

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASCO

In the Matter of:

CITY OF THE DALLES, an Oregon
municipal corporation,

Plaintiff,

vs.

MICHAEL ROGOWAY and ADVANCE
LOCAL MEDIA LLC (dba "Oregonian
Media Group")

Defendant.

Case No.: _____

COMPLAINT

Action for Declaratory Judgment pursuant to
ORS Chapter 28 (Uniform Declaratory
Judgments Act), ORS 192.411, and ORS 192.415

Filing Fee: \$281.00

Fee Authority: ORS 21.135

(Not Subject to Mandatory Arbitration)

Plaintiff, City of The Dalles, alleges:

1.

Plaintiff City of The Dalles ("City") is municipal corporation located in Wasco County
and duly organized and existing under the laws of the State of Oregon.

2.

Defendant Michael Rogoway ("Rogoway"), an individual, is a resident of and domiciled
in Multnomah County, Oregon.

3.

Defendant Advance Local Media (dba "Oregonian Media Group") is a foreign limited
liability company registered in the State of New York and conducting business throughout
the State of Oregon. In Oregon, it publishes *The Oregonian*, a daily newspaper in Portland,

1 both in a print edition and in an electronic edition on its Internet website OregonLive.com.

2 Defendant Rogoway is a reporter for *The Oregonian*.

3 4.

4 The Circuit Court for Wasco County has personal jurisdiction over Defendant Rogoway
5 and Defendant Advance Local Media LLC (collectively, “Defendants”) consistent with
6 ORCP 4 A(2) and ORCP 4 A(4), respectively.

7 5.

8 Venue is proper in the Circuit Court for Wasco County because it is the circuit court for
9 the county in which the City is located, as required by ORS 192.415(1)(b).

10 6.

11 On September 24, 2021, Defendants submitted a public records request (“Request”), a
12 copy of which is attached to and made part of this Complaint herein as Exhibit A.

13 Defendants’ Request *inter alia* sought records in the City’s custody connected with Design,
14 LLC’s (“Design”) water consumption for the year 2020.

15 7.

16 On September 24, 2021, the City timely responded to Defendants’ Request (“Response”),
17 a copy of which is attached to and made part of this Complaint herein as Exhibit B. The
18 City’s Response provided the City’s position records responsive to the Request are exempt
19 from disclosure consistent with the Oregon Public Records Law (“Public Records Law”,
20 ORS 192.311 *et seq.*).

21 8.

22 On October 7, 2021, Defendants sought review of the City’s Response by petitioning the
23 Wasco County District Attorney pursuant to ORS 192.422(1). A copy of Defendants’ petition
24 for review is attached to and made part of this Complaint herein as Exhibit C.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

9.

On October 12, 2021, the City timely submitted a memorandum of law (“Memorandum”) to the Wasco County District Attorney, a copy of which is attached to and made part of this Complaint herein as Exhibit D. The City’s Memorandum supported its withholding of records responsive to the Request as conditionally exempt from disclosure as Design’s trade secrets pursuant to ORS 192.345(2).

10.

ORS 192.345(2) conditionally exempts “trade secrets” from disclosure under the Public Records Law unless the public interest requires disclosure in the particular instance. “Trade secrets”, as used in the Public Records Law, “may include, but are not limited to any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is [(a)] not patented, [(b)] known only to certain individuals within an organization and which is used in a business it conducts, [(c)] having actual or potential commercial value, and [(d)] which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.”

11.

The City maintains records containing information connected with Design’s water consumption data are exempt from disclosure as “trade secrets” pursuant ORS 192.345(2) because (a) the information is not patented; (b) the information is used in Design’s business and is known only to certain individuals within the company; (c) the information has actual or potential commercial value; (d) if disclosed, the information would give its users an opportunity to obtain a business advantage over Design’s competitors who do not know or use it; and (e) the public interest does not demand disclosure in the particular instance.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

12.

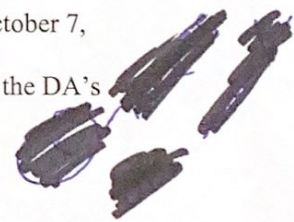
On October 13, 2021, Defendants submitted to the Wasco County District Attorney a reply to the City’s Memorandum, a copy of which is attached to and made part of this Complaint herein as Exhibit E.

13.

On October 15, 2021, the Wasco County District Attorney issued an order (“DA’s Order”) pursuant to ORS 192.415 granting Defendants’ petition and compelling the City to “disclose all records responsive to [the Request].” A copy of the DA’s Order is attached to and made part of this Complaint herein as Exhibit F.

14.

As a threshold issue, ORS 192.418(1) provides “[t]he failure of the . . . district attorney to issue an order under [ORS 192.415] denying, granting, or denying in part and granting in part a petition to require disclosure within seven [(7)] days from the day of receipt of the petition shall be treated as an order denying the petition for the purpose of determining whether a person may institute proceedings for injunctive or declaratory relief . . .”. Despite both the statute’s lack of ambiguity and the Oregon judiciary’s consistently strict construction of the Public Records Law’s deadlines, the Wasco County District Attorney issued the DA’s Order on October 15, 2021, eight (8) days after Defendants submitted their petition on October 7, 2021. The City maintains ORS 192.418(1) decidedly mandates the untimeliness of the DA’s Order compels the Circuit Court for Wasco County to treat it as a denial *ab initio*.



15.

The DA’s Order analyzed the Request under the legal framework of ORS 192.355(9)(a) and ORS 646.461(4).

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

16.

ORS 192.355(9)(a) categorically exempts “[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.” The Uniform Trade Secrets Act (ORS 646.461 *et seq.*) restricts trade secrets from disclosure under Oregon law, and ORS 646.461(4) defines “trade secret” as “information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that: (a) [d]erives 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) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

17.

The City maintains records containing information connected with Design’s water consumption data are categorically exempt from disclosure pursuant to ORS 192.355(9)(a) since such records qualify as “trade secrets” under ORS 646.461(4) because the information (a) derives independent actual or potential economic value from not being generally known to the public or to persons who can obtain economic value from its disclosure or use and (b) is the subject of Design’s reasonable efforts, under the circumstances, to maintain its secrecy.

18.

On October 22, 2021, the City timely sent a notice (“Notice”) to the Wasco County District Attorney and Defendants of its intention to institute proceedings for injunctive or declaratory relief against Defendants pursuant to ORS 192.411(2). A copy of the Notice is attached to and made part of this Complaint herein as Exhibit G.

///
///

CAMPBELL PHILLIPS PC
PO Box 2449, The Dalles, OR 97058
Telephone: (541) 371-5585 - Fax: (541) 248-2784

1 **CLAIM FOR RELIEF**

2 19.

3 The City realleges paragraphs 1 through 18, above.

4 20.

5 This Complaint is an action for declaratory judgment pursuant to ORS Chapter 28, ORS
6 192.411, and ORS 192.415.

7 21.

8 A present and actual controversy exists between the parties as Defendants contend they
9 are entitled to disclosure of the requested records under the Public Records Law and the City
10 contends (a) the Wasco County District Attorney's failure to issue an order by the seven-day
11 deadline imposed by ORS 192.418(1) should be treated as an order denying Defendants'
12 petition and (b) alternatively, the requested records are exempt from disclosure pursuant to
13 either ORS 192.345(2) and the public interest does not demand disclosure in the particular
14 instance, or ORS 192.355(9) because the requested records qualify as trade secrets as defined
15 by and restricted under the Uniform Trade Secrets Act.

16 22.

17 The City has been required to expend costs to bring this action.

18 23.

19 The City is entitled to reasonable costs of litigation, including attorneys' fees.

20 ///

21 ///

22 ///

23 ///

24 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24


24.

WHEREFORE, Plaintiff prays for a judgment as follows:

1. Finding and declaring the Wasco County District Attorney's failure to issue a timely order within seven (7) days from the day of receipt of Defendants' petition:
 - a. is a statutory denial of Defendants' petition pursuant to ORS 192.418(1); and
 - b. the City is not compelled to disclose records responsive to Defendants' Request because Defendants' petition was statutorily denied.
2. Finding and declaring records responsive to Defendants' Request are exempt from disclosure under the Public Records Law:
 - a. as trade secrets pursuant to ORS 192.345(2) and the public interest does not demand disclosure in the particular instance; or
 - b. as trade secrets as defined by and restricted under the Uniform Trade Secrets Act pursuant to ORS 192.355(9).
3. Finding and declaring the City to be the prevailing party.
4. Awarding the City its reasonable costs of litigation as may seem equitable and just pursuant to ORS 28.100.
5. Awarding the City such other supplemental relief as the Court deems necessary and proper pursuant to ORS 28.080.

DATED: October 29, 2021

CAMPBELL PHILLIPS P.C.



Jonathan M. Kara, OSB #200969
City Attorney
City of The Dalles
jkara@campbellphillipslaw.com
Telephone: (541) 371-5585

CAMPBELL PHILLIPS PC
PO Box 2449, The Dalles, OR 97058
Telephone: (541) 371-5585 - Fax: (541) 248-2784

Rachel Anderson

To: Jonathan Kara
Subject: RE: Google/Design

From: Mike Rogoway [mailto:mrogoway@oregonian.com]
Sent: Friday, September 24, 2021 9:25 AM
To: Dave Anderson <danderson@ci.the-dalles.or.us>
Subject: Re: Google/Design

Dave,

Thanks so much for the chat last night. Very helpful. One thing I didn't ask, but should have – can you tell me what Google's/Design's water consumption was last year?

Thanks,

Mike

Rachel Anderson

From: Jonathan Kara
Sent: Friday, September 24, 2021 5:05 PM
To: Rachel Anderson
Subject: Fwd: Google's water use

Categories: Saved to Worldox

From: Jonathan Kara
Sent: Friday, September 24, 2021 5:02:45 PM
To: Mike Rogoway <mrogoway@oregonian.com>
Cc: Dave Anderson <danderson@ci.the-dalles.or.us>; Izzetta F. Grossman <igrossman@ci.the-dalles.or.us>
Subject: RE: Google's water use

Mike:

Thank you for your inquiry. Dave forwarded me your email string from this morning; in summary—

You asked the Public Works Director for Google's/Design's water use last year. Dave responded he could not disclose quantities of water used or wastewater discharged. You replied by asking for him to cite an exemption to the Oregon Public Records Law to support the City's withholding and asking for total industrial water use in The Dalles for the past five years. Dave referred you to me.

In accordance with ORS 192.324(2), this email acknowledges the City of The Dalles (City's) receipt on September 24, 2021, of your request for records connected with (A) Google's/Design's water use last year and (B) total industrial water use in The Dalles over the last five years.

The City is the custodian of records potentially responsive to Part (A) of your request to the extent such records exist.

The Public Records Law confers a right to inspect Oregon public bodies' public records subject to certain exemptions and limitations. Here, the City's position is certain records responsive to Part (A) of your request are not subject to disclosure consistent with the following statutory exemptions—

1. ORS 192.345(2) conditionally exempts trade secrets from public disclosure. Trade secrets include any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.
2. ORS 192.355(4) categorically exempts information submitted to the City in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the City has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

The City is not the custodian of records responsive to Part (B) of your request. The Public Records law does not require public bodies to create new public records. See, e.g., Public Records Order, Nov 14, 1996, Schwartzrock. Nor does it require public bodies to disclose the reasoning behind their actions, answer questions about their records, or analyze

their records. Letter of Advice to Jim Kenney, at 4-5, 1987 WL 278343 (OP-6126) (June 1, 1987). You may coordinate with Dave regarding what information is otherwise available at your discretion.

Since the City withheld records from disclosure, you may seek review of this withholding pursuant to ORS 192.401, 192.411, 192.415, 192.418, 192.422, 192.427, and 192.431. The City's position is you may seek review of this denial by submitting a petition to the Wasco County District Attorney's Office.

The Public Works Director and City Clerk are copied here; please reply-all to any correspondence connected with this request.

Jonathan Kara
City Attorney
City of The Dalles

Jonathan M. Kara
Municipal Attorney



Mailing: P.O. Box 2449, The Dalles, OR 97058
Physical: 919 Cherry Heights Road, The Dalles, OR 97058
Hood River Office (by appointment only): 208 State Street, Suite 202, Hood River, OR 97031
Phone: (541) 371-5585
Fax: (541) 248-2784
Email: jkara@campbellphillipslaw.com
Website: www.campbellphillipslaw.com

NOTICE: This communication may contain information that is privileged or confidential. If you have received this message in error, please contact the sender immediately and delete the message and any attachments without copying or disclosing the contents.

From: Mike Rogoway <mrogoway@oregonian.com>
Sent: Friday, September 24, 2021 3:32 PM
To: Jonathan Kara <jkara@campbellphillipslaw.com>
Subject: Google's water use

Good afternoon,

It's Mike Rogoway with The Oregonian newspaper over in Portland. I understand you serve as The Dalles city attorney, and I believe Dave Anderson forwarded my request for details on Google's water use. I believe that's a straightforward public record. Would love to get that information today – or early Monday at the latest.

Please call if you've got questions.

Best,

Mike

Mike Rogoway
Business writer
The Oregonian
503-294-7699
Twitter: @rogoway



Oct. 7, 2021

Mr. Matthew Ellis
Wasco County District Attorney
Wasco County Courthouse
511 Washington, Suite 304
The Dalles, OR 97058

Dear Mr. Ellis:

I, the undersigned, request the District Attorney of Wasco County to order The Dalles and its employees or agents to produce a copy or copies of the following:

--records that document "what Google's/Design's water consumption was last year (2020)"

I asked to inspect these records on Sept. 24, 2021.

The request was denied in part by the following person (see attached response):

Jonathan Kara, City Attorney, City of The Dalles

The city cited ORS 192.345(2), the trade secrets exemption; and ORS 192.355(4), confidential submissions, in denying our request (The city also represented it was not the custodian of certain other records.)

The trade secrets exemption does not apply because the information is quite plainly not secret. Google's water use connected to its data centers has been disclosed in other states.

If Coca-Cola's secret formula were public knowledge in Arkansas, it surely cannot be considered top secret in Oregon.

Even if it were a trade secret, the public interest requires disclosure in this particular instance.

It is important to understand the Oregon Legislature envisioned instances in which even true trade secrets should be disclosed in the public interest. That is testament to the strength of Oregon's public records law, which is primarily a law of disclosure. (*Guard Publ'g Co. v. Lane County Sch. Dist. No. 4J* », 310 Or 32, 37 (1990) ("Under the statutory scheme, disclosure is the rule.").

Legislators created the trade secrets exemption and placed it among the conditional exemptions of the public records law, which have an overriding public interest test. The confidential submissions exemption also has a public interest component embedded within it.

While a Multnomah County district attorney's decision is not binding on your office, it has provided a persuasive analysis: (The case related to Portland Family Entertainment (PFE)'s business dealings with the city of Portland. Full text here: https://www.mcda.us/wp-content/files_mf/13517101509915.pdf)

This office has previously concluded that the Trade Secret exemption is a conditional exemption. Assuming the documents marked **Confidential** are Trade Secrets, it still must be determined whether the "public interest" requires disclosure.

PFE asserts that its proposal contains trade secrets and that the parties agreed to maintain confidentiality by separate agreement including a condition of confidentiality in the MOU. Nevertheless, this office is not persuaded that this diminishes the existence of the public's interest in disclosure. This office once again observes that "... private contracts - including contracts between citizens and government agencies - are subject to duly-enacted positive law, such as the public records law." *Petition of Steve Mayes for The Oregonian dated November 15, 1994*. A pledge by an agency of government to confidentiality necessarily is entered into subject to the conditional nature of the public records law exemption for trade secrets. Consequently, a contract provision or agreement cannot change the conditional nature of the exemption provided by public law. *Broonson v Moonen*, 270 Or 469, 478-81 (1974) (contract clause contrary to positive law generally is unenforceable).

In the next section, this office provides a thorough explanation of the overriding public interest in disclosure of the documents. We conclude that the Trade Secrets exemption does not bar disclosure of the records....

The public interest in this case also strongly favors disclosure. As The Oregonian/OregonLive and other news organizations have reported, Google is negotiating to build two more data centers in The Dalles.

As part of the deal, the company is seeking access water from the public water system and substantial tax breaks.

In essence, Google is proposing a public-private partnership: Google would pay the \$28.5 million cost of the upgrade to the city's water treatment and storage facilities under the agreement, which then would substantially boost the water available through the city utility – and, in turn, the volume of water available to cool Google's enormous server farms.

Skepticism among residents over the tax breaks Google receives from the city and Wasco County has grown along with the company's expansion.

The issue of water rights has raised the level of scrutiny around the company's latest expansion proposal, which would excuse Google from much of its property tax bill.

The Dalles won't say, for example, how much of the expanded water supply it expects Google will consume. The water comes from The Dalles groundwater aquifer, a public resource.

"Is there any protection built into this contemplated scenario to protect me if you start pulling those kind of volumes down there and my pump goes dry?" asked county resident Vance Ellett, Oregon Public Broadcasting reported.

As the Multnomah County district attorney said in its order releasing documents related to PGE Park and the city of Portland:

This public record request raises fundamental questions about the nature and method of the conduct of the government's business. Public-private partnerships present unique and novel issues. This office appreciates the business concerns raised by PFE, the City's outside counsel, and the City Attorney's office. We accept that in the normal course of business transactions, the desire for privacy is shaped if not controlled by the nature of the private transaction. Nevertheless, when government becomes an active participant in the creation and the operation of a business enterprise, it is the people who carry the ownership interest in the decisions made by their elected representatives and it is they who will carry the burden of any ill-advised decisions. The conduct of government business is the conduct of the public's business.

In reaching our decision in this matter we find that the records are no longer entitled to be exempt from disclosure. We believe that the people have the right to know how their tax dollars have been spent and will be committed in the future. There are a minimum of thirty-three million reasons why the public light should shine on the PFE/City transaction.

The Portland Civic Stadium is a landmark. It has created treasured memories for many and will continue to do so in the future. Thus, it is not only the taxpayers but all the citizens of Portland and the metropolitan area who stand to benefit (or suffer) depending on the long-term outcome of Civic Stadium renovation and operation. The investigative work of the Oregonian will benefit all parties to the transaction from PFE partners, investors and lenders to the City and, most importantly, to the users of this venerable public sports facility. Establishing that the enterprise envisioned by PFE and the City is the right thing to do and will go a long way to generate the necessary public support for the project.

The public interest factors are equally compelling here. The water source is a public resource. While we may know that google is poised to receive property tax exemptions costing taxpayers each year, we don't know the equivalent cost of the city's water supply. The public must know the company's current water usage to understand the impact that volume has on the rest of the community – and what the projected impacts will have on future use under the expansion plan. Without disclosure, the public has no way to

evaluate the terms of this agreement or whether the elected officials who negotiated the deal have been good stewards of public resources or should be re-elected to office.

Trade secrets exemption

"If the information is publicly available, obtainable, or observable, it cannot reasonably be considered confidential." *Guard Publ'g*, 96 Or App at 467-68

The city won't disclose how much water Google currently uses, which is the subject of this appeal.

As noted, however, Google's use of water for data centers is not a secret elsewhere. As The Oregonian/OregonLive has reported, Google's water use has been disclosed in other states – among them Texas, Arizona and South Carolina – where its data centers' demands have created controversy over the amount of water they use.

The formula X water use for Y square feet of Google data center is a rough calculation and the square footage of Google's expansion will be obvious to the naked eye, to drones and from space.

Water rights are contentious in Oregon and the taxpayers deserve to know how much the city is agreeing to allow Google to consume. Oregon has been in a sustained drought and access to water is fundamental to the city's and the county's prosperity.

As OPB reported: The state designated The Dalles as a critical groundwater area in 1959 after the water table fell to record lows. "Water's absolutely critical to our community," City Councilor Dan Richardson was quoted as saying at a recent meeting on the Google proposal.

The Oregon Attorney General's Manual on Public Records is instructive:

"In assessing whether the public interest requires the disclosure of trade secrets, we typically look to how much harm the entity asserting a trade secret would suffer by disclosure; the benefits enjoyed by that entity in connection with submitting the information at issue; and the nature of the governmental activity connected to the information."

It is difficult to imagine how The Dalles information being public would change the competitive landscape for Google. First and foremost, it is public elsewhere. Second, Google is a behemoth. It is a universe of one. This information would no more harm its competitive posture than a flea would cripple an elephant.

Indeed, the city has made no showing of any harm whatsoever; it has offered no evidence of how anything or any entity would suffer by disclosure.

Google derives substantial benefits from the public body, and the nature of the government activity – economic development – is significant to the residents of the city. There is a lot riding on this expansion.

The Oregon Supreme Court stated public records "should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants. ***" *MacEwan v. Holmes* 226 Or 38

Mayor Richard Mays said he drove to Portland one day to interview a law firm that had negotiated deals with Facebook and Amazon before beginning negotiations with Google. But Mays said he concluded the outside attorneys weren't offering anything he and the city staff and county couldn't accomplish on their own.

"I determined that I thought we would do just fine the way it is, and I don't regret that at all," Mays said. "We did it ourselves, and I think we did a good job of it."

But residents of The Dalles – taxpayers, voters, ordinary Oregonians – cannot judge the quality of the performance of those public and elected officials who entered into this agreement with Google if they cannot see the terms.

A 2013 public records order from the Oregon Attorney General is on point (Mar 11, 2013, Meiffren », at 5–6). In Meiffren, the Attorney General concluded that the public interest required disclosure of salary information of private companies that had received sizable property tax abatements. The public records order said, even assuming the information qualified as trade secret, the attorney general found that "disclosure would help the public monitor the effectiveness of this investment of public funds tied to job creation."

That is exactly the case here.

In Oregon, companies cannot win substantial tax breaks and keep the conditions secret. In the past decade, The Oregonian has received public records from Washington County and the city of Hillsboro related to tax breaks received by Intel under a Strategic Investment Program. It also has received information about Intel's water usage.

The Confidential Submissions Exemption

The city of The Dalles also cited ORS 192.355(4), which exempts:

Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

There are no less than five conditions that must be met for the exemption to apply:

- The informant must have submitted the information on the condition that it would be kept confidential.
- The informant must not have been required by law to provide the information.
- The information itself must be of a nature that reasonably should be kept confidential.
- The public body must show that it has obliged itself in good faith not to disclose the information.
- Disclosure of the information must cause harm to the public interest.

This exemption simply does not apply. It applies solely to information *submitted* to the public body.

The Oregonian/OregonLive does not seek information submitted to the city. Rather, we seek records generated by the city of The Dalles, namely, Public Works Department reports showing Google's current water usage.

The Oregon Public Records Law applies to any records "prepared, used, owned, or retained" by a public body. These records certainly qualify and do not fall under the exemption.

Even if you determine the exemption applies, the city has not shown and cannot show that the public interest would be harmed by release of the records sought.

As we have pointed out, the public interest would be served by disclosure, not be harmed. The city has made no evidentiary showing of harm and therefore has not met its burden to sustain nondisclosure. Additionally, The Oregonian/OregonLive is aware of no apparent harm done when the same information was released in other states, and the city has offered no evidence of any harm.

The Oregonian/OregonLive does not have enough information to know if the information is required to be submitted by law.

The information is not the sort that should be kept confidential. As noted, it is a matter of public record elsewhere. As The Oregonian/OregonLive has reported Google's water use has been disclosed in states such as Texas, Arizona and South Carolina – where its data centers' demands have created controversy over the amount of water they use.

Google's water consumption quite simply is a matter of public concern across the country, and in Oregon.

As to whether the city obliged itself in good faith, The Dalles' response to The Oregonian/OregonLive does not cite a nondisclosure agreement as its basis for withholding records.

However, Oregon Public Broadcasting has reported the city signed one with Google: "The Dalles city officials signed a non-disclosure agreement with the company forbidding them from revealing exactly how much water Google plans to use at the new development." OPB did not cite a source. (<https://www.opb.org/article/2021/09/29/google-water-data-center-the-dalles-oregon/>)"

The city has made no showing and offered no evidence it has obliged itself in good faith to keep information confidential.

Because the city is subject to the Public Records Law, it could not have obliged itself in good faith to not disclose any submitted information that might qualify as a trade secret. (See Multnomah County analysis above.)

Again, the Attorney General's manual is instructive. It lays out the proper procedure for public bodies receiving information that may be a trade secret.



October 12, 2021

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

Re: Mike Rogoway – Public Records Appeal

Mr. Ellis:

On September 24, 2021, the City of The Dalles (“City”) received a Public Records request (“Request”) from Mr. Mike Rogoway, business writer for The Oregonian; specifically, the Request sought records connected with Google/Design, LLC (“Design”):

- (A) Design’s water use in 2020; and
- (B) Total industrial water use in The Dalles from 2016-2020.

On September 24, 2021, the City responded separately to each part of the Request:

- (A) The City confirmed it is the custodian of records potentially responsive to Part (A) of the Request but explained its position is such records are exempt from disclosure consistent with ORS 192.345(2) (the so-called *Trade Secrets* conditional exemption) and ORS 192.355(4) (the so-called *Confidential Submissions* categorical exemption).
- (B) The City confirmed it is not the custodian of records responsive to Part (B) of the Request and explained neither the Public Records Law nor its authoritative legislative, executive, or judicial interpretations compel the City to create such a record.

Since the City withheld records potentially responsive to the Request, the City confirmed its position was Mr. Rogoway may seek review of its denial by submitting a petition to your Office consistent with state law. It appears Mr. Rogoway sought review of the City’s withholding by petitioning your Office review the City’s position on October 7, 2021.

Part (B) of the Request

The City maintains it is not the custodian of records responsive to Part (B) of the Request because the City neither possesses an existing nor partial record of “total industrial water use in The Dalles from 2016-2020.” Such a record is not one ordinarily created in the typical business of the City and thus the Public Works Department or Finance Department must create it only in response to the Request. However, as cited to Mr. Rogoway in the City’s response, the Public Records Law does not mandate the City create a new record to respond to the Request: in fact, the Oregon Department of Justice and Oregon Attorney General consistently hold the Public

"... (A) public body cannot rely merely on the entity's assurance that the information is a trade secret. This often places a public body in the difficult position of carrying the burden to prove that information is exempt as a trade secret, without possessing the facts necessary to meet this burden.

We therefore recommend that public bodies require any entities submitting sensitive business information to clearly label any asserted trade secrets. *Submitting entities should be told that this information will be disclosed if it does not qualify as a trade secret or if the public interest requires disclosure.* (Emphasis added)

But the final condition is dispositive, according to the Oregon Attorney General's Manual: "The final condition is whether disclosing the information would harm the public interest. Even if all the other conditions are met, if the public interest would not suffer by disclosure, the exemption does not apply."

This information is released in other states and no harm has ensued. Disclosure in Oregon can only serve to further the public interest. The city of The Dalles has failed to meet its burden in justifying nondisclosure of the records sought, and for all of the foregoing reasons, and in the public interest, we ask your office to order disclosure in this particular instance.

Sincerely,

Mike Rogoway
Business reporter
The Oregonian/OregonLive

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

Records Law does not require a public body create new public records (*see, e.g.,* Public Records Order, Nov 14 1996, Schwartzrock), disclose the reasoning behind its actions, answer questions about its records, or analyze its records (Letter of Advice to Jim Kenney, at 4-5, 1987 WL 278343 (OP-6126) (June 1, 1987)).

Part (A) of the Request

The following analysis elaborates on and contextualizes the City's position with respect to its understanding of the Public Records Law and supports the withholding of records responsive to Part (A) of the Request.

ORS 192.355(4) – Confidential Submissions

ORS 192.355(4) categorically exempts:

Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by disclosure.

Mr. Rogoway's petition asserts the Confidential Submissions exemption does not apply because he is seeking records created by (*cf.* "submitted to") the City—however, the actual language of the Request was ". . . can [the City] tell me what Google's/Design's water consumption was last year?" The City interprets all Public Records requests both broadly (to support the public interest) and narrowly (to support governmental interests in efficiency); accordingly, the City's position when it responded to Mr. Rogoway on September 24, 2021, was the Request does not exclusively seek records created by the City but also seeks records otherwise in the City's custody by way of a confidential submission by Design. However, considering Mr. Rogoway's petition to your Office on October 7, 2021, it appears he clarified he only sought records "created by" the City, so the City agrees the Confidential Submissions exemption does not apply to his clarified Request.

ORS 192.345(2) – Trade Secrets

Background

Design operates an existing data center in the City. Design and its parent company (Google) provide computing and data services in a highly competitive global market. Design's competitive advantage, and that of its parent company, hinges on the unique design, siting, and capacity of its data centers, including the facility in the City. As explained below, the information contained in records sought by Part (A) of the Request would, if disclosed to Design's competitors, do substantial harm to Design's and Google's competitive position.

The Trade Secrets Exemption

ORS 192.345(2) conditionally exempts trade secrets. "Trade secrets", as used in the Public Records Law, may include, but are not limited to:

[a]ny formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

The information contained in records withheld from disclosure under this provision must meet all four of the following criteria:

1. The information must not be patented;
2. The information must be known only to certain individuals within an organization and used in a business the organization conducts;
3. The information must have actual or potential commercial value; and
4. The information must give its users an opportunity to obtain a business advantage over competitors who do not know or use it.

In considering whether information is trade secret, the Oregon Department of Justice provides reviewers (such as the City and your Office) may also consider “internal steps the entity takes to keep the information secret; steps taken to ensure that any associated third-parties keep the information secret; how the information would be economically valuable to a competitor or could be used to economically harm the entity; and the time, effort, and expense needed to compile the information.”

The City’s position is records containing the information sought by Part (A) of the Request is exempt from public disclosure under the Trade Secrets exemption and the public interest does not require disclosure in this particular instance.

In its negotiations with the City over the years, Design has been clear it considers its water use data exempt from public disclosure under the trade secrets exemption.

1. The requested information is not patented.

None of the information Design seeks to protect from public disclosure (namely, records responsive to Part (A) of the Request) is patented.

2. The requested information is used in Design’s business and known only to certain individuals within the company.

Design uses the requested information in the course of conducting its business of operating its data center in the City. This 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. All persons with knowledge of the requested information are required to maintain its confidentiality.

Design ensures the requested information is kept confidential by:

- requiring employees to sign confidentiality and nondisclosure agreements;

- securing the site perimeter and limiting site access to only authorized employees and approved contractors;
- maintaining policies ensuring employees and contractors comply with strict confidentiality protocols as it pertains to Design's water use data; and
- requiring any third-party contractors with access to the site or Design's water use data enter into nondisclosure agreements under threat of legal penalty for any violation.

3. *The requested information has actual and potential commercial value.*

Design has developed its data center designs, including its water systems, to enable it to design, construct, and operate data centers compatible with and supporting to Google's existing infrastructure and operations, and to ensure its data center in the City is competitive in the global market. Accordingly, the requested water use data has substantial economic and commercial value. Information regarding the size and utilization of Design's facility in the City is of considerable interest and commercial value to Design's competitors, who could use water usage data to infer the size and utilization of the facility.

If the requested information was released to the public, a competitor could use the information to its commercial advantage to compete with Design and ultimately siphon market share away from Design and its parent company. The water use data derives independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use—the very definition of a trade secret.

4. *If disclosed, the requested information would confer a business advantage on Design's competitors, who do not know or use it.*

Design's competitors are interested in acquiring details about Design's data center operations in the City. Disclosure of the water use data Design seeks to protect would erode any business advantage Design and Google have over their competitors as to the data center in the City and its role in the larger data center network. Revealing the requested water use data would give competitors valuable insight into the data center's operations. This information, either alone or when combined with other information known to Design's competitors, would provide competitors a sufficiently precise understanding of the water use and ultimate computing and data storage capacity of the facility. Such information is highly proprietary and protected by Design and its parent company Google.

Revealing the 2020 water usage at the data center in the City would compromise Design's data center siting and design strategy, which relates directly to the site's water use, a key driver of data center operations and an area in which Design and Google invest tremendous research and development resources. Design's proprietary data center design, including its water use, thus provides a competitive advantage over its competitors, as its unique design enables reduced and more efficient water consumption. Maintaining information related to its data center water use as confidential also enables Design and Google to maintain a competitive environment when negotiating for water and sewer rates, both for this and other projects.

The public interest does not require disclosure in this particular instance.

Consistent with ORS 192.345(2), trade secrets are exempt from disclosure unless the public interest requires disclosure in the particular instance. In this instance, it is unclear what, if any, public interest would be served by disclosing the requested information. To be sure, the public interest is served by the City's ongoing monitoring of Design's water use. The City's interest is not in question here, though, because the City has access to Design's water use information.

In general, the Public Records Law favors disclosure of public records. However, specifically when assessing whether the public interest requires the disclosure under the Trade Secrets exemption, the Oregon Attorney General relies on federal law evincing a legislative policy in favor of protecting trade secrets and finds it appropriate to give heightened scrutiny to contentions the public interest demands disclosure of a trade secret. (*See State of Oregon, Department of Justice Attorney General's Public Records and Meetings Manual (June 2019), Page 57*).

When assessing whether the public interest requires disclosure of a trade secret, the Oregon Attorney General typically looks to:

- (a) How much harm the entity asserting a trade secret would suffer by disclosure;
- (b) The benefits enjoyed by that entity in connection with submitting the information at issue; and
- (c) The nature of the governmental activity connected to the information.

Here, the City's position is the public interest does not require disclosure under Oregon law and precedent because:

- (a) Google would suffer by the City's disclosure of information it internally restricts, hired specialized Public Records counsel to protect, and otherwise coordinated with the City to enter nondisclosure agreements to guard;
- (b) Google enjoys the spoils of its innovation relating to its proprietary data systems and such enjoyment would be jeopardized if the City released information connected with Google's water consumption and/or discharge because Google's competitors could reverse engineer or otherwise gain and uncompetitive or unfair insight into its proprietary systems with the information, which would mitigate any business advantage afforded to Google; and
- (c) The City entered nondisclosure and confidentiality agreements to keep confidential information connected with Google's water consumption and discharge to bring Google to the negotiating table to construct an over \$1 billion dollar project in The Dalles instead of siting the project in any other city throughout the state, nation, and globe. The City's confidence was a primary consideration in Google's selecting The Dalles as its "first owned and operated data center". *See* <https://www.google.com/about/datacenters/locations/the-dalles/> Google and the City's partnership provides the City with tremendous economic vitality and critically contributes

Matthew Ellis
Public Records Appeal
October 12, 2021
Page 6 of 6

to the City's water and sanitary sewer infrastructure and resiliency to the benefit of all City water users.

The two agreements Design is currently negotiating with the City relate to future data centers in the City (and not existing facilities)—a Strategic Investment Program Agreement and Development Agreement will be reviewed and voted on by the City Council in an open public meeting slated for later this month on October 25, 2021. There have been no less than five public City Council and Wasco County Board of County Commissioner meetings on these agreements over the past year. Any member of the public interested in the terms of those agreements may participate in those meetings, and many have.

Further, as explained by the City's Public Works Director during the City Council meeting on September 27, 2021, under the terms of the draft Development Agreement, Design will transfer existing groundwater rights (currently held by Design) to the City for incorporation into the municipal water system. Design's transfer to the City will provide more water than the data centers covered by the agreement will use. See here: <https://thedalles-oregon.ompnetwork.org/sessions/229005?embedInPoint=1&embedOutPoint=9283&shareMethod=link>

In sum, the City's denial to disclose records responsive to Part (A) of the request is supported by the Public Records Law and its interpretations by the Oregon Department of Justice as records qualifying as trade secrets subject to withholding and the public interest does not require disclosure in the particular interest. The City is not the custodian of records responsive to Part (B) of the Request and the Public Records Law does not require the City create new records, disclose the reasoning behind its actions, answer questions about its records, or analyze its records.

Please let me know your thoughts and your Office's disposition here. I am most quickly reached at jkara@campbellphillipslaw.com or directly at (503) 917-0078 if you require any further information connected with this matter.

Regards,

/s/ Jonathan Kara
Jonathan M. Kara
City Attorney

cc: Julie Krueger, City Manager
Rachel Anderson, Municipal Paralegal



Oct. 13, 2021

Mr. Matthew Ellis
Wasco County District Attorney
Wasco County Courthouse
511 Washington, Suite 304
The Dalles, OR 97058

Dear Mr. Ellis:

Please consider this information supplementary to The Oregonian/OregonLive's Oct. 7, 2021, public records petition and in response to the City of The Dalles submission of Oct. 12, 2021.

Oregon courts interpret exemptions to the public records law narrowly. In addition, a public body that denies a records request has the burden of proving that the information is exempt from disclosure.

In this case, the City of The Dalles has failed to meet its burden. The city repeatedly cites "harm" – indeed, "substantial harm" – to the public interest if the records are disclosed, but it offers no showing, not one shred of evidence, to support this contention.

The Oregonian/OregonLive submits that the city has not offered any evidentiary showing of harm to the public interest because it simply cannot. This information is public in other states. If any harm to the public interest can be attributed to that disclosure, where is the evidence of it?

In South Carolina, for instance, Google's water consumption for its data center is publicly disclosed. Just this year, Google announced it would its expansion to its data center there.

<https://www.counton2.com/news/local-news/berkeley-county-news/google-announces-500m-investment-expanding-data-center-in-berkeley-county/>

Trade secrets

Google's water use is simply not the sort of thing that constitutes a trade secret. Google has requested or was granted 2.3 billion gallons of water in three states, according to Bloomberg. That includes 1.46B gallons of water in Red Oak, Texas. And in South Carolina, the company requested 1.5m gallons of groundwater. In Mesa, the company is guaranteed 1m gallons a day and up to 4m gallons a day, Bloomberg reports. The Post and Courier [has the same figures](#) for Google's water demands in South Carolina.