information, which includes electronic data stored in databases.*³⁶ *This obligation exists regardless of whether the public body has actually generated a report for its own use that contains the requested data.*" (Attorney General's Manual)

The Oregonian/OregonLive is not making an issue of this. Our primary concern at the moment is obtaining records showing Google's water consumption.

The public interest requires release of the information so that residents of The Dalles and all Oregonians can assess whether we are getting a good enough deal from Google.

Sincerely,

Mike Rogoway
Business reporter
The Oregonian/OregonLive

Cc: Jonathan Kara, City Attorney, City of The Dalles



Matthew Ellis, District Attorney
Kara Davis, Chief Deputy District Attorney
Sally Carpenter, Senior Deputy District Attorney
Michelle Thomas, Deputy District Attorney
511 Washington St., Ste. 304 • The Dalles, OR 97058
p: [541] 506-2680 • f: [541] 506-2681 • www.co.wasco.or.us

October 15, 2021

Mike Rogoway
Business Writer, The Oregonian
mrogoway@oregonian.com

Jonathan Kara
City Attorney, City of The Dalles
jkara@campbellphillipslaw.com

Dear Mr. Rogoway and Mr. Kara:

Pursuant to ORS 192.470, Mike Rogoway, from the Oregonian, filed an appeal petition requesting I review the City of The Dalles denial of his public records request. Mr. Rogoway emailed me his appeal to me on October 7, 2021.

Mr. Rogoway's request to The Dalles was sent via email on September 24, 2021 asking for 1) Google's/Design's water use last year, and 2) total industrial water over the last five years. Mr. Kara responded within hours of the email, acknowledging its receipt, and exempting from disclosure both requests for separate reasons. 1) The request was denied under the trade secrets exemption, ORS 192.345(2) and the documents were reasonably considered confidential, ORS 192.355(4). 2) The documents were denied because the City of The Dalles is not the custodian of the records. (The email exchange is Exhibit 1). Mr. Rogoway's requests that I review only part 1) of his request for Google's/Design water use last year (2020). Mr. Kara submitted a memorandum on October 12, 2021 (exhibit 2). Mr. Rogoway submitted a memorandum on October 13, 2021 (exhibit 3).

This letter constitutes my ruling in the matter of Mr. Rogoway's appeal of the City of The Dalles claiming exemption on his public records request.

Legal Analysis

The Dalles has the burden of persuasion to convince me that their decision in this matter was proper. ORS 192.450(1).

Standard of Proof

In order for The Dalles to carry their burden I must affirmatively conclude that the records request was not denied, or, that the requested records are exempt from disclosure. If I do not so conclude, I must order them to be disclosed. *Attorney General's Public Records and Meetings Manual 2014, section I.G.1.b (citing Oregon Attorney General Public Records Order, March 4, 2008, Brent Walth)*.

Application of Law:

For the following reasons, the petition is granted. The only the issue at hand is the city's claim that Google's water usage falls under the trade secret exemption under ORS 192.345(2). Mr. Kara conceded that the documents were not exempt under ORS 192.355(4) in his memo after Mr. Rogoway clarified his request that he is only seeking documents prepared by the City.

Are City Documents Concerning Google's Water use in The Dalles exempt from public records disclosure?

The City has not met its burden to show that Google's water usage in a trade secret. I make this finding for two reasons.

1. Water Use Does Not Fall Under the Definition of Trade Secret in the Plain Language of the Uniform Trade Secrets Act, ORS 646.462(4).

Oregon law provides that trade secrets, as defined by the Trade Secrets Act, are unconditionally exempt from disclosure under the Oregon Public Records Law. *Pfizer Inc. v. Oregon Dep't of Justice*, 254 Or App 144 (2012). ORS 646.461(4) defines a trade secret as: information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that:

- (a) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The documents Mr. Rogoway is requesting contain numbers concerning Google's use of a public resource. There is no "drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique, or process" concerning the water's use in the document. The document simply states the amount of water used by Google in The Dalles. Without water use falling under the definition of a trade secret, the document is not subject to exemption under ORS 192.345(2) or ORS 192.355(9) as it incorporates the definition in ORS 545.462(4).

2. Water Use Does Not Fall Under the Definition of Trade Secret Under ORS 192.345(2).

Though the Oregon Court of Appeals has used the definition of trade secret from ORS 646.462(4), I address ORS 192.345(2). The City's argument that use of water, a public resource, falls under the definition set out in ORS 192.345(2) is unpersuasive. ORS 192.345(2) states that trade secrets:

may include, but are not limited to any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information 1) which is not patented, 2) which is known only to certain individuals within the organization and which is used in a business it conducts, 3) having actual or potential commercial value, and 4) which gives its user an opportunity to obtain a business advantage over competitors who do now or use it.

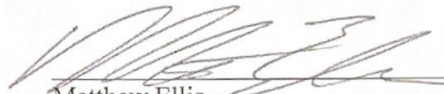
The city interprets the definitions in the statute very broadly. Only in the statute's broadest context could one interpret that water use falls under the definition set out in the statute. As the City points out in its argument, there is a four-part test in the statute whether the document would fall under this definition. For part one, while it seems obvious, water usage is not patented, because it is something that cannot be patented. This fact makes it less convincing that water usage falls under the trade secret definition. For part two, it seems that Google only allows a handful of employees the information pertaining to water use. Though it is not clear in the response how many or the percentage of employees on site. For parts three and four, the City's arguments are tenuous. Many of the arguments are conclusory statements that giving away the water usage will give an advantage to competitors. Nothing about water use gives away the design or actual use of the water, just the amount. Without something more, the City fails to meet its burden to uphold its claim of exemption.

3. Public Interest is not Addressed in this Letter.

Though I make the finding that Google's water usage is not a trade secret, if the records were found to be a trade secret, Oregon law would exempt disclosure. ORS 192.345(2) conditionally exempts trade secrets from disclosure under the public records law. However, the Court of Appeals has made clear that the misappropriation of trade secrets provisions in ORS 646.461 et seq. apply unconditionally in the public records context. *See Pfizer* at 158 (2012). To put it plainly, if release of a public record would constitute a misappropriation of a trade secret, those records are exempt from disclosure without consideration of the public's interest in disclosure. Accordingly, I do not address the public interest of water use in this order.

ORDER

The petition is granted. The City of The Dalles is ordered to promptly disclose all records responsive to this request. This disclosure is subject to payment of fees to the city, if any, not exceeding the actual cost in making this information available.



Matthew Ellis
District Attorney
Wasco County, Oregon

Notice to Public Agency

Pursuant to ORS 192.450(2), 192.460, and 192.490(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.



CITY ATTORNEY'S OFFICE
CITY OF THE DALLES
313 COURT STREETS
THE DALLES, OREGON 97058

(541) 296-5481 ext. 1122
FAX (541) 296-6906

October 22, 2021

Via Certified and Electronic Mail

Matthew Ellis
Wasco County District Attorney
511 Washington Street, Suite 304
The Dalles, OR 97058
matthewe@co.wasco.or.us

Mike Rogoway
Business Writer
The Oregonian
1500 Southwest First Avenue, Suite 500
Portland, OR 97201
mrogoway@oregonian.com

Registered Agent
Corporation Service Company
1127 Broadway Street Northeast, Suite 310
Salem, OR 97301

Re: Notice of Intention to Institute Proceedings for Injunctive or Declaratory Relief

Mr. Ellis and Mr. Rogoway:

On October 15, 2021, Wasco County District Attorney Matthew Ellis issued a ruling granting Mr. Rogoway's/The Oregonian's petition for review of the City of The Dalles's (City's) withholding of records responsive to Mr. Rogoway's/The Oregonian's September 24, 2021, public records request for Design, LLC's water use in the year 2020. The ruling ordered the City to disclose all records responsive to the request.

The City respectfully disagrees with Mr. Ellis's ruling. Accordingly, the City intends to institute proceedings for injunctive or declaratory relief against Mr. Rogoway/The Oregonian in Wasco County Circuit Court pursuant to ORS 192.411(2).

Regards,

Jonathan M. Kara
City Attorney

cc: City Manager