



OREGONLIVE

The Oregonian

OREGONIAN MEDIA GROUP

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.

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

