

No. 94026-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LYFT, INC, and
RASIER, LLC, a Delaware limited liability company,

Respondents,

v.

CITY OF SEATTLE and JEFF KIRK,

Appellants.

**CONSOLIDATED REPLY BRIEF OF
APPELLANT CITY OF SEATTLE**

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I. INTRODUCTION

Uber and Lyft¹ have been granted the privilege of operating a lucrative transportation business on the City of Seattle's ("City's") public rights-of-way. The City regulates this industry to protect the interests of the public. As part of the regulatory process, the City requires the TNCs to submit regular data reports, identical to data submitted by other similar transportation businesses such as taxi cabs. The data is clearly intended to be used and scrutinized by the public including through the public's representatives on the City Council. There is no other reason for the data to be collected. The TNCs' response briefs demonstrate, however, that they, as the regulated parties, want to control what information the public and the Council can consider. This Court should reject the TNCs' efforts to manipulate to Public Records Act ("PRA") and trade secret law to achieve these ends.

There is no dispute the trial court, at the TNCs' urging, disclaimed the applicability of the PRA's injunction standard in this PRA case. The trial court did not hold the TNCs to their burden under RCW 42.56.540 of showing both "irreparabl[e] damage" caused by release of the records, and that disclosure of the records is clearly *not* in the public interest. Had it properly done so, it would have denied the request for an injunction.

¹ The City refers to Respondent Rasier, Inc., by its parent company's name—Uber. Uber and Lyft are often referred to as "Transportation Network Companies" or "TNCs."

Seemingly cognizant of this, the TNCs now ask this Court to treat the error as harmless and create a new exemption-specific injunction scheme for the PRA, under which courts would apply lesser injunction standards to exemptions incorporated into the act by “other statutes.” This scheme is contrary to the language and purpose of RCW 42.56.540, which intentionally imposes a heightened burden on third parties seeking to prevent disclosure of public records. The protections afforded by RCW 42.56.540 are especially important in the present case when the public interests are so significant.

The continued expansion of the TNC business on City rights-of-way, the undercutting of the taxi industry, and the need for equitable transportation service raise policy questions worthy of robust public debate. Though the TNCs attempt to sidestep this point, the PRA request that culminated in this lawsuit sought the quarterly reports in order to study possible discriminatory practices in the TNC industry. By enjoining disclosure, the trial court failed to consider appropriately the interests of the requester and the public in evaluating this important issue.

The Court should also reject Uber and Lyft’s attempt to broaden the confines of the Uniform Trade Secrets Act (“UTSA”) far beyond its intended scope. The TNCs claim that the quarterly reports they submit pursuant to City Ordinance 124524 are trade secrets, but their briefs and

motions filed after entry of the injunction further demonstrate their objection to disclosure stems not from a need to protect actual trade secrets, but from their desire to shield from public and legislative scrutiny the conduct of their business and its extraordinary impact on City rights-of-way. Trade secret law was never intended as an indirect method for regulated entities to stymie legitimate oversight of an exponentially growing and substantially impactful industry.

Both because the trial court applied the wrong injunction standard and because the records are not trade secrets, the City respectfully requests that this Court reverse the trial court.

II. REPLY REGARDING STANDARD OF REVIEW

Relying solely on authority from CR 65 rather than the PRA, Lyft wrongly contends the applicable standard of review for the trial court's injunction decision is abuse of discretion. Lyft Br. at 12-13. Washington law is clear, however, that "[j]udicial review under the PRA and [RCW 42.56.540] is de novo." *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407, 259 P.3d 190 (2011); *see also Planned Parenthood of Great Nw. v. Bloedow*, 187 Wn. App. 606, 618, 350 P.3d 660 (2015) ("Judicial review of the denial of a request under the PRA and the *request for injunctive relief under the PRA is de novo.*") (emphasis added). Citing *Zink v. City of Mesa*, 140 Wn. App. 328, 336-37, 166 P.3d

738 (2007), Lyft claims this standard applies solely in cases where the trial court reviews documentary evidence and does not take live testimony. Lyft Br. at 13 n.21. But as Uber acknowledges, *Zink* merely holds that findings of fact based on testimony are reviewed for substantial evidence, not the injunction decision itself. Uber Br. at 10; *Zink*, 140 Wn. App. at 337 (holding that appellate court will review findings of fact based on testimonial record for substantial evidence, but will review “de novo all questions regarding the City’s obligations under the [PRA]”). The City accurately stated the standard in its Opening Brief, Op. Br. at 15, and Lyft’s attempt to apply a different standard of review should be rejected.

Next, Lyft cites Federal Rule of Evidence 201, wrongly contending the standard of review of decisions regarding judicial notice is abuse of discretion. Lyft Br. at 13. But the City did not seek judicial notice of an adjudicative fact when introducing the National Economic Bureau Report discussing discrimination in the TNC industry, and neither ER 201 nor its federal counterpart applies here. ER 201(a) (“This rule governs only judicial notice of adjudicative facts.”).² The City offered the report to show the legislative fact that there is significant public interest in potential

² Even if ER 201 did apply, Lyft misstates the applicable standard of review under Washington law, which is de novo. *Fusato v. Wash. Interscholastic Activities Ass’n*, 93 Wn. App. 762, 771-72, 970 P.2d 774 (1999) (“A court’s taking judicial notice of a matter raises a question of law reviewed de novo.”) (internal citation omitted).

discrimination in the TNC industry. *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980) (holding courts can take “notice of ‘legislative facts’ social, economic, and scientific facts that simply supply premises in the process of legal reasoning”) (internal quotation omitted). Regardless of the standard of review, the trial court erred in not taking judicial notice of this report in support of the City’s argument of public interest.³

III. ARGUMENT

The trial court’s order must be reversed on two independent grounds. First, the trial court erred in failing to apply the proper injunction standard under the PRA, opting instead to apply the lesser standard governing injunctions under CR 65. The trial court failed to make the requisite findings to support injunctive relief under the PRA, and this error was not harmless. Reversal is required on this ground alone.

Second, the trial court erred in concluding the two distinct categories of data, which the trial court lumped together as “zip code data,” was a trade secret under the UTSA and was exempt from disclosure under the PRA’s other statutes exemption. This error constitutes a separate and independent basis for reversal.

³ Despite the trial court’s failure to consider the study, *this* Court may, and should, take judicial notice of its substance in support of the City’s appeal. *Wyman*, 94 Wn.2d at 102.

A. The PRA’s injunction standard applies in all PRA cases, and the trial court erred in failing to apply this standard.

1. The injunction standard is the same for exemptions in the Act and exemptions created by “other statutes.”

At the outset, the TNCs have failed to support their argument below and on appeal that the PRA’s injunction standard does not apply in this case, which is a PRA proceeding. To the contrary, their position on RCW 42.56.540 continues to be a moving target. As noted in the City’s Opening Brief, both Uber and Lyft first took the (correct) position that the PRA’s injunction standard applied in this case. Op. Br. at 19. Then, at oral argument for the preliminary injunction, they made an about face and argued that this Court’s decision in *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 258-59, 884 P.2d 592 (1994) (“PAWS II”), precluded the applicability of RCW 42.56.540 when a party claimed an exemption under the UTSA. The trial court ultimately adopted this position, even though it acknowledged there was contrary appellate authority. CP 2716. Now, the TNCs concede that no case from this Court (or any other appellate court) has held that RCW 42.56.540 is inapplicable in “other statute” exemption cases. Lyft Br. at 39 (Supreme Court cases and “lower court opinions are indeterminative”); Uber Br. at 13 (claiming that no court has addressed the issue). Yet, this is the standard the TNCs ask this Court to adopt.

The TNCs urge the Court to apply the heightened PRA injunction standard only to exemptions found within the PRA while applying the lesser standard articulated in *Tyler Pipe Indus. v. Dep't of Revenue*, 96 Wn.2d 785, 638 P.2d 1213 (1982) to exemptions found in other statutes (such as the UTSA) and incorporated via RCW 42.56.070. No authority cited in their briefs supports this approach. Courts do not distinguish between “other statutes” exemptions incorporated through RCW 42.56.070 and exemptions within the PRA when applying RCW 42.56.540 because “[a]ll exceptions, including ‘other statute’ exceptions, are construed narrowly.” *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 525, 326 P.3d 688 (2014). As the Court of Appeals held, “the distinction between an exemption and a prohibition largely is immaterial. RCW 42.56.070(1) does not distinguish between the two, referring to any other statute that ‘exempts or prohibits’ disclosure.” *SEIU Healthcare 775NW v. State, Dep’t of Soc. & Health Servs.*, 193 Wn. App. 377, 400, 377 P.3d 214, *review denied*, *SEIU Healthcare 775 N.W. v. State of WA DSHS*, 186 Wn.2d 1016, 380 P.3d 502 (2016).

Consistent with this authority, the Court of Appeals recently held in an “other statute” case that “[a]n injunction is appropriate under the PRA’s injunction statute where the trial court concludes that an exemption applies and that the disclosure would not be in the public interest and

would substantially and irreparably damage a person.” *John Doe P v. Thurston Cty.*, No. 48000-0-II, 2017 WL 2645043, at *9 (Wash. Ct. App. June 20, 2017) (citing RCW 42.56.540; *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 808, 246 P.3d 768 (2011)). The *John Doe P* decision applied RCW 42.56.540 in the context of a claimed exemption under the Uniform Health Care Information Act, RCW 70.02.020(1).⁴ *John Doe P*, 2017 WL 2645043, at *8. This is consistent with prior authority. See *Planned Parenthood*, 187 Wn. App. at 627 (applying RCW 42.56.540 to exemption under RCW 43.70.050); *SEIU 775 v. State Dep’t of Soc. & Health Servs.*, 198 Wn. App. 745, 396 P.3d 369, 372 (2017) (invoking RCW 42.56.540 in considering “other statute” exemptions under Public Employees Collective Bargaining Act, chapter 41.56 RCW).

The other cases cited by the TNCs also do not support abandoning the .540 injunction standard. For example, both Uber and Lyft cite *Wright v. State*, 176 Wn. App. 585, 309 P.3d 662 (2013), but that case has nothing to do with injunctive relief or section .540. In relevant part, the case holds that when a party seeks certain juvenile court records, they must obtain those records through the specific procedure provided in chapter 13.50

⁴ Lyft claims no similar analysis was conducted in *John Doe G. v. Dep’t of Corrections*, 197 Wn. App. 609, 391 P.3d 496 (2017). Lyft Br. at 41. As the briefing from *John Doe G.* shows, however, Lyft is incorrect. See *DOE G v. DEPARTMENT OF CORRECTIONS et al.*, Br. of Resp’ts, 2016 WL 4046743 (Wn. App.), at 38 (briefing of RCW 42.56.540 in applying exemptions under chapter 70.02 RCW).

RCW, rather than under the PRA. *See Wright*, 176 Wn. App. at 599 (to obtain record from DSHS, petitioner had to comply with the process set forth in RCW 13.50.100(8)). Here, the PRA unquestionably applies.

The TNCs also rely on *Ameriquest Mortgage Co. v. Washington State Office of Atty. Gen.*, 170 Wn.2d 418, 241 P.3d 1245 (2010) (*Ameriquest I*), and *Ameriquest Mortg. Co. v. Office of Att’y Gen.*, 177 Wn.2d 467, 300 P.3d 799 (2013) (*Ameriquest II*). *Ameriquest I* dealt only with the questions of whether a federal statute preempted the PRA and, if not, whether it could nonetheless be an “other statute” exempting disclosure through RCW 42.56.070(1). *See* 170 Wn.2d at 439-40. As these were the sole issues on appeal, the court had no reason to (and did not) address RCW 42.56.540. *Id.*; *see also Doe ex rel. Roe v. Washington State Patrol*, 185 Wn. 2d 363, 376, 374 P.3d 63 (2016) (discussing *Ameriquest I*). Similarly, the portion of *Ameriquest II* on which the TNCs rely addresses only whether certain personal identifying information was protected by federal law. *Ameriquest II*, 177 Wn.2d at 483-84. There is no indication that any party argued the applicability of .540 in this context, nor would there have been grounds to contend that disclosure of federally protected personal identifying information was in the public interest. Nothing in either *Ameriquest* decision supports the premise that .540 does not apply to injunction requests based on “other statute” exemptions.

Respondents' reliance on *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 328 P.3d 905 (2014), is equally flawed. Although *Robbins* declined to address the question of what injunction standard applied, the court expressed serious reservations with the same arguments Uber and Lyft make here (based on the same cases cited in the present case). In a footnote, the Court of Appeals opined that this Court had never rejected the application of RCW 42.56.540 in "other statutes" cases: "If the Supreme Court decided the issue, it did so sub silentio." *Robbins*, 179 Wn. App. at 726 n.7 (discussing *Ameriquest* cases and *Wright*, and distinguishing cases Uber and Lyft now rely upon).

Moreover, *Belo Mgmt. Servs., Inc. v. Click! Network*, 184 Wn. App. 649, 343 P.3d 370 (2014), was decided six months *after Robbins*, and *Belo* did squarely address the issue, applying the PRA injunction standard in a trade secret PRA case. *Id.* at 661 ("Even if the broadcasters had proven that RCA prices are trade secrets or that the federal regulations are an 'other statute,' the broadcasters still failed to prove the requirements for an injunction under RCW 42.56.540.").

This leaves Uber and Lyft to simply assert that the above portion of *Belo* is dicta, without addressing its merits. Uber Br. at 14; Lyft Br. at 39-40. The application of RCW 42.56.540 was not dicta, however, but as the trial court recognized, an alternative holding with equivalent

precedential value. *West v. Port of Tacoma*, No. 48110-3-II, 2017 WL 2645665, at *10 (Wash. Ct. App. June 20, 2017) (“Alternative holdings are not dicta....”); *see also* CP 2715.⁵ Regardless, the decision in *Belo* was correct and consistent with numerous cases applying RCW 42.56.540 when “other statutes” exemptions are claimed. *See* Op. Br. at 16-19.

At bottom, the PRA is a self-contained statute, with its own specific injunction requirement. Just last year, this Court held that the PRA’s one-year statute of limitations, as opposed to the two-year general catchall limitations period contained in the civil procedure code, applied in all PRA cases. *Belenski v. Jefferson County*, 186 Wn.2d 452, 458, 378 P.3d 176 (2016). That same logic applies here. Applying the more rigorous injunction standard is consistent with both the PRA’s mandate of liberal construction to provide access and its requirement that all exemptions be narrowly construed. Consequently, the trial court committed legal error by applying the wrong injunction standard.

2. Applying a lower injunction standard to “other statutes” exemptions leads to absurd results.

This Court must also consider the practical implication of the TNCs’ argument. If the TNCs’ position is correct, the ironic result would

⁵ Uber cites to the briefing in *Belo*, Uber Br. at 14, but neglects to mention that current counsel for Lyft was counsel for one of the *Belo* Respondents, and argued to the Court of Appeals that RCW 42.56.540 was the correct injunction standard to apply when considering a claim of trade secrets, as in the present case. CP 468.

be that exemptions the Legislature has specifically included in the PRA would provide *less* protection than exemptions *not* included in the PRA. For example, the Legislature considered and did not pass a bill this year that would have provided a PRA exemption for the type of TNC data at issue here. *See* Engrossed Substitute Senate Bill 5620 § 22 (2017). Under the TNCs’ logic, had the Legislature adopted this exemption, they would have then faced a higher burden to obtain an injunction than they do now in the absence of a specific exemption. This would be an absurd result. *But see Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013) (PRA must be interpreted to “avoid absurd results.”).

The absence of a specific exemption, moreover, demonstrates that the Legislature elected *not* to protect the specific records at issue here, even though it has done so in many other instances. For example, RCW 42.56.270 addresses numerous other types of specific financial, commercial, and proprietary information that the Legislature has decided to exempt from disclosure. Notably absent from the list is “trade secrets.” Similarly, RCW 42.56.330(1) expressly exempts “[r]ecords filed with the utilities and transportation commission or attorney general” under RCW 80.04.095, including “valuable commercial information, including trade secrets or confidential marking, cost or financial information” submitted to

the Utilities and Transportation Commission. The Legislature knows how to implement very specific exemptions when it wishes to do so.

Uber nonetheless claims that applying the general protections of the UTSA to the exclusion of RCW 42.56.540 would address a “conflict between the Acts.” Uber Br. at 15. The acts do not conflict, however, because the UTSA does not contain an independent set of injunction criteria, and only identifies an injunction as a potential remedy in the case of misappropriation. RCW 19.108.020.⁶ Nor did this Court in *PAWS II* create any such conflict, since the holding there did not address injunction criteria at all.⁷ “*PAWS* does not set out any subsequent steps that courts should take in order to determine whether an individual about whom a public record pertains may be granted injunctive relief. The holding in *PAWS* was limited to whether RCW 42.56.540 is an independent PRA exemption or merely creates a remedy.” *DeLong v. Parmelee*, 157 Wn. App. 119, 151, 236 P.3d 936 (2010), *review granted, cause remanded*, 171 Wn.2d 1004, 248 P.3d 1042 (2011).

⁶ There is no claim of misappropriation asserted in this case. Lyft Br. at 33.

⁷ Uber and Lyft now acknowledge that *PAWS II* did not address a third-party injunction at all, since there was no third party—only the requester and the government agency. Lyft claims this is “irrelevant” because the case held the UTSA created an “other statute” exemption under the PRA, but this misses the point. Lyft Br. at 42. Without a third party, the Court did not consider the substance of RCW 42.56.540. Similarly, Uber claims the PRA injunction standard applies in the absence of a third party because it contains the word “agency”. Uber Br. at 12 n.1. But this word was added to the statute to confirm that an agency could be a third party and bring an injunction action when its own records were at issue, not that RCW 42.56.540 applied even in the absence of a third party claim. *See Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 754-55, 174 P.3d 360 (2007).

As a result, even if there were a conflict as Uber maintains, the PRA and not the UTSA would then control. *Spokane Research & Def. Fund v. City of Spokane*, 96 Wn. App. 568, 578, 983 P.2d 676 (1999) (holding that “[i]f any conflict exists between the Act and the UTSA” the PRA controls); *Worthington v. Westnet*, 182 Wn.2d 500, 507, 341 P.3d 995 (2015) (“With respect to the scope of the [PRA], the statute unambiguously provides for a liberal application of its terms, explicitly subordinating other statutes to its provisions and goals.”) (citing RCW 42.56.030). Thus, in *Worthington*, various parties could not rely on the Interlocal Agreement statute to avoid disclosure obligations under the PRA. 182 Wn.2d at 510 (“[T]he affiliates cannot designate a task force as a nonentity if doing so would conflict with PRA obligations and requirements.”). Similarly, this Court concluded with respect to portions of the statute relating to community notification of sex offenders that “even if RCW 4.24.550(3)(a) were rendered meaningless by this decision, ‘[i]n the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.’” *Wash. St. Patrol*, 185 Wn.2d at 381.

In sum, there is no basis to exclude “other statute” exemptions from the PRA injunction requirements set out in RCW 42.56.540. No court has ever done so, and the text, structure, and purpose of the PRA

does not allow it. The trial court erred in ruling that RCW 42.56.540 did not apply in this case and in failing to properly apply the standards set forth in the statute. CP 2716.

B. The trial court’s error in failing to apply the PRA injunction standard was not harmless.

According to Lyft, because the trial court “said that her decision would have been the same under both RCW 42.56.540 and the general CR 65 standard”, the failure to apply RCW 42.56.540 was harmless. Lyft Br. at 31. While the trial court may have said this, neither the decision nor the analysis are consistent with RCW 42.56.540, and in fact track only the CR 65 standard under *Tyler Pipe*.⁸ As the trial court acknowledged, “[a]lthough the Court must consider the public interest under both standards, the PRA would require Lyft and Rasier to meet a higher burden of proof: that disclosure ‘would clearly *not* be in the public interest’ and disclosure would cause ‘substantial and *irreparable* damage.’” CP 2714 (emphasis in original). The trial court’s failure to make any findings with

⁸ In fact, in closing, Uber candidly admitted that it had presented evidence solely to meet the *Tyler Pipe* standard and not RCW 42.56.540: “[A]s to the injunctive standard, the Court has, as you will likely recall, already ruled on the injunctive -- appropriate injunctive standard when applying the trade secrets exemption to the PRA two times, first at the preliminary injunction stage and then on the City’s motion for reconsideration. So to the extent that the City wants to relitigate that, we think that’s well decided in this case, *and the evidence that Rasier has presented in this case was in reliance on the Court’s articulated standard that it would be applying Tyler Pipe here.*” VRP (10/26/16) 422 (emphasis added).

respect to either element of the TNCs' admittedly higher burden constitutes reversible error.

1. The trial court made no findings of "substantial and irreparable damage," and the record does not support such a showing.

The trial court discussed the question of "actual and substantial injury" under *Tyler Pipe*, but made no findings and conducted no analysis of "substantial and irreparable damage" under RCW 42.56.540. CP 2716. To the contrary, the trial court's cursory harm analysis merely recites the misappropriation standard in the UTSA and concludes that disclosure of a trade secret is *per se* irreparable harm. CP 2718 (stating that "disclosure of trade secrets under the Public Records Act constitutes irreparable harm because such disclosure destroys the information's status as a trade secret"). The effect of the court's circular ruling is to equate irreparable damage with refusing to apply the exemption in the first instance. This creates the equivalent of a third-party categorical exemption for trade secrets, which is substantially disfavored. *See Sargent v. Seattle Police Dep't*, 179 Wn. 2d 376, 389, 314 P.3d 1093 (2013).

This Court has expressly rejected similar attempts to sidestep the required heightened harm analysis. In *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007), this Court held that courts cannot

ignore the requirements of .540, even after finding a specific exemption applies. Rejecting presumed harm, this Court explained:

It may be that in most cases where a specific exemption applies, disclosure would also irreparably harm a person or a vital government interest. But if we assume that the additional findings contemplated by RCW 42.56.540 are unnecessary, then a significant portion of the statute is rendered superfluous. We therefore clarify that to impose the injunction contemplated by RCW 42.56.540, the trial court must find that a specific exemption applies *and* that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest.

Id. at 756-57 (internal citations omitted, emphasis original). Here, the trial court’s ruling, and the TNCs’ argument, does just that—it presumes harm under the lesser *Tyler Pipe* standard by virtue of claiming the data is a trade secret, but does not apply the heightened standard nor make any findings that could support it.

Even if the court had made the required findings of substantial and irreparable damage, which it did not, the record would not support them.

The TNCs concede that they did not even attempt to quantify any alleged harm from past or expected future disclosures and likewise concede that their businesses have grown exponentially in every market where similar data has been released, including Seattle. *Uber Br.* at 39; *Lyft Br.* at 37. Nonetheless, the TNCs now argue that the previous data disclosures in other jurisdictions were not “identical” to the zip code data at issue here,

and therefore, the fact that they suffered no harm from those disclosures is irrelevant. In each of these prior cases, however, the TNCs argued as they do here—that the data at issue was a trade secret, the disclosure of which would cause substantial harm. CP 110-11; Ex. 307, 310, 388. To the extent *any* of these predicted harms came to pass, however, the TNCs presented no evidence of them at trial. As such, where the TNCs presented no evidence of actual harm from data disclosures, their demonstrated history of falsely (or disingenuously) predicting catastrophic harm due to the release of analogous records undercuts the speculative fears of future loss argued in their briefs.

Moreover, as highlighted in the TNCs’ Answering Briefs, the only harm claimed by the TNCs is “unfair competition.” Uber Br. at 34; Lyft Br. at 35. Adopting this incorrect construction of harm, the trial court ruled that disclosure of Uber and Lyft’s data would provide each TNC “an unfair competitive advantage against each other.” CP 2718. But the trial court never explained how, nor why such alleged competition would be “unfair,” particularly when Lyft requests and receives identical quarterly data provided by the taxis. Furthermore, both the trial court and the TNCs failed to explain how disclosure of the generalized records *provided to the City*—as opposed to the wealth of granular real-time data collected by the TNCs—could actually cause any of the hyperbolic harms they now allege.

For example, Mr. Kelsay did not explain how a competitor could “cherry pick routes” or “potentially create or improve their algorithms” by virtue of knowing only the zip code for a given ride four months after it was provided. *See Lyft Br.* at 35-36.

Recognizing the dearth of evidence, Uber argues that numerous courts have found that misappropriation of trade secrets will result in irreparable harm where the information “would be used by competitors to wrest away customers or market share—losses that cannot be quantified or remedied.” *Uber Br.* at 35. But the authority cited for this proposition does not apply to Uber’s claims. First, all but one of the cases cited sought preliminary injunctive relief, and as such, the court was evaluating likelihood of harm, not the existence of “irreparable damage” on the merits as the trial court did here.⁹ Moreover, each of the cited cases involves the type of information that actually constitutes a trade secret, such as secret formulas, confidential marketing strategies, engineering specifications for solar panels, and computer software.¹⁰ In these cases,

⁹ In the one case involving a permanent injunction, the plaintiff had proved that the defendant had misappropriated a secret chemical process by colluding with a former employee and then destroying documents. *Wyeth v. Nat. Biologics, Inc.*, No. CIV. 98-2469 NJE/JGL, 2003 WL 22282371, at *1 (D. Minn. Oct. 2, 2003), *aff’d*, 395 F.3d 897 (8th Cir. 2005).

¹⁰ *Optos, Inc. v. Topcon Med. Sys., Inc.*, 777 F. Supp. 2d 217, 239 (D. Mass. 2011) (detailed customer information relating to retinal imaging devices); *Wyeth v. Nat. Biologics, Inc.*, No. CIV. 98-2469 (NJE/JGL, 2003 WL 22282371, at *1 (D. Minn. Oct. 2, 2003), *aff’d*, 395 F.3d 897 (8th Cir. 2005) (chemical process to extract estrogens); *Bimbo Bakeries USA, Inc. v. Botticella*, No. CIV.A. 10-0194, 2010 WL 571774, at *1

the plaintiffs demonstrated that disclosure of the information had immediate adverse consequences and that the loss of secrecy was truly irreparable because the “secrets” could not be unlearned. Here, by contrast, the data provided to the City is highly generalized, different every quarter, and is inherently not secret—Uber and Lyft already know the best places to find drivers and riders by the very nature of their business and the use of common sense. *Cf. Altana Inc. v. Schansinger*, 111 A.D.2d 199, 200, 489 N.Y.S.2d 84, 86 (1985) (generally known trade information is not a trade secret). While the TNCs clearly do not want City policymakers or the public to know the extent of their operations, the conclusory claim that this data will put one TNC out of business at the hands of the other is neither credible nor supported by substantial evidence.

In sum, even if the trial court had applied the correct standard, which it did not, the record does not support a finding of irreparable damage from disclosure.

(E.D. Pa. Feb. 9, 2010), *aff'd*, 613 F.3d 102 (3d Cir. 2010) (proprietary marketing data for baking company products); *Xantrex Tech. Inc. v. Advanced Energy Indus., Inc.*, No. CIV.A07CV02324WYDMEH, 2008 WL 2185882, at *4 (D. Colo. May 23, 2008) (business plans and engineering specifications for solar inverters); *Benefit Res., Inc. v. Apprize Tech. Sols., Inc.*, No. CIV.07-4199(JNE/FLN), 2008 WL 2080977, at *1 (D. Minn. May 15, 2008) (computer software).

2. The trial court did not find that disclosure was “clearly not in the public interest,” and the record establishes the contrary.

a.) The trial court did not make the requisite finding regarding public interest.

Unlike the test articulated in *Tyler Pipe*, RCW 42.56.540 required the trial court to determine that disclosure would “clearly not be in the public interest.” The burden is on the TNCs to prove this element, and the court must consider the public interest in determining whether nondisclosure is appropriate. *See, e.g., Ameriquest II*, 177 Wn.2d at 493 (holding that moving party “produced no authority or evidence to prove that the public lacks a legitimate interest in monitoring agency investigations”); *Morgan v. City of Fed. Way*, 166 Wn.2d 747, 756-57, 213 P.3d 596 (2009) (considering significant public interest in disclosure of report regarding job performance of elected official). As evidenced by the trial court’s opinion, it never analyzed this legal question, nor made adequate findings as to why disclosure would clearly not be in the public interest. As with irreparable damage, the trial court erred in failing to properly apply this element of the PRA injunction standard.

Both TNCs fail meaningfully to defend the trial court’s error. For its part, Lyft primarily contends that the trial court appropriately considered the potential competitive effects on the TNC market in Seattle when considering the question of public interest. Lyft Br. at 43-44. But

this confuses the interests of the *public* in general with those of *TNC customers* specifically. This reasoning is flawed for the same reasons set forth in *Belo*, where the court determined that while customers of the cable company might suffer injury as a result of higher cable rates if certain information was disclosed, the public as a whole—some of whom are not cable customers—had an overriding interest in government transparency. *Belo*, 184 Wn. App. at 661-62 (stating that arguments against disclosure “confuse the public with Click! and its customers” and noting that “not all people [] subscribe to Click!”). On that ground, *Belo* rejected the identical argument Lyft advances here—that it and its customers’ interests override those of the public—and instead found the public interest was served by disclosure. *Id.* That reasoning is sound and should be followed here.

Both TNCs also argue the trial court properly considered the public interest in protection of trade secrets and that this interest outweighed that of regulatory transparency. This argument fails because, as set forth below, the zip code data does not constitute a trade secret and does not require protection. Regardless, this is the same flawed argument as the harm *per se* standard the TNCs urge the Court to adopt when trade secrets are at issue. Essentially, the TNCs contend that no alleged trade secret should ever be disclosed regardless of the public’s interest. This argument is inconsistent with the Court’s obligation to consider the PRA injunction

factors even where an exemption applies. *Soter*, 162 Wn.2d at 756-57. Here, the trial court did not consider whether disclosure was clearly *not* in the public interest; it instead ruled the public had an interest in protecting trade secrets. This does not satisfy RCW 42.56.540.

Uber’s claim that “[t]he UTSA reflects Washington’s strong interest in protecting trade secrets” is also wrong as a matter of law. Uber Br. at 14 (citing precursor to RCW 4.24.601); *see also* Uber Br. at 41 (citing *PAWS II*). A similar argument was rejected by Judge Jones, who noted: “The UTSA itself contains no declaration of public interest impact. The Court concludes that RCW 4.24.601 does not contain a declaration of public interest impact sufficient enough to make misappropriation of a trade secret an act with a per se public interest.” *T-Mobile USA, Inc. v. Huawei Device USA, Inc.*, 115 F. Supp. 3d 1184, 1197 (W.D. Wash. 2015).¹¹ This lack of public interest declaration in the UTSA itself

¹¹ RCW 4.24.601 provides in full:

The legislature finds that public health and safety is promoted when the public has knowledge that enables members of the public to make informed choices about risks to their health and safety. Therefore, the legislature declares as a matter of public policy that the public has a right to information necessary to protect members of the public from harm caused by alleged hazards to the public. The legislature also recognizes that protection of trade secrets, other confidential research, development, or commercial information concerning products or business methods promotes business activity and prevents unfair competition. Therefore, the legislature declares it a matter of public policy that the confidentiality of such information be protected and its unnecessary disclosure be prevented.

contrasts sharply with the PRA's strong "public interest" statement favoring disclosure over non-disclosure. RCW 42.56.030. And, as noted above, in the event of a conflict between the PRA and any other legislative enactment, the PRA prevails. *See id.* Thus it is simply incorrect as a matter of legislative intent to say that the protection of trade secrets is on par with the public's right to disclosure of public records.

RCW 42.56.210 drives this point home. It provides that even where a PRA exemption applies, disclosure "may be permitted" if a court determines "that the exemption of such records is clearly unnecessary to protect any individual's right or privacy or any vital governmental function." RCW 42.56.210(2). In other words, the public's interest in disclosure is so strong, that even exempt records may be disclosed unless a privacy interest or vital governmental function is jeopardized by the release of the records. After all, the primary purpose of the PRA's exemptions is not to protect the interests of regulated entities from disclosing information about their business, but rather to protect personal privacy or vital government operations. *Resident Action Council*, 177 Wn. 2d at 432. ("The PRA's exemptions are provided solely to protect relevant

As Judge Jones observed: "This statute is not part of the UTSA, but rather part of an act relating to public access to information about product liability and hazardous substance claims." *T-Mobile*, 115 F. Supp. 3d at 1197.

privacy rights or vital governmental interests that sometimes outweigh the PRA's broad policy in favor of disclosing public records.”).

Finally, the TNCs contend the trial court correctly determined that disclosure of the zip code data was not necessary for the City's regulatory purposes. In addition to being contrary to the evidence, this conclusion does not consider the interest the public may have in receiving this information. Instead, the trial court conflated these two issues by concluding (erroneously) that because *the City* did not need to disclose the data to regulate effectively, the *public* somehow had no interest in disclosure. Moreover, the court's analysis wholly ignores the interest of the requester, Mr. Kirk. The trial court plainly erred in failing to consider the public's interest in disclosure as required under .540.

Ignoring the interests of the public as a whole is particularly inappropriate given the nature of the TNCs' business. It is undisputed that the TNCs operate their business exclusively on public rights of ways. As this Court has recognized, “there is no inherent right in a private individual to conduct private business in the public streets.” *Baxter-Wyckoff Co. v. City of Seattle*, 67 Wn.2d 555, 560, 408 P.2d 1012 (1965). Doing so is an “extraordinary use” that is not a right, but a “privilege.” *Hadfield v. Lundin*, 98 Wn. 657, 662, 168 P. 516 (1917). Despite this privilege, the TNCs (and the trial court) take the view that the public has

no right to examine and scrutinize the TNCs' use of the very roads and streets that are built and maintained by taxpayer funds. Thus, the people who bear the financial and congestive burden of this burgeoning industry are left in the dark as to exactly how those companies are operating on the City's streets. The PRA does not countenance such a result.

b.) Disclosure is in the public interest to permit meaningful regulation of the TNCs.

While the trial court erred in failing to analyze whether disclosure was clearly *not* in the public interest under RCW 42.56.540, the record also demonstrates the public has a substantial interest in disclosure.

First, disclosure of the data is required under the Open Public Meetings Act ("OPMA") if the City Council is to use the data to effectively regulate the TNC industry. While the TNCs do not directly dispute this, they claim instead that the City can meaningfully use the zip code data to inform policymaking decisions without providing the actual data to the City policymakers (i.e., the Council). Before the trial court (and this Court), Uber argued the City could share the data only with a single member of the Council and that the Council as a whole could review summaries of the data in executive session in order to inform policymaking. The trial court erroneously adopted this view, opining

generally that the injunction “does not in any way impact [the City’s] ability to ...make recommendations to the City Council.” CP 2719.

There can be no dispute that for the *Council* to meaningfully consider the data and take action accordingly, it must do so in public session. Specifically, the OPMA requires that the adoption of any “ordinance, resolution, rule, regulation, order, or directive” be made in a meeting open to the public, and that any action taken that fails to comply with this requirement is null and void. RCW 42.30.060(1). “Action” includes the “receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.” RCW 42.30.020(3). There is no support for Uber’s claim that the data can be considered solely by a committee of the Council, behind closed doors, and that the Council may then take action based on this information. *See Cathcart v. Anderson*, 85 Wn.2d 102, 107, 530 P.2d 313 (1975) (purpose of Act is to allow public to view decisionmaking process at all stages).

Uber also does not identify any statutory basis under the OPMA to support the position that this topic would be appropriately subject to executive session. Nor could it, as there is no statutory basis to consider this data in a session closed to the public. *See* RCW 42.30.110. Indeed, such a reading of the OPMA executive session provision would be contrary to well-established law as recently reinforced by this Court in

Columbia Riverkeeper v. Port of Vancouver USA, __ Wn.2d ____, 395 P.3d 1031 (June 8, 2017). There, the Court applied a narrow interpretation of the “minimum price” exception to hold that topics and considerations that might influence the minimum price must be discussed in open session, and that public bodies may only consider the actual minimum price itself in executive session. *Columbia Riverkeeper*, 395 P.3d at 1039. Under this authority, there is no support for the contention that the City Council could consider factors related to TNC regulation outside of a public session simply because such consideration may involve purported trade secrets.¹²

Similarly, while Lyft does not directly address the OPMA, it selectively and misleadingly cites the trial record to argue that the City does not really “need to disclose” the quarterly reports to the City Council in order to effectively regulate the TNCs. Lyft Br. at 48. Lyft claims that the City Council does not need to “get publicly into the weeds of millions of lines of zip code data” in order to have a public policy discussion. *Id.* at 45. Putting aside the issue that Lyft’s “need” construct is not the applicable standard under RCW 42.56.540, Lyft avoids the real issue. City staff never attempted to present “millions of lines” of data to the City Council. Rather, staff sought only to present the Council with the

¹² While Dr. Main-Hester attempted to work with the TNCs on a compromise, she testified that she later learned from city attorneys that the TNCs’ demands for executive session were prohibited by the OPMA. VRP (10/25/16), 251:13-252:21.

meaningful substance represented by the data, in other words, the report required by Ordinance 124524 which contained maps depicting the levels of service by various modes throughout the City. CP 2369-2370.

In response, the TNCs threatened to sue the City if the FAS report contained so much as a map with a meaningful legend. CP 2065, 2717, 2719, VRP (10/25/16), 231:15-22. Though Lyft frequently invokes the rhetorical construct of “millions of lines of data” to make the information appear of lesser value for regulatory purposes, it is the meaning behind the data that the TNCs seek to keep from public view.¹³ Moreover, City witnesses testified at length how the TNCs’ insistence on secrecy has hampered their ability to meaningfully use the data required by the Ordinance and precludes City staff from making data-supported recommendations to Council on needed changes to the Ordinance.¹⁴ VRP (10/25/16), 269:3-10.

¹³ At the outset of this case, the TNCs insisted that the total number of rides they provide within the City every quarter was also a trade secret. CP 844, 2669. The trial court rejected this argument, and that number has since been released with no indication the TNCs have suffered as a result. CP 2701. But the fact that the TNCs even sought to suppress the number of cars they are putting on City streets highlights both the absurdity of their trade secret claim and their desire to thwart transparency at all costs. It is hard to avoid the conclusion that the TNCs do not wish the City to be informed about the full scope of their operations or their impacts on either City rights-of-way or the taxi industry. Particularly in light of the long history of regulation of the for-hire industry, shrouding a single industry player in secrecy does not support the Council’s stated goal of “regulatory parity” across the various for-hire modes, nor the myriad other indisputably public purposes furthered by the TNC regulations.

¹⁴ Uber cherry picks individual statements from the court’s narrative opinion concerning the impact on the City’s regulatory efforts and alleges they were “unchallenged” by the City in its Opening Brief. Uber is wrong. The City assigned error to the trial court’s

Finally, the TNCs' own actions since the entry of the injunction further confirm their intent to use the ruling to inhibit the City Council's ability to effectively regulate them. In closing argument, the TNCs assured the trial court an injunction would be narrowly tailored and that "no one opposes the City using the data for regulatory purposes, properly directed to the regulatory purposes defined in the ordinance, which is in section 100, making TNCs viable options and ensuring proper enforcement." VRP (10/26/16), 358:6-10 (Lyft closing).¹⁵ In a colloquy with the trial court, Uber's counsel acknowledged that the City Council would be "rightfully curious about the impact specifically of TNCs on traffic in the [C]ity:"

THE COURT: Okay. So you knew that something was going to have to be disclosed to the chair of the taxi committee?

MS. BRADLEY: That's right.

THE COURT: And you must have known that the reason for that is because they needed this data to evaluate whether they needed to tinker, for example, with the ordinance, right? I mean –

MS. BRADLEY: I think that's – that's fair.

VRP (10/26/16), 323:25-324:9 (Uber closing).

overall conclusion, which encompasses these narrative statements, that "an injunction does not in any way impact SDOT's or FAS's ability to analyze the data provided by Lyft or Uber and make recommendations to the City Council." Op. Br. at 3.

¹⁵ Despite this purported desire to be regulated, both Uber and Lyft have since argued in federal court that the City has no authority to regulate them under state law because they do not provide transportation services. *Chamber of Commerce of United States v. City of Seattle*, No. C-17-0370RSL, 2017 WL 3267730, at ** 5 & 12 (W.D. Wash. Aug. 1, 2017). Judge Lasnik, however, rejected this argument as "disingenuous." *See id.* at 5.

Several months later, however, when the City received public records requests for data either outside the scope of the injunction (unfulfilled rides) or created *after* entry of the court’s order, the TNCs went back to court seeking to expand the scope of the injunction through motions to “enforce.” CP 3551-58, 3561-71. In so doing, the TNCs made clear that they considered the sharing of *any* zip code data with even an *individual* City Council member to be a violation of the injunction. CP 3566 (“Given the City’s ‘interpretation’ of the [Injunction] Order, the City could disclose Lyft’s zip code data to virtually anyone, whether a city council member or a PRA requester, at any time.”). Although no data had been shared with any requesters or council members, Lyft even asked the trial court to sanction the City and hold it in contempt. CP 3570, 3574.¹⁶ Although the trial court denied much of the TNCs requested relief (finding unfulfilled rides and data created after the fact to be outside the scope), it did rule that the injunction extended not just to the sets of data requested by Mr. Kirk, but all sets of zip code data in existence at the time the injunction was entered. CP 3876-77. In so ruling, the trial court at least implied that all such data could not be shared with individual councilmembers:

¹⁶ The Court refused to do so.

This court's ruling was not limited to the two quarters of data that were specifically requested by Mr. Kirk. *I say that because the City itself wanted the data, said it wanted the data, wanted to disclose it to city council members. That was specifically litigated. The Court addressed that issue in its ruling, and the Court did not limit it to the two quarters of data that Mr. Kirk requested.*

VRP (6/2/17), 58:23-59:4 (emphasis added).¹⁷ In other words, despite the acknowledgement at trial by all parties and the trial court that the City Council had a legitimate interest in using the zip code data to regulate Uber and Lyft (by, for example, refining the Ordinance), the TNCs have now taken the position, and the trial court has apparently agreed, that even sharing the data with an individual councilmember violates the injunction. Under the OPMA, the only meaningful way for the Council to use and consider the data is through action in an open session. But even assuming there was another way for the Council to achieve this goal, it certainly cannot do so if even individual council members are denied access to the data under risk of contempt and sanctions.

c.) Disclosure is in the public interest to allow the study of potential discrimination in the industry.

Disclosure also is in the public interest based on the specific reason the requester sought the records at issue—to study potential discriminatory practices in the TNC industry. While attempting to trivialize possible

¹⁷ This transcript is the subject of a pending motion to supplement the record.

discriminatory practices, or redlining, by the TNCs as a “red-herring,”¹⁸ the TNCs argue the Court should ignore this additional compelling reason for disclosure because the City did not “prove” at trial that the TNCs are in fact redlining. Uber Br. at 43; Lyft Br. at 48-49. In this PRA trial, however, the question of whether the TNCs have engaged in illegal discrimination was not at issue. As such, the TNCs’ citation to counsel’s remark stating as much is irrelevant. *Id.*

Far from being a “*post hoc* pretext for the need to publicly disclose the millions of lines of zip code data” as argued by Lyft, the issue of redlining in this case was raised in the initial PRA request from Mr. Kirk, who stated that he sought the reports for the purpose of studying the issue of redlining. CP 3395-96.¹⁹ City witnesses confirmed the quarterly reports can be used to study this issue, which is consistent with the City’s race and social justice initiative, and unquestionably in the public interest. VRP (10/25/16), 135:1-17; 136:10-22. The City offered the National Economic

¹⁸ See Lyft’s Answer to Statement of Grounds for Direct Review at 14, n.29; Uber’s Answer to Statement of Grounds for Direct Review at 13, n.3.

¹⁹ Uber and Lyft even deposed Mr. Kirk and asked him about this specific point:

Q: Is there any reason in particular you wanted the zip code data?

....

A: I am happy to answer. Again, I mean, it goes back to showing whether or not Uber or Lyft is engaging in redlining, and if -- I mean, if, for instance...there is a notable discrepancy in accepted rides. Like if, in zip code X, 98 percent of the rides are accepted, but in zip code Y, which has an average household income of \$20,000 a year, only 68 percent are collected, then that would likely be indicative of redlining. So, again, that was my sole purpose for asking that.

Bureau Report, which was published post-trial, as further evidence of the public's ongoing interest in the issue, and made clear to the court that the report was not offered for its substantive truth. CP 1915, 1937-1985 & *supra* to fn.3. The TNCs' claim that the court should not consider the public's interest in using the reports to study redlining because the City did not prove redlining at trial is both circular and misses the point.

Finally, in pressing their trade secret theory, the TNCs take pains to argue that the zip code data is highly valuable to both the TNCs and to the City. Ironically, at the same time, they argue that the data is not valuable to the public for studying redlining or any other purpose. *See* Uber Br. at 19; Lyft Br. at 10; VRP (10/26/16), 317:3-318:7 (Uber closing); VRP (10/26/16), 343:3-344:21 (Lyft closing). The TNCs cannot have it both ways. The trial court erred by failing to evaluate the public's interest in disclosure of the data, including for anti-discrimination related efforts. The record demonstrates significant public interest in disclosing the reports and the trial court should be reversed.

d.) Disclosure is in the public interest to allow the city to regulate use of its rights-of-way.

The City's witnesses testified at length regarding the impacts of the exponential growth of Uber and Lyft on the City's rights-of-way. For example, the addition of tens of thousands of drivers to City streets adds to

traffic congestion, increases pollution, and diminishes available curb space. VRP (10/25/16), 104:17-105:6. As Dr. Main-Hester testified, the reason the City requires the quarterly reports in the first place is because the City uses the data to ensure consumer and public safety, along with traffic planning and greenhouse gas regulation. VRP (10/25/16), 259:12-260:18 (explaining fraud enforcement, fee regulation and public safety issues). The quarterly reports also enable FAS to evaluate the health of the taxi industry, which was one of the major concerns animating Ordinance 124524. Dr. Main-Hester explained that the Ordinance was written assuming that the “taxi industry would do okay, and they’re not,” but as detailed above, needed changes to the Ordinance supported by the quarterly data cannot be made without disclosing it. *Id.* at 265:19-266:1.

Because the trial court erroneously failed to apply RCW 42.56.540 to the prejudice of the City, reversal is required on this basis alone.

C. The records at issue are not trade secrets.

Reversal is also required because the so-called zip code data is not a trade secret. In defending the trade secret component of the trial court’s ruling, both Uber and Lyft attempt to muddy the waters around the actual nature of the public records at issue in this case. Lyft repeatedly references the “millions of lines of data” and quotes its witness Todd Kelsay’s (impeached) testimony regarding the “complicated” process of collecting

it. Uber likewise offers bulleted lists of testimony referencing the numerous purported uses for all kinds of data it collects, but cites no testimony on how it uses the *actual records* provided to the City every quarter, or why *those records* contain trade secrets.

The reason for these omissions is simple—the records provided to the City are not trade secrets. Far from being “unique” or “novel” compilations like a client list or a design specification, the records are auto-generated results of a database query that gives the City a generalized overview of the portions of its rights-of-way impacted by TNCs over the prior three months. VRP (10/11/16), 183:2-6; (10/10/16) PM 35:7-36:12. The records do not reveal the TNCs’ methods or algorithms for obtaining this information (which could arguably be trade secrets), nor do they even show the addresses where customers are picked up or dropped off, or the time of day. Tr. Exs. 332, 333-342.²⁰ The TNCs provide these records as a condition of operating on the City’s streets, in order to inform City regulators and policymakers of the scope and general location of the TNCs’ impact on the City. *See* SMC 6.310.540; VRP (10/25/17), 162:12-163:18. This information neither can nor should be a trade secret.

²⁰ Rather, each line provides only a zip code, which reveals to the public nothing about whether a particular customer was picked up at Roosevelt High School or across town at Magnuson Park, as both locations are in 98115. Whether that passenger was dropped off at the Port of Seattle Harbor Island terminal or Safeco Field is similarly not disclosed by the reports, as even though Puget Sound separates these divergent destinations, they share parts of the 98134 zip code. *See e.g.*, VRP (10/25/2016), 111:19-112:3.

Viewing the records for what they actually are, and considering the TNCs' failure to introduce evidence of *the records'* novelty or independent economic value, or their efforts to adequately keep the records confidential, the error in the trial court's ruling is plain.

1. The records are not unique and novel compilations under trade secret law.

Contrary to the TNCs' claims, the City expressly challenged the trial court's ruling that the records are a protected "compilation" under Washington trade secret law. Op. Br. at 13, #6.²¹ The issue is not, as Lyft argues, whether the records themselves could meet a dictionary definition of "compilation," rather, the question is whether the trial court properly applied trade secret law in ruling that the records were trade secrets. As detailed below, the trial court's ruling was in error.

Though both TNCs argue generally about the sanctity of their data overall, they fail to cite any testimony demonstrating the novelty or uniqueness of the records *submitted to the City*. In a trade secret case, "simply to assert a trade secret resides in some combination of otherwise known data is not sufficient, as the combination itself must be delineated with some particularity in establishing its trade secret status." *SL*

²¹ In addition to the express assignment of error, the City devoted 5.5 pages of its Opening Brief to the court's erroneous analysis of the compilation standard. It is simply false to suggest the City did not appeal this issue.

Montevideo Tech., Inc. v. Eaton Aerospace, LLC, 491 F.3d 350, 354 (8th Cir. 2007)(alterations in original incorporated); *Robbins*, 179 Wn. App. at 722 (“The alleged unique, innovative, or novel information must be described with specificity.”); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 522 (9th Cir. 1993) (plaintiff must specifically identify trade secrets). In this case, the TNCs wholly failed to show that the specific records provided to the City were in any way unique or novel, rather than merely a highly-generalized overview of the results of their operation in the City. *See, e.g., Waterville Inv., Inc. v. Homeland Sec. Network, Inc. (NV Corp.)*, No. 08 Civ. 3433(JFB), 2010 WL 2695287, at *4-5 (E.D.N.Y. July 2, 2010) (report was not a trade secret without evidence of disclosing a unique process for compiling the information, rather than a finished product displaying the results of that process). Moreover, neither TNC has cited a case suggesting that a backward-looking list of non-unique data is a protectable trade secret, and neither has pointed to any record evidence showing that the quarterly spreadsheets were “compiled in a unique way” as required under Washington trade secrets law. Op. Br. at 36-37 (collecting cases). It is not enough to argue that the data is “unique” or “novel” merely because it is generated by Uber or Lyft, who then claim that they alone are knowledgeable about their data collection efforts.

Unlike the “customer list” trade secret cases cited by the TNCs, the specific data in the quarterly reports is not the result of a unique, time-consuming, process of organizing the data in a meaningful or novel way. *Compare Fireworks Spectacular, Inc. v. Premier Pyrotechnics, Inc.*, 86 F. Supp. 2d 1102, 1106 (D. Kan. 2000) (where “the party compiling the customer lists, while using public information as a source, ... expends a great deal of time, effort and expense in developing the lists and treats the lists as confidential in its business, the lists may be entitled to trade secret protection.”) *with Woo v. Fireman’s Fund Ins. Co.*, 137 Wn. App. 480, 489, 154 P.3d 236 (2007) (insurance manuals are not trade secrets because they do not “compile information in an innovative way”).

To the contrary, both TNCs’ corporate witnesses conceded that generating the spreadsheets for submission to the City is a simple database query that automatically distills generalized zip code information from highly-detailed GPS information that Uber and Lyft collect on every ride. VRP (10/11/16), 183:2-6; (10/10/16) PM 35:7-36:12. “Thus, this is not a case where material from the public domain has been refashioned or recreated in such a way so as to be an original product, but is rather an instance where the end-product is itself unoriginal.” *Buffets, Inc. v. Klinke*, 73 F.3d 965, 968 (9th Cir. 1996); *Capsonic Grp. v. Swick*, 181 Ill. App. 3d 988, 995, 537 N.E.2d 1378, 1384 (1989) (no trade secret without “specific

tangible product” or “identifiable process”; rather, “generalized knowledge” in an industry is not a trade secret).

Without evidence of novelty or uniqueness, it is not enough to argue that the records could not be precisely replicated by the City without great expense. Uber Br. at 25; Lyft Br. at 20. Again, the TNCs cite no case holding that a compilation of purely public information—here, known in part to drivers, riders and City observers—is a trade secret just by virtue of being “compiled.” In fact, numerous courts have held to the contrary.²²

Finally, the TNCs ignore that Washington courts require a showing that a party’s alleged trade secrets are “materially different from those of its competitors.” *Robbins*, 179 Wn. App. at 723. Neither TNC presented evidence on this issue, and the trial court erroneously ignored this requirement. Nor is it true, as Lyft claims, that novelty or uniqueness is not required under Washington law. Lyft Br. at 19; *but see Buffets, Inc.*, 73 F.3d at 968 (“OCB argues that novelty is not a requirement for trade secret

²² *Think Tank Software Dev. Corp. v. Chester, Inc.*, 30 N.E.3d 738, 746 (Ind. Ct. App.), *transfer denied*, 35 N.E.3d 672 (Ind. 2015) (knowledge of customers’ computer systems and current or future needs was readily ascertainable, as such information belonged to the customers in question); *Dir., Dep’t of Info. Tech. of Town of Greenwich v. Freedom of Info. Comm’n*, 274 Conn. 179, 195, 874 A.2d 785 (2005) (compilation of GIS data not trade secret where data could be compiled from other sources, albeit piecemeal); *In re Providian Credit Card Cases*, 96 Cal. App. 4th 292, 305, 116 Cal. Rptr. 2d 833, 843 (2002) (even piecemeal disclosure of elements of compilation of sales pitches to the public undercuts trade secret status); *Steenhoven v. College Life Ins. Co. of America*, 460 N.E.2d 973, 974 n.6 (Ind. Ct. App. 1984) (policyholder information not a trade secret because “it was readily ascertainable from the policyholder themselves” and was “the same information that could be extracted from the policyholder in a blind replacement attempt”).

protection; this contention, however, clearly contradicts Washington law.”) In fact, in both *Robbins* and *Belo*, the courts evaluated novelty, found it lacking, and rejected application of a trade secret exemption. *Robbins*, 179 Wn. App. at 723; *Belo*, 184 Wn. App. at 658 (no trade secret where “the broadcasters failed to show that their RCA fees are unique”).

In sum, because the TNCs submitted no evidence on the novelty or uniqueness of the specific data points or records submitted to the City, and the trial court made no findings pertaining to the novelty of the “compilation” of the records, the conclusion of a trade secret should be reversed as a matter of law.

2. The records do not have independent economic value.

The so-called zip code data also is not a trade secret because it lacks independent economic value as that term is applied under Washington law. In citing to *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 971 P.2d 936 (1999) and *McCallum v. Allstate Property and Cas. Ins. Co.*, 149 Wn. App. 412, 204 P.3d 944 (2009), the TNCs acknowledge that the “effort and expense expended on developing the information” is one of the *key factors* courts use to determine whether an alleged trade secret has independent economic value. Despite this, Uber concedes it did not provide *any evidence* on this point, arguing instead no such evidence was necessary. Uber Br. at 38. Lyft likewise downplays this

key requirement and reiterates the only testimony it can—Mr. Kelsay’s general musing that the Lyft *App* cost “millions and millions.” VRP (10/11/16), 80:8-15. Even if credible, which it is not, this testimony is irrelevant to the effort and expense of creating the specific records provided to the City.

Without any testimony on the effort and expense of creating the records at issue, the TNCs argue instead that zip code data *generally* (as opposed to the specific data and records provided to the City) is useful to the TNCs in a variety of ways. But general “use” of “zip code data” does not substantiate the independent economic value of the quarterly reports, particularly because the TNCs’ only witnesses conceded that they use the data in the reports only in conjunction with all the other data the TNCs already collect. VRP (10/10/16 PM), 65:23-25; (10/11/16), 156:22-23.

For example, the testimony cited by Uber does not discuss any use of the records provided to the City, but instead describes marketing efforts and campaigns that rely on multiple data points not provided to the City at all. Uber Br. at 22-23. In describing these efforts, Uber’s Brooke Steger acknowledged using data related to driver supply, variable pricing during certain hours, and the mapping of specific routes, none of which can be done with the records provided to the City. VRP (10/10/16 AM), 98:20-25; 102:12-17; 107:11-23. Lyft likewise provided no testimony on how

the records provided to the City have independent economic value, and like Ms. Steger, Mr. Kelsay conceded that to the extent he uses the zip code data, he does so in conjunction with the more detailed data collected by the Lyft App. VRP (10/11/2016), 152:25-153:2.

The real thrust of the TNCs' economic value argument is that release of the records would result in "unfair competition." Lyft Br. at 26-27; Uber Br. at 26. But the "Uniform Trade Secrets Act was promulgated by the legislature to prevent the abusive and destructive usurpation of certain economically-imbued business knowledge commonly referred to as trade secrets. We do not believe the legislature ever intended the statute's provisions to act as a blanket post facto restraint on trade." *Think Tank Software*, 30 N.E.3d at 746 (quoting *Steenhoven*, 460 N.E.2d 974, n.7 ("Insofar as College Life attempts to merely restrain Steenhoven's competition, we believe the Uniform Trade Secrets Act to be an improper vehicle therefore.)); *Capsonic*, 181 Ill. App. 3d at 995 ("Capsonic's concern appears to be that now another company in the industry may become more adept at automated production and cause competition in the future. This is an attempt to restrict competition *per se* and will not be encouraged by the courts.")). To the extent competitive impact is relevant, the TNCs do not dispute they failed to produce any concrete evidence of such impact. Neither attempted to "quantify in any meaningful way the

competitive advantage” the other “would enjoy” if the information was released. *Woo*, 137 Wn. App. at 489 (citing *Klinke*, 73 F.3d at 969).

Rather, the gist of the TNCs’ claim (and the trial court’s order) is that the data is valuable in ways known only to the TNCs, and the court should not require more than their say-so. Under this theory of trade secret law, any regulated entity could claim that the regulators are in “no position to know” whether certain data is valuable, thus transforming all information submitted pursuant to regulation into “trade secrets.” *See* VRP (10/26/16), 343:5-8 (Lyft closing) (City witnesses are “not in a position to speak to the value of the Zip Code data as to either Uber or Lyft or other players in the TNC industry”); VRP (10/26/16), 317:20-22 (Uber closing) (“Of course, no City witness is competent to testify about whether the data is valuable to Rasier.”). Such an approach is particularly untenable under the PRA, as it creates an irrefutable presumption of nondisclosure.

In sum, the TNCs provided no testimony on actual effort and expense, no testimony on use of the records provided to the City and no testimony quantifying any theoretical competitive harm that could result from disclosure. On this record, the trial court erred in finding that the records possessed independent economic value.

3. Uber and Lyft have not taken reasonable efforts to maintain confidentiality.

a.) The TNCs acknowledged that they assumed the risk of PRA disclosure and failed to take appropriate measures.

In defending the trial court’s ruling with respect to the next trade secret element, efforts to maintain confidentiality, the TNCs again give little attention to the records at issue in favor of discussing their internal treatment of all their data. Uber Br. at 28-29; Lyft Br. at 28. But both Uber and Lyft knew that submitting records to the City could result in their disclosure. Both companies made a conscious business decision to enter into the Seattle market with knowledge that their data may become public. *Cf. Ruckelshaus v. Monsanto, Co.*, 467 U.S. 986, 1007 (1984) (“a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.”); *M.C. Dean, Inc. v. City of Miami Beach, Florida*, 199 F. Supp. 3d 1349, 1353 (S.D. Fla. 2016) (“Disclosing the ‘information to others who are under no obligation to protect the confidentiality of the information defeats any claim that the information is a trade secret.”). Their unsupported assertions as to the City’s conduct must also be

considered against that backdrop. *See, e.g.*, Lyft Br. at 8 (accusing City of “deliberately renege[ing]” on an alleged promise).²³

To that end, both Uber and Lyft acknowledge that under Ordinance 124524 they received what they bargained for—the right to “oppose disclosure” in response to a PRA request. Uber Br. at 1 (“The City’s ordinance and its confidentiality agreement with Rasier preserve Rasier’s right to oppose disclosure of its trade secrets....”); Lyft Br. at 31 (“The risk assumed by the TNCs was possible disclosure brought about by a third party request....”).²⁴ Ms. Steger further testified that by choosing to operate in Seattle, Uber subjected its records to disclosure under the PRA:

MR. RYAN: But you understood that there was a possibility that the data that you were providing to the City, that you believed to be confidential, could ultimately be disclosed through a Public Records Act, correct?

MS. STEGER: We believed that the data was confidential, and that it would be -- we continue to believe that it would be confidential.

Mr. RYAN: But you understood that there was a risk associated with that, correct?

²³ The Court should also reject Lyft’s assertion that the City “chose” not to withhold the records. Lyft Br. at 3, 8. Rather, the City took the same position with respect to the TNCs’ quarterly reports as it did with the taxi’s reports when Lyft requested them, i.e., the City did not invoke the exemption because it did not believe the records are exempt, and faced potential fees and penalties under the PRA if records are wrongfully withheld.

²⁴ Judge Lasnik likewise recently noted that production of records to a municipality requires a third party to invoke RCW 42.56.540 to prevent disclosure. *Chamber of Commerce v. City of Seattle*, 2017 WL 3267730 at *13, n. 14 (W.D Wash. Aug. 1, 2017).

MS. STEGER: We understand that the City of Seattle has to comply with city or state law that exists, so yes.

VRP, (10/10/16 PM), 23:16-24:1. The TNCs elected to operate with knowledge that the PRA may require disclosure of their records, yet they also did not pursue a non-disclosure agreement (as they did in other cities) nor did they seek to insert any confidentiality provisions into Ordinance 124524, despite having their input welcomed. *See* Exs. 303; 172; 264.

Finally, though the TNCs attempt to justify their failure to mark the records at issue as confidential (as required by the Ordinance), they do not dispute that they repeatedly failed to do so.²⁵ None of Lyft's quarterly spreadsheets containing the zip code data were marked confidential, and only one of its nine Fee Forms was so designated. VRP (10/11/16), 145:1-147:2; VRP (10/25/15), 162:5-11. Uber likewise failed to mark some spreadsheets and many fee forms. VRP (10/25/16), 258:25-259:4; Tr. Exs. 332, 333-340, 385. These failures further underscore the trial court's error in ruling the records are trade secrets.²⁶

²⁵ Lyft repeatedly cites to a form letter from Ms. Main-Hester that erroneously stated that all TNC records had been marked proprietary and confidential. Lyft Br. at 6, 7 (citing Ex. 125). As Lyft is aware, Ms. Main-Hester testified that the form letter was wrong, as Lyft had not marked documents confidential. VRP (10/25/16), 161:20-162:11; VRP (10/11/16), 145:1-147:2. Lyft misleadingly cites to a document it knows to be incorrect.

²⁶ *See Plymouth Grain Terminals, LLC v. Lansing Grain Co., LLC*, No. 10-CV-5019-TOR, 2013 WL 12177037, at *16 (E.D. Wash. Dec. 20, 2013), *modified on reconsideration*, No. 10-CV-5019-TOR, 2014 WL 585838 (E.D. Wash. Feb. 14, 2014) (without NDA or confidential stamp, trade secret claim failed); *Sepro Corp. v. Florida Dep't of Env'tl. Prot.*, 839 So. 2d 781, 784 (Fla. Dist. Ct. App. 2003) (failure to mark data as confidential means not reasonable efforts to maintain secrecy as a matter of law, even

b.) The TNCs' submission of data is governed by Ordinance 124524, not the mediation terms.

Since Ordinance 124524 did not require the confidentiality the TNCs now seek, Lyft relies heavily on the superseded 2014 mediation terms between the City and the TNCs to support its claims of ongoing confidentiality. Lyft Br. at 2, 4-6. Lyft's arguments both mischaracterize the mediation terms, as well as misstate their continuing significance.

As an initial matter, there is no dispute that Ordinance 124524 was enacted after the mediation terms were entered. The Ordinance therefore supersedes the prior mediation terms with respect to confidentiality. Uber concedes as much, Uber Br. at 31, and Lyft offers no authority to the contrary. Instead, Lyft simply claims the mediation terms are "still in effect," Lyft Br. at 30, but it is well-established that "independent of statute or charter provisions, the hands of [successor officers of a municipal entity] cannot be tied by contracts relating to governmental matters." *Pub. Hosp. Dist. No. 1 of King Cty. v. Univ. of Wash.*, 182 Wn. App. 34, 38, 327 P.3d 1281 (2014)(alteration in original).²⁷ Accordingly, the mediation terms cannot bind the City or future Councils in legislating

where data otherwise a trade secret); *In re Providian Credit Card Cases*, 96 Cal. App. 4th at 308 (failure to mark memorandum as confidential undercut trade secret claim).

²⁷ See also 10A Eugene McQuillin, *Municipal Corporations* (3d ed. rev.) § 29.102 ("With respect to the [government powers], their exercise is so limited that no action taken by the governmental body is binding upon its successors . . ."). Nor can the Council delegate its legislative power to others, including the executive. See, e.g., *Roehl v. Pub. Util. Dist. No. 1 of Chelan Cnty.*, 43 Wn.2d 214, 240, 261 P.2d 92 (1953).

on this issue, which the Council did in enacting Ordinance 124524. This Ordinance—not the mediation terms—controls.

Lyft also mischaracterizes the substance and import of the mediation terms themselves.²⁸ Lyft cites to the testimony of Kiersten Grove to contend the focus of the mediation was on *data* confidentiality, but she actually testified that the focus of the mediation was on *driver* confidentiality. VRP (10/25/16), 171:18-172:4; 87:16-88:5. Moreover, in the mediation terms, the City committed only to “work to achieve the highest level of confidentiality for the information provided *within the confines of state law.*” Tr. Ex. 101, Ex. A at 5 (emphasis added). Ordinance 124524 requires the City to provide third party notice in the event of a request for information designated as confidential by the TNCs—an obligation the City otherwise would not have under the PRA. RCW 42.56.540 (stating that, absent other legal requirement, agency “has the option of notifying persons” named in records of a request). This is the only commitment the City could (and did) make under the PRA. *See, e.g.*, RCW 42.56.070 (requiring agencies to provide public records absent a specific exemption); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 137, 580 P.2d 246 (1978) (“An agency’s promise of confidentiality ... is not adequate to

²⁸ Lyft also mischaracterizes the referendum to overturn the City’s 2014 ordinance as a “citizen referendum,” Lyft Br. at 1, later conceding it was actually a “TNC effort,” Lyft Br. at 5; Uber Br. at 5 (“Rasier and Lyft filed a referendum to overturn the ordinance.”).

establish the nondisclosability of information; promises cannot override the requirements of the disclosure laws.”).²⁹

For these additional reasons, the trial court erred in finding the records at issue were a trade secret.

IV. CONCLUSION

The PRA’s heightened injunction standard facilitates transparency consistent with the purpose of the Act. By holding the TNCs to a lesser burden, the trial court’s order undermines public dialogue on issues critical to the rapidly growing City of Seattle. It further allows the TNCs to evade regulation by suppressing data they are required to provide to the City by law. The trial court erred in both refusing to meaningfully apply RCW 42.56.540 and in ruling that the TNCs’ quarterly reports are trade secrets. The trial court’s injunction should be dissolved.

RESPECTFULLY SUBMITTED this 11th day of August, 2017.

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²⁹ The TNCs were also provided the opportunity to offer input on this provision of the Ordinance and did not propose any modifications, further indicating their understanding that the Ordinance went as far as the PRA allows. Ex. 303. Indeed, Uber concedes that the Ordinance provides only that Uber has the “right to oppose disclosure of its trade secrets” upon notice, as governed by the terms of the PRA. Uber Br. at 1.

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August 11, 2017 - 4:49 PM

Transmittal Information

Filed with Court: Supreme Court
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Appellate Court Case Title: Lyft, Inc., et al. v. City of Seattle, et al.
Superior Court Case Number: 16-2-03536-1

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