



ROD UNDERHILL, District Attorney for Multnomah County

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January 29, 2019

Ryan Felton
Consumer Reports
ryan.felton@consumer.org (by email only)

Ken McGair
Deputy City Attorney
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Ryan Felton seeking unredacted copies of Bird and Lime's applications to participate in the City of Portland's e-scooter pilot program

Dear Mr. Felton and Mr. McGair:

In his public records petition, dated January 15, 2019, petitioner Ryan Felton asks this office to order the City of Portland to disclose "an unredacted version of Bird and Lime's applications to the Portland transportation bureau for the city's scooter program."

Bird and Lime are competing companies, each of which provide dockless electronic scooters in various cities across the country. These scooters may be activated by any person using a smart phone loaded with the company's app. The user is then charged on a per minute basis to ride the scooter. The City of Portland ran a four month pilot program in which various companies, including Lime and Bird, applied for, and were granted, permits to operate scooter fleets in the city. That pilot program has ended and the city is currently evaluating the future of dockless scooters in Portland.

Petitioner made his request on January 14, 2019. The City provided petitioner with redacted versions of each companies applications and asserted that the withheld information is covered either as confidential submissions under ORS 192.355(4) or constitutes protected trade secrets under ORS 192.345(2).

DISCUSSION

A. Confidential Submission – ORS 192.355(4)

ORS 192.355(4) exempts from disclosure,

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.

The fourth element is dispositive on these facts. Analysis of this section has made clear that the public body must in some fashion prospectively commit itself to confidentiality for this section to apply. See, ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL (2014) at 83-84.

Although Bird and Lime assert that they believed their information would be held confidential, neither they nor the City has pointed to any communication or information that would provide objective support for belief. Indeed, the City informs us that although it did incorporate confidentiality provisions into its regulatory data collection scheme for its dockless scooter program, see TRN-15.01(C), confidentiality was not an expressed condition of the permit submission. According to the city nothing in the relevant administrative rule, the permit application, or the permit documents themselves contains any guarantee, or suggestion, of confidentiality as to the permit application.

As such, this exemption does not apply to any portion of the redacted materials.

B. Trade Secrets – ORS 192.345(2) & ORS 646.461

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. *Pfizer Inc. v. Oregon Dep't of Justice*, 254 Or App 144, 158 (2012). That is to say, 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.

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.

Here we can begin and end our analysis with the second element. As we concluded when evaluating the applicability of ORS 192.355(4) above, permit applications were voluntarily submitted to a public body with no assurances of confidentiality. We cannot say that that is a reasonable effort to maintain its secrecy. As to Bird's permit application in particular, much of the redacted information is already available online, having been released by another municipality in response to a request under their public records law.¹

¹ The City of Pittsburgh, Pennsylvania has released a copy of Bird's similar application to operate in its jurisdiction. The version of this permit that has been published online is a poor scan that crops some of the pages and does not

The materials certainly contain details here and there that would likely be of interest to a competitor, but on balance these are marketing materials designed to convince a municipality to afford the firm the opportunity to operate in its jurisdiction. The two applications do not contain identical materials, but the following categories of information are included in one or both of the permit applications:

- names and/or contact information for company contacts;
- names and/or contact information for public employee “references” in other jurisdictions where the company has worked;
- a list of other jurisdictions in which the firm operates;
- expected battery life or scooter lifespan for the firm’s scooters;
- steps the firm has taken to engage with the local community;
- accident and complaint data from other jurisdictions in which the firm operates;
- the user experience of the firm’s app; and
- the, highly generalized, process by which scooters are charged and maintained in service.

We have been provided no factual record, apart from a general assertion, to show that this information is closely held within either company, that its release would unduly hamper its ability to compete, or indeed that any prospective effort was made to prevent redistribution of these materials within or outside of the City of Portland. On this record, and for the reasons above, the City of Portland, to the extent it adopts the arguments of the two dockless scooter firms, has not met its burden of establishing an exemption under this section.

The regulatory framework enacted by the Portland Bureau of Transportation requires the submission of certain data by each permittee as a condition of continuing to operate in the city. This is distinct from the permit application process and, to be very clear, the above analysis applies only to the permit applications that were voluntarily submitted to the city. The regulatory data is of a different nature; it is more granular, detailed, and operationally valuable to a firm or its competitors. See, *Lyft, Inc. v. Portland Bureau of Transportation et al.*, Mult. Co. Cir. Ct. 16CV32174 (2017, Matarrazo, J) (finding regulatory data of transportation network companies to be covered by trade secret protection and unconditionally exempt from disclosure under the public records law).

ORDER

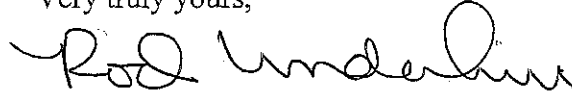
Accordingly, the petition is granted. The City of Portland is ordered to promptly release the permit applications submitted by Lime and Bird in unredacted form. This release is subject to

include as much detail as the application at issue here, however many of the redacted sections are reproduced word-for-word in the already published Pittsburgh application.

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the payment of fees, if any, not to exceed the City of Portland's actual costs in producing the records.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, with a large loop at the end.

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

Cc: Daniel Suvor, counsel for Bird Rides, Inc.
Robert Sills, counsel for Lime, Inc.

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