

NO. 94026-6

SUPREME COURT OF THE STATE OF WASHINGTON

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LYFT, INC., et al.,

Respondents,

v.

CITY OF SEATTLE, et al.,

Appellants.

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RESPONDENT LYFT, INC.'S  
ANSWERING BRIEF

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## I. INTRODUCTION

This case is a byproduct of a 2014 mediation and negotiation between the City of Seattle and new market entrants that offer innovative and increasingly popular shared mobility services to the people of Seattle. These newcomers, called transportation network companies (“TNCs”), include Lyft, Inc., (“Lyft”) and its arch-competitor, Rasier, LLC, owner of Uber (“Rasier” or “Uber”).

The City struggled to regulate the TNCs, first enacting a 2014 ordinance that quickly drew opposition from the TNCs and the public. Facing the threat of a citizen referendum to overturn the ordinance, the City convened a mediation in 2014 to negotiate a regulatory scheme satisfactory to the City, the TNCs and the taxi industry.

During the mediation, a key concern of the TNCs was protection of their confidential trip data, produced from the complicated software that allows them to operate. For TNCs, much of this trip data comprise a trade secret of great value and competitive sensitivity. The City also viewed this data as valuable and wanted access to it. To induce the TNCs to provide this data, the City agreed to “work to achieve the highest level of confidentiality for information provided.”<sup>1</sup> Relying on these assurances, the TNCs agreed to provide detailed confidential data on quarterly report forms to the City. The new regulations that arose out of the mediation

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<sup>1</sup> Ex. 101, Ex. A.

require, among other things, that the TNCs submit these quarterly reports and pay a per-ride fee, or they will not be allowed to operate in the City.<sup>2</sup>

The City's conduct after the mediation substantiated the TNCs' understanding of the City's intent with respect to confidential treatment of TNC data. All parties – the City and the TNCs – treated the TNC submissions as confidential. The City made no claims that its confidentiality obligations prevented it from using the TNCs' confidential data internally for transportation planning, analysis and regulation.

After receiving a Public Records Act (“PRA”) request from Austin, Texas resident Jeffrey Kirk in January 2016, the City suddenly shifted course. Kirk asked for TNC data, including the specific data at issue in this case: millions of lines of data detailing the pick-up and drop-off zip codes for each TNC ride and the percentage of rides by zip code (“zip code data”). At this point, the City decided to actively try and shed its obligation to treat the TNC quarterly report data as confidential.

The City admits in its Opening Brief (p. 6) that it could have claimed that the requested information was exempt, but “chose not to.”<sup>3</sup> Ignoring the regulatory bargain reached in 2014, the TNCs' reasonable

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<sup>2</sup> VRP 10/11/16 80:19-20; Main-Hester Dep. 99:19-24. On June 15, 2017, Lyft filed a Notice of RAP 7.2(B) filing of Deposition Designations of Main-Hester, VanValkenburgh, Kirk and Grove because certain designated deposition testimony reviewed by Judge Andrus in her ruling (CP2701) was not in the record and had no docket number with the King County Superior Court. When that is assigned Lyft will submit a supplemental designation of clerk's papers for these. Lyft will cite to certain designated deposition testimony in this brief by reference to the witness and deposition page location.

<sup>3</sup> The Opening Brief (p. 14) also states, “When the City receives a public records request, it must produce all responsive records unless an exemption applies.”

expectation of confidentiality, and the City's course of conduct treating the requested data as confidential, the City decided to litigate, on behalf of Kirk, to destroy the confidentiality of the TNCs' zip code data. This led to the four-day evidentiary hearing before King County Superior Court Judge Beth Andrus, who found the zip code data to be a trade secret. She granted a permanent injunction against the City's disclosure of the TNC data on December 9, 2016 (the "Ruling"). CP 2700-21. Lyft presented substantial evidence at trial that the zip code data provided by Lyft to the City is a trade secret exempt from public disclosure, justifying the permanent injunction issued by Judge Andrus.

Rather than discuss the actual evidence admitted at the hearing, the Opening Brief instead misrepresents (and then attacks) Judge Andrus's reasoning in support of the injunction.

Most significantly, the City misleadingly suggests that Judge Andrus failed to apply the PRA injunction standard in RCW 42.56.540. Not so. The Ruling expressly states: "Lyft and Rasier have established an entitlement to an injunction under *both* the UTSA *and* RCW 42.56.540." CP 2716 (emphasis supplied). As explained herein, Judge Andrus properly applied the UTSA standard,<sup>4</sup> but in any event, the result is the same under the standard urged by the City, which Judge Andrus also applied. Because Judge Andrus correctly evaluated the evidence under both standards, no reversible error occurred.

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<sup>4</sup> The UTSA is the Uniform Trade Secrets Act, RCW ch. 19.108 *et seq.* RCW 19.108.020(1) provides that "actual or threatened misappropriation [of trade secret] may be enjoined." Under this statute an injunction may be granted pursuant to CR 65.

The City's altered view of reality provides no reason to reverse Judge Andrus' well-reasoned, thorough Ruling, which is supported by substantial evidence. It should be affirmed.

## II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does substantial evidence support the trial court's ruling that Lyft's zip code data is a trade secret under the UTSA?

2. Does substantial evidence support the trial court's ruling that Lyft would suffer actual and substantial injury from disclosure of its zip code data trade secrets?

3. Did the trial court commit reversible error by applying the standards from the UTSA and RCW 42.56.540 in granting Lyft a permanent injunction?

4. Does substantial evidence support the trial court's conclusion that disclosure of Lyft's zip code data is "clearly not in the public interest"?

## III. COUNTERSTATEMENT OF THE CASE

### A. The TNC's Expectation of Confidentiality Reasonably Grew Out of a Regulatory Bargain between the City and the TNCs and the City's Treatment of Confidential TNC Submissions.

This litigation grew out of the City's regulation of the nascent TNC industry. The City first regulated TNCs in 2014 via Ordinance No. 124441 (Ex. 301), which capped the number of TNC drivers. The Ruling explains how the TNCs (Lyft and its arch-competitor, Rasier/Uber) entered into a mediation in 2014 with the City because the City wanted to

forestall a TNC effort to pursue a referendum to overturn Ordinance No. 124441. CP 2703.

During the mediation, the TNCs were concerned about protecting their confidential data. Kiersten Grove, the City's lead in the mediation, acknowledged that the TNCs expressed concerns during the mediation about having to provide the City with their confidential information to comply with reporting requirements.<sup>5</sup> She said that the TNCs repeatedly asked for assurances that their data would be kept confidential.<sup>6</sup> Consequently, the City agreed at the mediation to protect Lyft's confidential data (including zip code data) as an inducement to get TNC consensus.<sup>7</sup> The agreed-upon Mediation Terms (Ex. 101, Ex. A) promised: ***“The City will work to achieve the highest possible level of confidentiality for information provided within the confines of state Law.”*** This language was the result of hard bargaining and would not have been inserted had the TNCs not insisted upon it.<sup>8</sup>

After reaching this agreement, and in accordance with the Mediation Terms, the City enacted a new ordinance that became SMC 6.310.540. This required the TNCs to submit ten standard categories of data on quarterly reporting forms to the City, including the zip code data at

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<sup>5</sup> Grove Dep., 24:1-25:4, 91:6-16; VRP 10/25/16 179:15-24, 180, 192:22-194:15.78:6-24.

<sup>6</sup> Ex. 101 ¶ 6; Grove Dep. 88:21-89:16; 91-95:11.

<sup>7</sup> Grove Dep.21:10-22:5; 25:23-26:2. Grove said that the City offered the confidentiality clause during the mediation “to keep a peaceful relationship with the TNCs.” VRP 10/25/16, 168:19-20. (“[W]e’re trying to stay in a good position with the TNCs and make sure that they were comfortable with the way that we were moving forward with the work that we were doing.”) *Id.* at 182:18-22.

<sup>8</sup> See VRP 10/25/16 181:5-8.

issue in this litigation. Exhibit 341, *introduced by the City*, compiles all of this Lyft zip code data. Exhibit 341 compiles, among other things, the pick-up and drop-off zip codes for each TNC ride and the percentage of TNC rides by zip code in Seattle for each quarter since late 2014.

The City's continued performance after the mediation and the enactment of the new ordinance confirmed its understanding of its obligation to treat Lyft's confidential data with "the highest possible level of confidentiality." On appeal, the City does not challenge the findings that the City treated the TNC zip code data confidentially:<sup>9</sup>

- The City put in place a secure portal to receive Lyft's quarterly reports. Grove Dep. 29:6-10; Ex. 105.
- The City limited access to the data on the quarterly reports with password controls. Main-Hester Dep. 32-35.
- The City limited access to the data on the quarterly reports to persons within SDOT<sup>10</sup> and FAS<sup>11</sup> with a need-to-know. Main-Hester Dep. 78-79.
- Before disclosing the data or the quarterly reports to a third party consultant, SDOT required the consultant to execute a non-disclosure agreement. VanValkenburgh Dep. 34:3-22; Ex. 115.

Further, the City knew that all the quarterly reports submitted by Lyft were deemed confidential, and treated them as such. Kara Main-Hester, a TNC regulator from FAS, knew that "TNCs have designated documents as confidential or proprietary."<sup>12</sup> A Main-Hester memo said, "The TNCs have marked all data 'proprietary and confidential' and SMC

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<sup>9</sup> See Exs. 102 (City Responses to Nos. 8 and 9); 105, 106, 119, 128, 147.

<sup>10</sup> The Seattle Department of Transportation engages in transportation planning and analysis.

<sup>11</sup> Seattle Department of Financial and Administrative Services is the unit charged with overseeing TNC regulation.

<sup>12</sup> Main-Hester Dep. 53:7-12; Ex. 124.

6.310.540D specifically requires third-party notice to the TNC companies if a request is made.” Ex. 129. Main-Hester was also advised by Lyft in July 2015 that the Q2 Quarterly Report was highly sensitive and to be treated with confidentiality.<sup>13</sup>

The City’s initial handling of Kirk’s PRA request was consistent with, and evidenced, the City’s understanding of its confidentiality obligations to the TNCs. In response to Kirk’s PRA request, Main-Hester wrote: “Uber and Lyft have marked *all* records submitted to the City and related to the data that you have requested as confidential.” Ex. 125 (emphasis supplied).

Fred Podesta, the head of FAS, reported on Kirk’s PRA request to Seattle Mayor Ed Murray, noting that “[t]his data has been marked proprietary and confidential by the TNCs.”<sup>14</sup> The City treated *all* of the zip code data confidentially, irrespective of any marking by a TNC, because Main-Hester said that the City treated all files submitted through its secure FTP the same way.<sup>15</sup>

*Without any evidence* that the City’s confidentiality obligation somehow vanished and *with proof* that the City performed as if it had such an obligation, the TNCs reasonably expected their confidential data to be protected by the City. Even if, as the City claims, its only confidentiality obligation is to provide third-party notice of any PRA request, pursuant to SMC 6.310.100, the City was not justified in aggressively litigating to

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<sup>13</sup> Main-Hester Dep. 44:5-45:23.

<sup>14</sup> Ex. 271, p. 1.

<sup>15</sup> Main-Hester Dep. 44:5-45:23. Main-Hester Dep. Ex. 27.

destroy the confidentiality that it had promised. What is most telling, and disturbing, is the City's concession in its Opening Brief (p.6) that it could have claimed a PRA exemption for Lyft's confidential submissions but "chose not to." This means that the City knew that the PRA does not *require* the City to disclose the zip code data to Kirk. Certainly, the PRA does not require the City to litigate for disclosure on behalf of a requester like Kirk. The City could have honored its confidentiality commitment, and the PRA, by invoking the legitimate trade secret exemption. Instead, the City deliberately reneged on its confidentiality agreement by actively litigating for disclosure of Lyft's zip code data. Indeed, the City's position in this litigation is inconsistent with positions taken in other litigation in which it has taken a neutral position on whether a record contains a trade secret.<sup>16</sup>

The Opening Brief repeatedly maligns the TNC for "obstruction of public disclosure" (p.7), "insistence on secrecy" (p. 12), and "demanding the data be kept confidential to evade effective regulation" (p. 26). No evidence supports these *ad hominem* attacks. Substantial evidence supports Judge Andrus's findings that the TNCs took reasonable measures to protect their legitimate trade secrets; that the City recognized and agreed to do so as part of the new regulatory scheme; and the TNCs reasonably relied upon the City's words and conduct. Certainly nothing forewarned the TNCs that the City would do an about-face and attack the confidentiality of their zip code data in this litigation.

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<sup>16</sup> Ex. 102, City Response to Nos. 6, 33; CP 1701-1702, 1719-1785.

**B. The Preliminary and Permanent Injunction Hearings established that the zip code data is a trade secret.**

Kirk, a resident of Austin, Texas, is a self-proclaimed expert on the TNC industry.<sup>17</sup> He submitted his PRA request on January 26, 2016.<sup>18</sup>

The City provided Lyft with third-party notice that it intended to disclose the data to Kirk unless Lyft obtained a court order enjoining the disclosure. CP 23. The parties stipulated to a temporary restraining order and set a hearing on the motion for preliminary injunction for March 10, 2016.<sup>19</sup> Judge Andrus granted in part and denied in part Lyft's Motion for Preliminary Injunction. She enjoined the disclosure of the zip code data:

The Court does find that the second and third category of information requested by Mr. Kirk does qualify as a trade secret. The percentage of rides picked up in each Zip code by each TNC, and the pickup and dropoff Zip codes for each ride by each TNC, the Court concludes there has been a showing that this is a compilation of information that does derive economic value from not being generally known to the competitors. And it is the subject of reasonable efforts to maintain its secrecy. The granular data, quote, unquote, is not generally known to the consuming public. It's not generally known to competitors.

And it's the data regarding Seattle that is at issue here, not data regarding New York, Boston, Portland, or other markets. It's the Seattle data that has been demonstrated to the Court to have economic and competitive and market value.

Ex. 310 p. 81.

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<sup>17</sup> Kirk Dep. 12:1-12; 12:25-13-1; 20:18-19.

<sup>18</sup> Ex. 112. The request sought: The total number of rides provided by each TNC; the percentage or number of rides picked up in each ZIP code; the pick-up and drop-off ZIP codes of each ride; the number of rides when an accessible vehicle was requested; reports of crimes against drivers and, if available, passengers.

<sup>19</sup> CP 25-45. The parties also agreed to consolidate for hearing Lyft's case (King County Cause No. 16-2-03536-1 SEA) and Rasier's case (King County Cause No. 16-2-03420-9 SEA) because Kirk's PRA request sought the same data for both companies.

Trial on Lyft's motion for a permanent injunction commenced on October 10, 2016. Brooke Steger, Rasier's general manager for Seattle, and Todd Kelsay, Lyft's general manager for Seattle, testified over the first two days. As described in more detail in Sec. \_\_\_, both Steger and Kelsay provided extensive testimony about the independent, proprietary value of their respective zip code data in the highly competitive TNC industry. The City does not dispute the "cutthroat, very fierce" competition between Lyft and Uber. TR 10/11/16 p. 78.

Kelsay and Steger told Judge Andrus how the data is created, used and protected by Lyft and Rasier, as well as the efforts of the companies to work with the City to allow it to do its work while protecting the confidentiality of the zip code data. They also described the harm each company would suffer if the zip code data was publicly disclosable.

Kristina VanValkenburgh from SDOT testified that Lyft zip code data was valuable for transportation planning and analysis, and that she and her staff could do their work while treating this data as confidential. Kirsten Grove testified that the City came to an agreement during the mediation that included a commitment to treat TNC data with "the highest level of confidentiality." She also testified that the City was able to do its transportation analysis while maintaining confidentiality. VRP 10/25/16 169, 2-8.<sup>20</sup>

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<sup>20</sup> Grove did *not* testify, as the City claims, "that the TNC's obstruction of public disclosure and insistence on secrecy were compromising the City's ability to fulfill its regulatory functions." Opening Brief p. 7.

The third City witness, Kara Main-Hester, testified about work on a report to the City Council required by SMC 6.310.100. She acknowledged that Lyft and Rasier expressed concern over the report's disclosure of their zip code data; that their proposal to protect it "seems reasonable on its face"; that zip code data can be represented "in many different ways"; and that FAS chose not to give the report to the City Council Committee (although the Committee was advised of its contents by different means). Main-Hester also testified that it would be "mundane" for City Council members to see the millions of lines of zip code data. VRP 10/25/16 168.

No City witness provided evidence that refuted that Lyft's zip code data meets the elements of a trade secret, whereas Lyft and Rasier provided irrefutable proof that its zip code data is a trade secret.

On December 9, 2016, Judge Andrus issued her 22-page Ruling permanently enjoining the release of Lyft's zip code data, concluding:

- A. Lyft's and Rasier Zip Code Data are trade secrets under the UTSA.
- B. The Zip Code Data are exempt from public disclosure under the PRA.
- C. Lyft and Rasier are entitled to an injunction under *Tyler Pipe*.
- D. Lyft and Rasier are entitled to an injunction under RCW 42.56.540.

CP 2720.

#### IV. ARGUMENT

A. **The Standards of Review for Judge Andrus' Ruling are Deferential.**

The standards of review that govern this appeal are highly deferential to the trial court. Because the trial court was the finder of fact, its findings of fact will not be disturbed on appeal if they are supported by substantial evidence, and a reviewing court will not substitute its judgment for that of the trial court. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003); *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 943, 640 P.2d 1051 (1982). Any statement in Judge Andrus' ruling which has not been challenged by the City for error becomes a verity on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

Courts defer to the fact finder and "consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority." *Cingular Wireless, LLC v. Thurston County*, 131 Wn.App. 156, 768, 129 P.3d 300 (2006). And "[w]e reserve credibility determinations for the fact finder and do not review them on appeal." *J.L. Storedahl & Sons, Inc. v. Cowlitz County*, 125 Wn.App. 1, 11, 103 P.3d 802 (2004).

The trial court's decision to issue an injunction is subject to a similarly deferential standard of review: a "trial court's decision to grant an injunction and its decision regarding the terms of the injunction are reviewed for abuse of discretion." *Kucera v. State, Dept. of Transp.*, 140

Wn.2d 200, 209, 995 P.2d 63 (2000).<sup>21</sup> A trial court's decision "is presumed to be correct and should be sustained absent an affirmative showing of error." *State v. Wade*, 138 Wash.2d 460, 464, 979 P.2d 850 (1999). So, too, a trial court's refusal to take judicial notice of a matter is reviewed under an abuse of discretion standard. *United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir. 1994), *cert. denied* 514 U.S. 1135 (1995).

A *de novo* standard of review applies only to issues of law. Under the foregoing standards of review Judge Andrus' Ruling should be affirmed.

**B. The Trade Secrets Exemption is Well-Settled in Washington Law.**

For more than twenty years Washington law has recognized that the PRA exempts trade secrets from disclosure. The Supreme Court in *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994) ("*PAWS*") expressly found that the Washington Uniform Trade Secrets Act ("*UTSA*") is an exemption to the PRA under the "other statutes" exemption in RCW 42.56.260(1).

*PAWS* emphasized that even *potential* trade secrets may be protected under the *UTSA* which "operates as an *independent limit* on disclosure of portions of the records at issue here that have even potential

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<sup>21</sup> The City claims that review of an injunction decision is *de novo*, incorrectly relying on PRA cases involving records consisting of affidavits, memoranda and other documentary evidence. In such cases, *de novo* review is proper because the appellate court stands in the same position as the trial court. But in a case such as this, the record is an evidentiary record, where deference must be paid to the trial court's findings of fact and *de novo* review is not proper. *Zink v. City of Mesa*, 140 Wn. App. 328, 336-37, 166 P.3d 738 (2007). RCW 42.56.550's reference to *de novo* review means the standard applicable at the trial court level reviewing agency action.

economic value. *The Public Records Act is simply an improper means to acquire knowledge of a trade secret.*” 125 Wn.2d at 262 (emphasis supplied).

The PRA recognizes that for government to function it needs to interact with private commercial entities, such as Lyft. Those entities have a reasonable, legitimate interest in protecting any proprietary commercial information they are required to submit to the government for regulatory purposes.<sup>22</sup> Indeed, the PRA recognizes the legitimate need to protect proprietary commercial information through express exemptions in the PRA or through other statutes such as the UTSA and RCW 80.04.095. Such statutes show that governmental interests can be served while preserving third-party confidentiality.<sup>23</sup>

“The PRA’s mandate for broad disclosure is not absolute. The PRA contains numerous exemptions that protect certain records from disclosure and the PRA also incorporates any ‘other statute’ that prohibits disclosure of information or records.” *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 432, 327 P.3d 600 (2013).

“The general mandate that the [PRA] may be liberally construed does not permit us to ignore the plain language of [a] specific public disclosure exemption.” *Bldg. Indus. Ass’n of Wash. v. State Dep’t of Labor*

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<sup>22</sup> It is well-settled that submission to a public agency does not automatically make a record publicly disclosable. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 738 P.2d 665 (1987).

<sup>23</sup> See, e.g., *Northwest Gas Ass’n v. Washington Utilities and Transp. Comm’n*, 141 Wn. App. 98, 168 P.3d 443 (2007), and *In the Matter of the Joint Application of Puget Sound*, 2008 WL 4905512 (Wash. U.T.C.) (2008).

*& Industries*, 123 Wn. App. 656, 666, 98 P.3d 537 (2004) *rev. denied*, 154 Wn.2d 1030 (2005). Thus, it was proper for Judge Andrus to apply the trade secret exemption and issue an injunction.

The City argues that the general policies and rules of interpretation in the PRA mandate public disclosure of Lyft's trade secrets. Not so. Because Lyft has established that its zip code data constitutes a trade secret, the PRA recognizes and protects it from disclosure. This protection serves public policies that are just as compelling as the general PRA policies promoting governmental transparency.

The City cites *Spokane Research & Def. Fund v. City of Spokane*, 96 Wn. App. 568, 578, 983 P.2d 676 (1999), to suggest that the PRA trumps the UTSA "if any conflict exists." But *Spokane Research* presented no conflict between the PRA and UTSA because the records at issue were not trade secrets. Even when records *are* trade secrets, *PAWS* holds that there is no conflict between the UTSA and the PRA and trade secrets are exempt under the "other statute" exemption.

Trade secret protection in a digital age is a national policy, as well. In May 2016, President Obama signed into law the Defend Trade Secrets Act of 2016, Pub. Law 114-153 (amending 18 U.S.C. §§ 1832, 1836). This provides a private company with a private cause of action for trade secret misappropriation. This new law recognizes the importance of trade secret assets generally to America's economy and the need to protect them. According to a 2013 Report, it has been estimated that 75% of the

value of U.S. Fortune 500 companies is attributable to intangible assets such as trade secrets.<sup>24</sup>

**C. Lyft's Zip Code Data is a Trade Secret.**

The trial court correctly found that Lyft's zip code data satisfies every element of a trade secret.

**1. *Elements of a Trade Secret.***

Under the UTSA, a "trade secret" is defined as:

[I]nformation, including a formula, pattern, **compilation**, program, device, method, technique, or process that:

- (a) Drives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, 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.

RCW 19.108.010(4).

**2. *The Zip Code Data is a Unique and Novel Compilation.***

While the definition of a trade secret is a matter of law, the determination of whether specific information is a trade secret presents a question of fact. *West v. Port of Olympia*, 146 Wn. App. 108, 120, 192 P.3d 926 (2008). Judge Andrus properly found that Lyft's zip code data is a trade secret as a matter of fact. The Opening Brief (p. 34-35) argues that Judge Andrus erred in finding Lyft's zip code data to be a "compilation" under the UTSA, as a matter of law. The City fails to explain legally why

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<sup>24</sup> See The IP Commission, *The Report of the Commission on the Theft of American Intellectual Property* (May 2013), available at [www.ipcommission.org/report/IP\\_Commission\\_Report\\_052213.pdf](http://www.ipcommission.org/report/IP_Commission_Report_052213.pdf) (emphasis added).

Lyft's zip code data cannot be a "compilation", which is not defined in any Washington UTSA case.

Webster's Unabridged Third New International Dictionary defines a "compilation" as "an accumulation of many things, elements, or influences."<sup>25</sup> Exhibit 341, *produced by the City*, represents Lyft's "accumulation" of all zip code data for each and every Lyft ride on the quarterly reports.<sup>26</sup> The City presented no evidence to the contrary. The Court concluded, correctly, that Ex. 341 is a "compilation."<sup>27</sup>

What the City seems to be claiming, albeit unclearly, is that Lyft's zip code data is generally known and thus, not a trade secret. According to the City's scattered reasoning, the zip code data cannot be a trade secret because some of it is publicly available to Lyft and Rasier drivers because Rasier drivers drive for Lyft and vice versa. This misses the point – what makes Lyft's zip code data unique and novel is *the fact* that it is a

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<sup>25</sup> When terms are not defined in the statute, courts turn to their ordinary meaning, as evidenced by lay dictionaries. *C.J.C. v. Corporation of Catholic Bishop*, 138 Wash.2d 699, 709, 985 P.2d 262 (1999) (citing *American Legion Post No. 32 v. City of Walla Walla*, 116 Wash.2d 1, 8, 802 P.2d 784 (1991)).

<sup>26</sup> The characteristics of the zip code data are uniform for each and every quarterly report provided to the City. The evidence presented by the parties to support, or refute, a finding that zip code data is a trade secret applies equally to *all* zip code data submitted on quarterly forms, irrespective of quarter. The evidence at trial showed that the information in categories 3 and 4 on each quarterly report was created by, and protected by, Lyft the same way. Further, each quarterly report was provided to, and treated confidentially by, the City in the same way. Because of this, the Court's finding that the zip code data on the quarterly reports is a trade secret should apply equally to all zip code data on the quarterly reports.

<sup>27</sup> See *XTec, Inc. v. Hembree Consulting Servs.*, 183 F.Supp.3d 1245 (S. D. Fla. 2016) (a software compilation can be a trade secret). See *Earthbound Corp. v. MiTek USA, Inc.*, 2016 WL 4418013 (W.D. Wa.) at \*9; *United States v. Nosal*, 828 F.3d 865, 882 op. amended and superseded 844 F.3d 1024 (9<sup>th</sup> Cir. 2016) (compilation of data can be a trade secret).

compilation of *all* zip code data for each quarter since late 2014. Therein lies its *novelty* and incredible value. Exhibit 341 contains the entire universe of zip code data for Lyft for any given quarter. No Uber or Lyft driver could “generally know” that entire universe of data.<sup>28</sup> The City did not challenge the Court’s finding that “[w]hile drivers and passengers know some pieces of data, they do not have access to the compilation that Rasier and Lyft have to disclose to the City.” CP 2706.

Moreover, even if some zip code data is known by some drivers, this does not destroy trade secret status for the entire set of data.<sup>29</sup> In *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 50, 738 P.2d 665 (1987), the court said, “A trade secrets plaintiff need not prove that every element of an information compilation is unavailable elsewhere.”

The City maintains several other unpersuasive claims. It asserts, without record support, that Lyft generates its zip code data only for purposes of complying with City regulation. Kelsay testified that this is “absolutely false.”<sup>30</sup> Lyft’s software was capturing zip code data to be used for Lyft analytical purposes long before Lyft started reporting such data to the City. Kelsay uses the very data at issue on a daily basis to carry out his job functions as GM. VRP 10/11/16 87:24-25. The fact that he views and uses the data in a different format than the City is immaterial.

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<sup>28</sup> VRP 10/11/16 85:23-25; 106:1-107:3.

<sup>29</sup> In *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 325 (1992), evidence was presented that pilots, mechanics, and airplane parts manufacturers generally knew that the brakes at issue were defective.

<sup>30</sup> VRP 10/11/16 86:11-18.

Because the City has admitted that it does not own Lyft's data,<sup>31</sup> *Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 983 P.2d 676 (1999), is distinguishable. Unlike in this case, where Lyft owns the trade secrets (the zip code data), the City owned the studies in *Spokane Research*, so they could not be the trade secrets of the developers, who had sought the trade secret exemption.

Further, the City suggests that the submission of zip code data for regulatory purposes means that this zip code data cannot be a novel trade secret. If that were true, then *no* submission to a governmental agency could ever be a trade secret. The Supreme Court in *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 52, 738 P.2d 665 (1987), rejected outright the City's argument when it found that Boeing's submission of confidential data to the Federal Aviation Administration did "not mean that the information is available to the public upon demand."<sup>32</sup>

The cases cited by the City that have found a lack of "novelty" or "uniqueness" involved alleged trade secrets in exhibits at trial subject to a sealing motion – not PRA cases. For example, *McCallum v. Allstate Property & Cas. Co.*, 149 Wn. App. 412, 426, 204 P.3d 944 (2009), and *Woo v. Fireman's Fund Ins. Co.*, 137 Wn.App. 480, 154 P.3d 236 (2007),

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<sup>31</sup> Ex. 103, p.11 (RFA No. 18).

<sup>32</sup> The Opening Brief (p. 46) cites *Ruckelshaus v. Monsanto, Co.*, 467 U.S. 986, 1002 (1984), claiming voluntarily producing trade secrets for regulatory purposes results in loss of trade secret status. *Ruckelshaus* dealt with a constitutional "takings" claim under a specific federal statute that governed when and how data submitted to the EPA would become public. This advised Monsanto specifically that its trade secret would become public at a certain point. In contrast, no specific statute expressly told the TNCs their data would become public. The possibility of a PRA request does not do so.

involved insurance company manuals with material” that would be obvious to any insurance company setting out to prepare a claims manual.” 137 Wn. App. 480, 489, 154 P.3d 236 (2007). In *Woo*, the claimed trade secret status was supported by conclusory affidavits that did not explain how the manuals at issue differed from those of other insurers. In *Buffets v. Klinke*, 73 F.3d 965, 968 (9th Cir. 1996), the court ruled that the recipes at issue were not trade secrets because many of them were “basic American dishes that are served in buffets across the United States,” such as macaroni and cheese.

Central to the analyses in these decisions were facts that showed the trade secret at issue could have been developed by others based upon commonly available information. That is not the case here. As discussed further below, Exhibit 341 contains millions of rows of zip code data that are generated exclusively through the Lyft-developed application.

Thus, again, Judge Andrus’ finding that the zip code data is a trade secret must be sustained, both factually and legally, because this universe of data is not generally known and is novel and unique.

### ***3. The Zip Code Data Cannot be Readily Ascertainable by Proper Means.***

The City fails to address another key component in RCW 19.108.010(4); namely, can the trade secret be determined by other proper means? The City did not challenge Judge Andrus’ finding that “the Zip Code Data is not readily ascertainable by proper means by competitors.” CP 2717. This is hardly surprising, for City witnesses have admitted that

the zip code data can only be created by Lyft and therefore is novel and cannot be replicated.<sup>33</sup>

Substantial evidence at trial proved that there is no commonly available way to replicate Lyft's zip code data, since it is the compilation of *all* Lyft zip code data. Kelsay described the complex, difficult process created, and used, by Lyft to gather zip code data, which the Company views as a vital analytical tool:

A. Well, there's so much going on that is required to gather that data, and I'm not an engineer, but, you know, it starts with GPS satellites in the sky, and cars that are moving around by the 10s of thousands, picking up 10s of thousands of passengers, and all that data is coming in in real-time and being captured in a database that is going 24/7, 365. And then that data has to be extracted in a meaningful way, so that somebody like me can understand what's really going on. So there's a tremendous amount of things going on behind the scenes.

VRP 10/11/16 at 85.

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<sup>33</sup> First, they admitted that they do not know how the zip code data is created. Grove Dep. 62:9-11. Next, they admitted that the zip code data cannot be obtained from any other source. Grove Dep. 58:15-18; VanValkenburgh Dep. 174:8-24; VRP 10/25/16 82:16-19. Finally, they admitted that the zip code data could not be replicated in any other way to produce traffic data with the same accuracy without significant expense. Grove and VanValkenburgh said that SDOT would have to administer costly surveys, with higher margins of error, to try to recreate the data that the TNC's provide. Grove Dep. 62-63. Only City witness Main-Hester seemed to think the zip code data is readily obtainable elsewhere, although the City has never tried to do so. Her testimony at trial revealed the sheer improbability that the zip code data could be replicated by other means. She suggested that individual "observers" could collect the data, but she admitted that they would have to follow every ride to conclusion. VRP 10/25/16 210-214. She suggested that drivers or passengers would be able to provide zip code data, but she admitted that the City has no means to compel this information from them. In the end, she grudgingly agreed with experienced SDOT employees that the City *could not replicate* the zip code data to the same level of accuracy as what is provided by the TNCs. VRP 10/25/16 214-215. Indeed, why else would the City be fighting so hard in this lawsuit to unprotect the TNCs' data?

Kelsay testified to the significant investment and expense associated with the development of the Lyft app.<sup>34</sup> He testified that Lyft's app, and its operations in Seattle, cost the company "millions and millions to develop." VRP 10/11/16 80.

In sum, substantial evidence at trial established that the zip code data cannot be readily ascertainable by proper means.

**4. *Lyft's Zip Code Data Derives Independent Economic Value from Not Being Generally Known to Others Who Can Obtain Economic Value from its Disclosure.***

The UTSA expressly requires a trade secret to have "independent economic value," which can be established in many ways.

The City did not challenge Judge Andrus' finding that Rasier and Lyft "have credible presented evidence that this information has independent economic value from not being generally known to competitors." CP 2716. This analysis is consistent with cases that have analyzed the first, "independent economic element" prong of the USTA<sup>35</sup> and held that to have independent economic value, "the secret information must afford the owner a competitive advantage by having value to the owner and potential competitors." *Daimler-Chrysler Servs. N. Am., LLC v.*

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<sup>34</sup> 10/11/16 85:9-25.

<sup>35</sup> Washington courts can look to the courts of other states that have adopted the UTSA. *Ed Nowogroski, Inc. v. Rucker*, 137 Wn.2d 427, 438-439, 971 P.2d 936 (1999). As of 2016, 49 states have adopted the UTSA. See <http://www.uniformlaws.org/legislativfactsheet.aspx?title=Tra> The Minnesota Supreme Court, one of the first states to interpret the "independent economic value" element of the Uniform Trade Secrets Act, held that secret information has independent economic value "[i]f an outsider would obtain a valuable share of the market by gaining [the] information." *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 900 (Minn. 1983).

*Summit Nat'l, Inc.*, 289 Fed.Appx. 916, 922 (6th Cir. 2008); *see also Mike's Train House v. Lionel LLC*, 472 F.3d at 410-11 (6th Cir. 2006). In other words, information has independent economic value if it “would be useful to a competitor.” *Id.* (citations omitted).

Judge Andrus made credibility determinations in favor of the TNCs witnesses with respect to their testimony as to “independent economic value.” She heard extensive, non-conclusory testimony from these witnesses that Lyft’s zip code data would be useful to its competitors. Kelsay testified as to the value of Uber’s zip code data:

- Q. So if one of those options were the ability to buy Uber’s ZIP code data, would you do so?
- A. Yes.
- Q. How much would it be worth to you?
- A. It would be worth every penny.
- Q. If you had access to Uber’s ZIP code data, what would Lyft do with it?
- A. We would analyze it, and we would use it as quickly as possible to inform our business decisions around the product choices that we make, the promotions, the pricing, the marketing, everything.

VRP 10/11/16 97:9-19.

Steger similarly testified that she would pay for the zip code data of Uber’s competitors because “we see it as having a ton of value.” VRP 10/11/16 106:23. Steger explained how she would use the data to “see where Lyft was getting category position in certain zip codes over others.” *Id.* 107:2-3. This would lead to decisions regarding marketing strategies

to attract new riders as well as campaigns to attract new drivers for Uber.  
*Id.* 107:3-25.

Steger's testimony shows that Uber would take advantage of any Lyft confidential data that might be disclosed. Uber conducted an analysis of Lyft's total ride data that was released as a result of this Court's March Order and developed a competitive strategy for "next steps." VRP 10/10/26 113:21-115:21; Ex. 246.

Both general managers testified at length about the value of the zip code data with respect to marketing, promotions, product placement, supply positioning, and product development.<sup>36</sup> Kelsay described the zip code data as "actionable, in terms of how we offer product, the pricing that we offer, promotions that we run marketing campaigns for, to generate additional drivers or passengers . . . . [I]t's more valuable because of its actionability." VRP 10/11/16 81:22-82:3. Both Lyft and Uber's general managers described how zip code data is instrumental in developing the carpooling services of Lyft and Uber. Kelsay testified:

A perfect example of that is when we launched Lyft Line, which is our carpooling service. We had to have that ZIP code data in order to determine where we could -- if we could offer the product, based on volumes and density, and where that product would be operational within our service area. And, in addition to that, how we would determine pricing discounts to make the product work within that given area. We couldn't have done that without an understanding of that ZIP code data.

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<sup>36</sup> VRP 10/10/16 (am) 98:9-25; 99:9-103; 104:19-106:4; 109:21-110:12; VRP 10/11/16 86:19-87:3; 87:15-88:2; 16-18; 88-91; 93-94.

VRP 10/11/16 82:11-19.

Reflecting on Uber's rival offerings, Steger noted:

I know if I got the [zip code data] I would dig into potential marketing campaigns. I would also look at past campaigns. So, for example, I know Lyft put up billboards on 15th Avenue. I would love to acquire that data to see how effective those were. And I would be able to go back and -- there's only two bridges that are connecting those two sets of those two neighborhoods to downtown, and so I would love that data to go back and look at the effectiveness of the various marketing campaigns that competitors have run. And I see it as detrimental to both of us should it be released, as well as any future competitor.

VRP 10/10/16 (am) 112:9-20. Later she testified that "if Lyft then got ahold of that [zip code data], they could look at the overall patterns for that ZIP code, and then actually compare it to the neighboring ZIP code, to see if there was a bump in growth for 98109 versus 98108, and if they were decoupled, something that impacted the growth in one ZIP code over another, so I can give it -- easily back in with that data to the effectiveness of a marketing campaign." VRP 10/10/16 (am) 69:9-17. Kelsay provided some additional context:

As I look at my ZIP code information, I will look for patterns, I'll look for spikes, I'll look for, you know, again, a pattern of last Thursday there was sure a lot of unfulfilled ride requests, what happened, why, and it might be something simple. You might find that, hey, that's because it's Century Link Field and there was the Seahawks let out, there was a tremendous number of ride requests, we didn't have enough supply, those were unfulfilled rides. But there might be something else. It might be that an area of town became more aware of Lyft services because of a promotional campaign, and we didn't anticipate that it would go so well and we didn't have enough drivers there. So that's how I would use it on a daily basis, to try to make sure that we have as few supply/demand imbalances as

possible, so that we can create the most efficient . . . service.

VRP 10/11/16 92:7-24.

Although the City witnesses testified that the zip code data has economic value for the City,<sup>37</sup> inexplicably, the City argues that it has no value to the TNCs. But the City witnesses are in no position to know whether the zip code data is valuable to competitors in the TNC industry, because they have no knowledge or experience in that industry, as the Ruling found (CP 2716-17) and the City has not challenged. The City witnesses even testified that the only way to understand competition within that industry is to ask participants in the industry.<sup>38</sup>

The City did not refute the substantial evidence presented by the TNCs of the economic value of the zip code data in today's fierce, competitive environment. Instead, the City argues that "independent economic value" really means that Lyft and Uber had to prove how much they spent to develop the zip code data, relying on a case that does not even involve a PRA trade secret. *See McCallum v. Allstate Property*, 149 Wn. App. 412, 424 204 P.3d 944 (2009).<sup>39</sup> That is not what the statute says. The testimony of Kelsay and Steger establish the *independent value*

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<sup>37</sup> City witnesses also testified at length as to the economic value of the zip code data *to the City* as traffic data because the City gets precise, detailed traffic data for free when it otherwise might have to purchase it from third party vendors or conduct expensive intercept studies. VanValkenburgh Dep. 36:1-35; 60:20-25; 120-121;132:15-133:19

<sup>38</sup> Main-Hester Dep. 120: 1-4; Grove Dep. 82:13-83:7; VanValkenburgh Dep. 170:15-17.

<sup>39</sup> *McCallum* involves a dispute over a protective order that shielded certain insurance manuals from disclosure, as trade secrets. The court found them not to be trade secrets because there was no showing how a competitor would use them. In this case that strong showing has been made.

of the zip code data of Lyft and Uber because each company could gain *clear economic value from the disclosure* of the other company's data.

Even if proof of effort and expense was required, Lyft presented such proof. As described above in Sec. IV.C.3., Kelsay described the complex, difficult process created, and used, by Lyft to gather zip code data, which the Company views as a vital analytical tool.

Kelsay testified that Lyft's app, and its operations in Seattle, cost the company "millions and millions" to develop. VRP 10/11/16 80. Kelsay's testimony establishes that Lyft has spent considerable effort and expense to develop the app that produces the zip code data from the Seattle market.<sup>40</sup> Thus, Lyft established the independent economic value of its zip code data even by the City's (erroneous) standard.

**5. *Lyft Took Reasonable Efforts to Maintain the Confidentiality of its Zip Code Data.***

Judge Andrus described how the TNCs treat their zip code data as confidential. CP 2705-06. She concluded that "[b] Lyft and Rasier have taken reasonable efforts under the circumstances to maintain secrecy of their zip code data." CP 2717.

Substantial evidence supports this conclusion. First, Lyft had an agreement on confidentiality with the City. Lyft refused to submit its confidential data to the City without the promise provided in the Mediation Terms, which the City (until this lawsuit) acted upon by treating the zip code data as confidential. *See* discussion in Sec. III.A.

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<sup>40</sup> VRP 10/11/16 80:1-15; 85:9-22; 93:25-94:9.

Next, Kelsay testified that the zip code data was subject to the stringent confidentiality protections stated in the Lyft Security Practices Statement.<sup>41</sup> He said that access to this data is limited to people who need to know, such as the general manager in charge of the market corresponding to the data at issue; that he does not have access to this data for other markets; and that the Seattle zip code data has only been disclosed to the City and King County as required by regulation.<sup>42</sup> This zip code data has never been disclosed to Lyft customers, academics, purveyors of other apps, or any other third party.<sup>43</sup> The fact that Lyft has expended the considerable resources that it has in this case is incredibly strong evidence of the efforts that Lyft takes to protect its trade secrets.

The City tries to counter this evidence with instances where TNC data may have been disclosed in other jurisdictions. The City ignores evidence of contemporaneous, similar litigation in Portland over TNC data that resulted in a judicial finding that Lyft's ride/vehicle data *is a trade secret*, which could not be disclosed in response to a PRA request. *See Rasier v. City of Portland, et. al.*, Case Nos. 16CV31985, 16CV32174 (Multnomah County Circuit Court) (Nov. 4, 2016) (CP 2153-2159).

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<sup>41</sup> Ex. 139.

<sup>42</sup>VRP 10/11/16 103:10. The City cites the Wheelchair Accessible Services Surcharge and TNC Licensing Fee Forms (Exs. 342-349) as proof that Lyft does not protect its data. This is not true because these Fee Forms do not contain the streams of raw zip code data which are contained on the quarterly reports submitted through the secure portal. Whether these forms are marked, or not marked, as confidential is irrelevant to whether the zip code data is confidential. There is no evidence as to how the Fee Forms are submitted (*i.e.*, in a package).

<sup>43</sup> VRP 10/11/16 111:23-125. The City claim that taxis have always provided zip code data is not true. Taxis started reporting this data as a result of the new ordinance after 2014. Main-Hester Dep. 115:13-23.

Each jurisdiction pointed to by the City is distinguishable from the zip code data in this case.<sup>44</sup> The Spokane case<sup>45</sup> did not deal with zip code data but with total ride counts used to calculate fees to be paid to the City of Spokane. A subsequent change to the Spokane regulation mooted the submission of the data that was at issue in that case, so future trade secret exposure was mitigated.<sup>46</sup>

With respect to the King County litigation,<sup>47</sup> the request at issue asked for number of licenses issued to drivers, not zip code data, and Lyft strenuously opposed the release of that information. That Lyft did not appeal the King County decision has no bearing on the question of whether the data at issue in that case, or the entirely different data at issue here, is a trade secret. A company's decision not to appeal an adverse ruling depends upon many factors, not the least of which is resource constraints and the presence of other litigation, such as this case.

The disclosure of Lyft's data in Austin, which did not include pick-up and drop-off information on a per ride basis, cannot be explained by Exhibit 390, in isolation. Comparing the situation in Austin with the situation in Seattle is simply not apples to apples. Indeed, Lyft was not

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<sup>44</sup> The TNCs proposed a reporting form with information similar to what is submitted to the California Public Utility Commission ("CPUC"). The CPUC allows this form and the data it contains to be treated *as confidential*. Decisions 06-06-066. *See* General Order 66-C, D 06-06-066; D16-08-024 (California Public Utilities Commission).

<sup>45</sup> Ex. 307.

<sup>46</sup> VRP 10/10/16 (pm) 74:6-14.

<sup>47</sup> Ex. 310.

even operating in Austin at the time of trial. In any event, Lyft is currently pursuing litigation in Austin over the Austin data request.<sup>48</sup>

No evidence shows that the Seattle zip code data at issue in this case, or *identical* zip code data in other markets, was ever disclosed publicly anywhere. Nothing refutes the Court's finding that Lyft took reasonable efforts to prevent the disclosure of its zip code data.

On appeal, the City continues several unsuccessful arguments, rejected by Judge Andrus, as to why Lyft allegedly did not take reasonable efforts to protect the zip code data, all of which fail. The City claims that because Lyft and Uber drivers see some zip code data, Lyft fails to protect ALL of its zip code data. This is an apples-to-oranges claim, with little legs, for the reasons discussed in Sec. IV.C.2.

The City argues that it has no confidentiality obligation because the final ordinance lacks the "highest level of confidentiality" language. Mayor Murray made an agreement that the City publicly acknowledged (Ex. 101, Ex. A), and the agreement is still in effect or the City would not have continued to protect the confidentiality of the zip code data. The City provided no proof that the Mediation Terms vaporized when the ordinance was enacted.

The City argues that the TNCs assumed the risk that their trade secrets would be disclosed because they were told that the data was subject to the PRA. They claim that the TNCs should have known that the City would never agree *to not disclose* the zip code data required to be

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<sup>48</sup> Ex. 175.

disclosed by the PRA. That is precisely the point – *the PRA did not require the City to release the zip code data*, which is exempt, and the City could have claimed this exemption, as it has conceded.

A fair reading of the two terms at issue – regarding third party notice and the agreement to provide the “highest level of confidentiality” in the Mediation Terms<sup>49</sup> – is that the City would keep the data confidential and would let the TNCs know of third party PRA requests. The risk assumed by the TNCs was possible disclosure brought about by a third party request – not deliberate action from the City to attack their trade secrets. Unlike Monsanto in *Ruckelshaus*, where a federal statute set the date for public disclosure, the TNCs could not have foreseen that their zip code data would be released under the general PRA or that the City would step in for the third-party requestor and actively litigate *against* the application of the legitimate trade secret exemption.

**D. Because Judge Andrus applied both the CR 65 injunction standard and that of RCW 42.56.540, no reversible error occurred.**

Judge Andrus said that her decision would have been the same under both RCW 42.56.540 and the general CR 65 standard. As such, the City cannot claim harm.

Washington follows the “harmless error” principle. “Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial.” *Saleemi v. Doctor’s Associates, Inc.*, 176 Wn.2d 368, 292 P.3d 108 (2013). [W]ashington courts have never reversed civil

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<sup>49</sup> Ex. 101, Ex. A.

judgments for harmless error.” *Id.* at 381. The Court will not reverse for errors of law which do not affect the merits. *Delamater v. Smith*, 14 Wash. 261, 44 P.266 (1896).

Judge Andrus correctly applied the general CR 65 injunction standard set forth in *Tyler Pipe Indus. v. State Dept. of Rev.*, 96 Wn.2d 785, 792, 638 P. 2d 1213 (1982), which is used to enjoin disclosure of a trade secret under the UTSA. This standard requires Lyft to show (1) that it has a clear legal or equitable right, (2) that it has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to it.

As set forth in Sec. IV.C., Lyft has satisfied the first element because Lyft established that its zip code data is a trade secret and legally protectable under the UTSA. The City has not challenged the Court’s finding on the second element. In any event, the City’s announced intent to disclose Lyft’s zip code data in response to Kirk’s PRA request represents a threat of immediate invasion of Lyft’s trade secret rights. Moreover, the City has made very clear in discovery responses, deposition testimony, and at trial that the City wants to publicly disclose Lyft’s data, even outside the context of individual public records act requests. Accordingly, Lyft has a well-grounded fear that its right to protect its trade secrets and proprietary data will be invaded, in violation of Washington law.

Then, the City makes a strange argument that such disclosure may not be a “misappropriation.” This is wrong according to the clear language in RCW 19.108.010(2), which defines “misappropriation” as:

(b) *Disclosure* or use *of a trade secret* of another *without* express or implied *consent* by a person who:

.....

(ii) *At the time of disclosure* or use, knew or had reason to know that his or her knowledge of the trade secret was.....  
(B) *acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use*, or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

As discussed in Sec. III.A., the City acquired Lyft’s zip code data under circumstances that gave rise to a duty to protect it from disclosure, and the City provided such protection. The Court correctly interpreted the UTSA in finding that disclosure without consent is a misappropriation and therefore a permanent injunction was appropriate.<sup>50</sup>

**E. Judge Andrus Correctly Found that Disclosure of Lyft’s Zip Code Data Would Cause It Immediate and Irreparable Harm.**

The City denies that Lyft would be harmed from disclosure of its trade secret. But Judge Andrus found that Lyft would face “actual and substantial” injury, which is direct language from *Tyler Pipe*, 96 Wn.2d at 792, for the third element for injunctive relief. CP 2718. In *SEIU Healthcare 775 NW v. State Dep’t of Soc. & Health Services*, 193 Wn. App. 377, 377 P. 3d 214 (2016), the court found that this requirement “is consistent with a similar requirement in RCW 42.56.540.” The City’s

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<sup>50</sup> The third element of the general CR 65 injunction standard – regarding actual and substantial injury to Lyft – is addressed in the next section.

quibble that Judge Andrus did not use the term “irreparable” harm is legally irrelevant, because the evidence established actual, substantial, and *irreparable* harm.

The City claims that Judge Andrus’ finding of irreparable harm is erroneously based upon a finding of harm *per se*. The Court’s finding refutes this claim by stating “once the data is disclosed. They will lose the trade secrets they have spent time and money developing, and they will be able to gain an unfair competitive advantage against each other with the disclosure of this data.” CP 2718. The TNCs provided concrete substantial evidence of the harm they would face from public release of their zip code data. Unlike in the case relied upon by the City, *Woo v. Fireman’s Fund Ins. Co.*, 137 Wn. App. 480, 154 P.3d 236 (2007),<sup>51</sup> the evidence showed that chief competitor Rasier *would* use Lyft’s zip code data to gain a competitive advantage and to improve its category position. Steger, for Rasier, testified:

Q. If you could pay for that zip code data for your competitors, would you do it?

A. Yes.

Q. Why?

A. Because it has -- we see it as having a ton of value. Obviously, once it's actually released I think the value declines, but -- if both -- if all parties have it. But number one, if we were able to see where Lyft was getting category position in certain zip codes over others, we would adjust our marketing campaigns to -- to reverse that effect. For example, if we saw that in Leschi the -- they had more, they were gaining in

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<sup>51</sup> The City also relies on *Buffets v. Klinke*, 73 3d 965 (9th Cir. 1996), which does not address the issue of harm that could be suffered due to release of a trade secret.

category position or had more category <sup>52</sup> position, we could offer -- we could do an email campaign, we could do a hyper targeted Facebook campaign, we could send emails to those users offering them a promotion, and then we could actually offer them lower pricing within our application in order incentivize. On the flip side of that, you know, we do have a two-sided marketplace, so it's not just rider acquisition. We may have plenty of riders but our supply or the drivers may not be sufficient. And so I think the first step, too, would be to look at: Do we have enough drivers in the neighborhood? Are -- are drivers going there in the morning? And then we can actually offer different incentives to drivers as well to bring them into a neighborhood. Like if you see that in Leschi there's demand but it's not being met because the ETAs are too long or there aren't enough drivers there, we could institute a Facebook marketing campaign just for driver acquisition based on zip code. We could offer driver incentives to that area.

10/10/16 Trans. 106:12-107:23.

Both TNCs provided testimony of the competitive harm they would suffer from disclosure of their zip code data. VRP 10/10/16 (am) 110: 15-11:3; VRP 10/11/16 94:16-96, 98:3-21. Kelsay testified that release of Lyft's trade secrets, which Rasier would then obtain,<sup>53</sup> would have a greater proportional harm to Lyft because of Rasier's larger size and greater capability to extract value from Lyft's zip code data.<sup>54</sup>

Kelsay discussed additional harms Lyft would experience if its zip code data were released because new TNC entrants could use it to cherry-

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<sup>52</sup> According to Steger, "category position" is a more useful measure of success than "market share" for TNCs. 10/10/16 (am). 108:15-22.

<sup>53</sup> VRP 10/11/16 95:17-96:7; 105:15-21.

<sup>54</sup> *Id.* 83:16-17; 105:17-21.

pick routes and potentially create or improve their algorithms.<sup>55</sup> Release “would diminish use, it would diminish our market share.”<sup>56</sup>

Kelsey described the investment made by Lyft in its app in Sec. IV.C.2., which would be jeopardized by disclosure of a key input such as the zip code data. In short, sufficient facts proved the actual harm the TNCs would face from disclosure, as Judge Andrus properly found.

Moreover, the City mischaracterizes Judge Andrus’ harm finding as based upon a *per se* analysis. As discussed above, it is not. But her reasoning is consistent with the cases *misconstrued* by the City, such as *Pac. Aerospace & Elec. Inc. v. Taylor*, 295 F. Supp. 2d 1188, 1198 (E.D. Wa. 2003), which said, “An intention to make imminent or continued use of a trade secret or disclose it to a competitor will almost certainly show irreparable harm.” More recently, in *Robbins Company v. JCM Northlink LLC*, 2016 WL 4193864 (W.D. Wa. Aug. 9, 2016) \*3, the court relied upon *Pac. Aerospace*, stating, “The disclosure of Robbin’s information that is confidential, proprietary, or constitutes trade secrets *alone* is sufficient to show a likelihood of irreparable harm.... [O]nce confidential information is disclosed it cannot be recovered.” *Accord Ossur Holdings, Inc. v. Bellacure, Inc.*, 2005 WL 3434440 (W.D. Wa. Dec. 14, 2005) at \*9.

Judge Andrus found Judge Robart’s views in *Versaterm v. City of Seattle*, 2016 WL 4793239 (W. D. Wa. Sept. 13, 2016), persuasive. Judge Robart granted a motion for preliminary injunction to prevent the City

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<sup>55</sup> *Id.* 97:20-98:21.

<sup>56</sup> *Id.* 98:14.

from releasing the computer programs and manuals of the vendor that allows the Seattle Police Department to manage its records and engage in its computer-aided dispatch operations. He concluded at \*7:

Irreparable harm may occur where “[p]ublic disclosure of a trade secret” is threatened because such disclosure “destroys the information’s status as a trade secret.” .... Disclosure also allows “competitors to reproduce [the] work without an equivalent investment of time and money.” ... (“The disclosure of...information that...constitutes trade secrets alone is sufficient to show a likelihood of irreparable harm.”). Further, evidence that trade secrets are likely to be disclosed may support a finding of irreparable harm. (Citations omitted.)

Thus, if *intent alone* is sufficient to establish irreparable harm the requisite intent is clearly evident in this case.<sup>57</sup>

The City also argues that Lyft has not proven that it will be harmed because it has not suffered from “similar” releases of its data in other jurisdictions, and because it has grown in size. As explained in Sec. IV.C.5., no valid comparison can be drawn from instances of involuntary disclosure of different types of data in other jurisdictions.<sup>58</sup> As for Lyft’s growth, there is no doubt that Lyft would be harmed if Uber obtained its competitive zip code data, which is the whole point of this litigation—to

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<sup>57</sup> That is because “[a] trade secret’s value lies in the ‘right to exclude others.’” If other are given the trade secret, the ‘holder of the trade secret has lost his property interest.’” *Phillip Morris, Inc. v. Reilly*, 312 F.2d 24, 37 (1st Cir. 2002). So, too, in this case Lyft’s harm or damage will occur at the moment of disclosure and Lyft will have lost its property interest in the zip code data. The harm from “loss of trade secrets cannot be measured in money damages” and therefore “[a] trade secret once lost is ... lost forever.” *North Atlantic Instruments, Inc. v. Haber*, 188 F.3d 38, 49 (2d Cir. 1999) (quoting *FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 63 (2d Cir. 1984) (*per curiam*)).

<sup>58</sup> Kelsay testified about the harm from the disclosure of total ride data: He also described the harm Lyft experienced from the release of total ride data in this case: lower than expected market share and increased resource expenditures to attract drivers. VRP 10/11/16 83-84.

prevent that certain harm. “The purpose of an injunction is not to punish for past transactions, but to restrain present or future acts.” *State ex rel. Dept. of Public Works of Washington v. Skagit River Navigation & Trading Co.*, 181 Wash. 642, 645, 45 P.2d 27 (1935). That is why the Court in *Sierracin* enjoined continued use of the trade secret – to prevent future harm.

Thus, Judge Andrus correctly found that disclosure of Lyft’s zip code data would cause it immediate and irreparable harm.

F. **The PRA Injunction Provision Does Not Apply to Records Exempt Under the UTSA.**

Despite the City’s protestations, the PRA injunction standard does not apply to public records exempt pursuant to an “other statute.” The Supreme Court has noted in *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 432, 327 P.3d 600 (2013), that the PRA’s broad disclosure mandate is “not absolute” and subject to “numerous exemptions” that “protect relevant privacy rights or vital government interests,” including “other statutes.” *See also Limstrom v. Ladenburg*, 136 Wash.2d 595, 607, 963 P.2d 869 (1998).

There are three sources of PRA exemptions: (1) enumerated exemptions contained in the PRA itself, (2) any “other statute” that exempts or prohibits disclosure, and (3) the Washington Constitution. *White v. Clark County*, 188 Wn. App. 622, 630-31, 354 P.3d 38 (2015), *review denied*, 185 Wn.2d 1009 (2016).

The first category of exemptions may be governed by RCW 42.56.540 when third-party injunctions are sought and RCW ch. 42.56 contains the exemption because the only chapter involved is RCW ch. 42.56. Courts consider the language of the provision in question, the context of that statute, and related statutes. *In re Adoption of T.A.W.*, 188 Wn. App. 799, 809, 354 P.3d 46 (2015). It makes sense that the RCW ch. 42.56 injunction standard would apply when addressing exemptions in that chapter. *See, e.g., Ameriquest Mortg. Co. v. Office of Attorney General*, 177 Wn.2d 467, 300 P.3d 799 (2013) (injunction not warranted because RCW 42.56.240(1) did not apply).

The PRA's injunction standard does not fit the "other statutes" exemption. No Supreme Court case has held that it does, and lower court opinions on this issue are indeterminative. In *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 328 P.3d 905 (2014), the court refused to find that the public records were exempt under the UTSA. It noted "no court has addressed whether the PRA injunction standard, RCW 42.56.540, applies when a court relies on an 'other statute' exemption such as the UTSA, rather than a PRA exemption to bar disclosure." *Id.* at 726. It refused to address that question, because it did not have to. The court in *Belo Management Services, Inc. v. ClickA Network*, 184 Wn. App. 649, 343 P.3d 370 (2014), cited *Robbins* and did not have to answer that question either because it first found that the records at issue were not trade secrets. Thus, its discussion of RCW 42.56.540 is nothing but

dicta.<sup>59</sup> So too, *Elster Solutions, LLC v. Seattle*, cited in the Opening Brief (p. 18), referred to RCW 42.56.540, but did not apply it because it found the records were not trade secrets. In contrast, Judge Robart in *Versaterm* did not apply RCW 42.56.540, but used CR 65. *Versaterm* at \*5.

*SEIU Healthcare 775 NW v. State Dep't. of Soc. & Health Services*, 193 Wn. App. 377, 377 P.3d 214 (2016), dealt with exemptions **in the PRA** (RCW 42.56.070(9) and 42.56.230(1)), finding they did **not** apply, to refuse to enjoin the release of lists of DSHS care providers.

Further, in cases involving injunctive relief for records covered by the “other statutes” exemption, courts have **not** applied RCW 42.56.540. That statute was not even considered in *Ameriquist Mortg. Co. v. Washington State Office of Atty. Gen.*, 170 Wn.2d 418, 241 P.3d 1245 (2010), where the court found the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809, to be an “other statute” exempting consumer financial information from disclosure. This ruling protected the disclosure of **all** information covered by GLBA to a PRA requester.

In *John Doe G. v. Department of Corrections*, 197 Wn. App. 609, 391 P.3d 496 (2017), the Court permanently enjoined the release of special sex offender sentencing alternative evaluations (SOSA) for Level 1 sex offenders in response to a PRA request. These were exempt because they contained patients’ healthcare information prohibited from release by Uniform Health Care Information Act (“UHCIA”) RCW ch. 70.02, which

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<sup>59</sup> “Dicta” is a statement not necessary to the holding. *State v. Mohamed*, 175 Wn. App. 45, 55, 301 P.3d 504 (2013).

guards healthcare information from disclosure. No RCW 42.56.540 analysis of substantial and irreparable damage or the public interest in disclosure was undertaken.

In *Wright v. Department of Social and Health Services*, the Court held that chapter 13.50 RCW provides an “other statute” exemption for juvenile justice records. 176 Wn. App. 585, 597, 309 P.3d 662 (2013). RCW 13.50.100(2) states that “[r]ecords covered by this section shall be confidential and shall be released only pursuant to this section and RCW 13.50.010.” This means that no consideration of the RCW 42.56.540 factors would be allowed. *Wright* and other Washington cases stand for the proposition that if an “other statute” expressly prohibits or exempts the release of records, such records may not be disclosed. Period. An “other statute” exemption prohibiting release of a record cannot be conditional, or the interest or value to be protected would not be served. Overlaying a RCW 42.56.540 analysis could impose conditions on those protections, making those records subject to release, contrary to the legislative determination that they should **not** be released. Applying RCW 42.56.540 would also lead to inconsistent application of the law, which should be avoided. If the UTSA protects against the release of trade secrets in the private sector it must do so in the public sector or the UTSA will be meaningless.

Like the GLBA in *Ameriquist, supra*, the UTSA is just one example of a statute that classifies certain information as “confidential” and prohibits disclosure. For such statutes, “an agency has no discretion to

release a record or the confidential portion of it.” WAC 44-14-06002(1). For instance, under RCW 70.02.020(1) patient healthcare information may not be released *even if disclosure would be in the public interest*. For this statute, and others, such as the UTSA or the Washington Criminal Records Privacy Act (RCW ch. 10.97), if the exemption applies the inquiry ends.

In *John Doe v. Wash. State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016), the Supreme Court said, “We also note that when courts have found an ‘other statute’ exemption they have also identified a legislative intent to protect a particular interest or value.” *Id.* at 377-78. Making those records subject to release under RCW 42.56.540 would be contrary to the legislative determination that they *should not* be released.

The Supreme Court identified such a legislative determination in *PAWS* where it discussed the Legislature’s intent to protect trade secrets embodied in the UTSA:

The Legislature recently emphasized this in a slightly different context:

The legislature ... 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*.

*Id.* at 263.

That *PAWS* did not involve a third party injunction is irrelevant. *PAWS* unequivocally means that records containing trade secrets *in their*

*entirety* may not be obtained through the PRA. This prohibition could not be clearer:

The UTSA “operates as an independent limit on disclosure of portions of the records at issue here that have even potential economic value. *The Public Records Act is simply an improper means to acquire knowledge of a trade secret.*” 125 Wn.2d at 262.

*PAWS* means that “other statutes” exemptions are different from PRA exemptions with “independent” considerations that justify unconditional exemption.

Honoring the underlying policies of “other statutes”, such as the UTSA, does not offend the primary purpose of the PRA which is “to foster governmental transparency and accountability by making public records available to Washington’s citizens.” *Washington State Patrol*, 185 Wn.2d at 371. Disclosing trade secrets will shed no light on government transparency or accountability because trade secrets do not deal with the conduct of government, but with third-party proprietary interests.

**G. The Public Interest is Served by Nondisclosure of Lyft’s Trade Secrets.**

Judge Andrus found that the public interest required nondisclosure for several reasons. First, Judge Andrus found Kelsay’s testimony very credible when he described the possibility that Rasier could drive Lyft out of the Seattle market if it had access to Lyft’s trade secrets, leaving one provider.<sup>60</sup> Kelsay said:

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<sup>60</sup> The numbers for the two TNCs as depicted on the City’s chart (Opening Brief p. 11) shows Lyft in the underdog position.

I think the public, including me, has an interest in making sure that government doesn't choose sides, that there is a fair playing field, so that companies like scrappy Lyft can exist and do good things here, and I think of what could happen if this drumbeat of releases ends up providing our main competitor with the weaponry that they need to ultimately defeat us, we could go the way of Sidecar, and I think the result of that we've discussed. The monopoly situation that would exist is not good for anybody here.

So, I think it's in the public's best interest to support innovation and businesses like Lyft, as we seek to solve some of these really challenging problems that we all live with every day. We are part of that mix of solutions, convinced of that.

VRP 10/11/16 123:6-15.

Judge Andrus correctly concluded that disclosing Lyft's trade secret could harm competition, which in turn could lead to a monopoly against consumers' interest. Second, she recognized the public interest in trade secret protection and public disclosure. She was also provided with evidence of other public policies that favor protection of TNC innovations because the City views the TNCs as providing a valuable service to Seattle citizens, and wants to promote the type of innovation they offer.<sup>61</sup> Third, she concluded, based upon the evidence, that the City could perform its necessary regulatory functions because it had full use of the zip code data and nondisclosure did not impact that use. CP 2719-2710. In contrast, she acknowledged the realistic potential harm to the public, and to the TNCs, from disclosure of trade secrets that deserve protection. Based upon the record before her, Judge Andrus made the right public interest decision.

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<sup>61</sup> See, i.e. Exs. 108, 110.

On appeal, the City presents two chief “public interest” arguments for disclosure, neither of which has merit. First, the City claims that City planners, analysts and regulators cannot do their jobs without public disclosure of the zip code data. Specifically, the City claims that there is no way to have a public policy discussion with City leaders without having to get publicly into the weeds of millions of lines of zip code data. No evidence supports these claims. Second, the City claims that public disclosure of zip code data is necessary to detect redlining and discrimination. No evidence supports these claims either.

First, City witnesses rebut the City’s claim that it cannot perform its regulatory functions, or report to the City Council, without public disclosure of TNC zip code data. For instance, City employee Grove *admitted* that the City can perform its transportation analyses without compromising the confidentiality of the TNCs’ data. VRP 10/25/16 169:2-19. Other testimony showed:

(1) The City has been able to do its work, ranging from congestion studies to the Shared Mobility Study without having to publicly disclose the zip code data.<sup>62</sup>

(2) The two City agencies who need access to data—SDOT and FAS—determine who receives access to the zip code data, not the TNCs.<sup>63</sup> No one from these agencies has ever been denied access to the

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<sup>62</sup> VRP 10/25/16 65:1-66:25; Main-Hester Dep. 153:21-23.

<sup>63</sup> Main-Hester Dep. 78:14-79:1.

zip code data who requested it.<sup>64</sup> VanValkenburgh said that while she would have liked to share the zip code data with SDOT engineers, she never requested such access and has never had a request denied.<sup>65</sup>

(3) SDOT staff, including an outside consultant, traffic engineer and data czar, have had access to the zip code data and been asked to analyze this data, but have not yet done so.<sup>66</sup> VanValkenburgh testified that the staff could do the requested analyses without publicly disclosing the zip code data.<sup>67</sup>

(4) The zip code data provided to SDOT outside consultants, pursuant to a Nondisclosure Agreement, could be used and incorporated in the consultant's model without publicly disclosing it.<sup>68</sup>

(5) VanValkenburgh testified that she could do her transportation planning using aggregate or anonymized data, without needing to know the identity of each transit provider.<sup>69</sup> VanValkenburgh could provide no specific, coherent reason why SDOT needs to disclose zip code data in order to report to the City Council.<sup>70</sup>

(6) Main-Hester provided conclusory testimony about her alleged inability to provide to a City Council committee the report required by SMC 6.310.100. However, Judge Andrus found that it was

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<sup>64</sup> VanValkenburgh Dep. 47: 15-49; 6; 100: 2-7; 135: 21-136:5, Main-Hester Dep. 78:14-79:13; VRP 10/25/16 4: 10-5: 4.

<sup>65</sup> VanValkenburgh Dep. 135:21-136:6.VRP 10/25/16 4:10-5:4.

<sup>66</sup> VRP 10/25/16 12: 1-22; 14: 5-12; VanValkenburgh Dep. 48:7-49:6. 137: 22-139: 6.

<sup>67</sup> VRP 10/25/16 15: 4-10.

<sup>68</sup> Ex. 115; VRP 10/25/16 15: 11-16: 3, 32: 1-33:5, 17: 22-18: 7, 18: 14-22.

<sup>69</sup> VRP 10/25/16 30:18-31:21; 54:14-55:4; VanValkenburgh Dep. 161:20-24.

<sup>70</sup> VRP 10/25/16 53:15-24.

“the *City*” that “decided not to finalize the report or submit it to the City Council” (CP 2712) and this finding was supported by substantial evidence. The evidence shows that the TNCs were concerned about heat maps that disclosed specific zip code data but never requested that the report be withheld from the committee. Main-Hester admitted that she viewed an Uber proposal that would have provided a way to prepare the report without disclosing confidential data as “reasonable,” until she talked to City lawyers.<sup>71</sup> She also admitted that there are many ways to prepare a report to the city council without disclosing confidential data.<sup>72</sup> Finally, she admitted that the City Council committee was informed about most of the contents of the “unprovided” report anyway, without submission of the actual report.<sup>73</sup>

Remarkably, no evidence was submitted from any actual City Council member expressing concerns about not having access to the millions of rows of zip code data. Main-Hester admitted that council members need not see the millions of rows of zip code data: “I think that would be fairly mundane.”<sup>74</sup>

In sum, the evidence reveals that City regulators have many different ways to present information to the City Council on public policy issues, and they are able to do their work, without having to publicly disclose millions of rows of zip code data.

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<sup>71</sup> VRP 10/25/16 251-52; Ex. 260.

<sup>72</sup> VRP 10/25/16 230:11-13; Main-Hester Dep. 87:21-88:3.

<sup>73</sup> VRP 10/25/16 235.

<sup>74</sup> VRP 10/25/16 269:21-22.

The Opening Brief introduces a second, *post hoc* pretext for the need to publicly disclose the millions of lines of zip code data. Public disclosure, the City now claims, without evidence, is necessary to detect redlining.

But the issue of redlining was not at issue in this trial. No City witness testified, or offered any evidence, that Lyft engaged in redlining.<sup>75</sup>

In fact, at trial a City attorney told Judge Andrus:

THE COURT: You're not contending they're engaging in redlining, are you?

MS. EVANSON: I'm not testifying about redlining at all, your Honor.

THE COURT: And neither are you going to contend in this case that they're redlining?

MS. EVANSON: No.

10/25/16 Trans. p. 44.

The City now insinuates that the TNCs are engaging in redlining and argues that public disclosure of Lyft's zip code data is essential to detect redlining. But the City had its opportunity to offer proof of this point, yet failed to do so. The Opening Brief (p. 22) misrepresents the alleged "evidence" of redlining. Specifically, the City relies upon Exhibit 393. But the trial court did not admit this exhibit as *substantive proof of redlining*. VRP 10/15/16 145. In fact, Judge Andrus chastised the City for trying to submit this newly-prepared exhibit as part of its case in chief, without notice to the TNCs' counsel, during re-direct of a City witness, Kristina VanValkenburgh. Further, this witness *did not testify* that this

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<sup>75</sup> VRP 10/25/16 152-153; 196-97.

exhibit showed that the TNCs were redlining. VRP 10/15/16 136:17-23.<sup>76</sup>

The City does not challenge the trial court's evidentiary ruling on appeal.

The other alleged evidence cited by the City is a report from the National Economic Bureau allegedly proving "discrimination." Judge Andrus also did not admit this into evidence, or consider this hearsay document produced after the trial. She did not abuse her discretion in refusing to consider his report, which does not even address redlining.

The City conflates Kirk's purported purpose for his request into support for its claim that disclosing zip code data is needed to detect redlining. However, Kirk testified at trial that the purpose of his request was *not* to detect redlining. He told Judge Andrus that "my angle here is, quite simply, transparency." VRP 10/10/16 54:9. Kirk testified that he has no plans to write about the zip code data; that he knows little about Seattle's socioeconomic data on a per zip code basis; and that he does not believe Lyft is engaging in redlining.<sup>77</sup>

The City further misleads the court by implying that one of the purposes of the new TNC regulation is to prevent discrimination and redlining. But that is not the stated "purpose" in SMC 6.310. After some preliminaries, the ordinance expressly states that its "regulatory purposes" . . . "are to increase the safety, reliability, cost-effectiveness, and the economic viability and stability of privately-operated for-hire vehicle and taxicab services within The City of Seattle." Ex. 305.

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<sup>76</sup> The fact that different areas of the City may have different levels of TNC activity may be due to many disparate factors. *See, i.e.*, VRP 1//25/16 152-53.

<sup>77</sup> Kirk Dep.66:1-2; 17:6-18;65:18-25;37:13-23.

None of the Council's findings suggest that in enacting the ordinance, the Council was motivated by concerns about redlining. Its most representative "WHEREAS" clause expresses the Council's finding that:

[I]ndustry regulations for these services must encourage innovation without compromising safety standards, so that regulation provides a safety net that the public can rely on for its protection while new businesses innovate and use technology to better the lives of Washingtonians; and

...

*Id.*

In sum, nothing in the record supports the City's concoction of an after-the-fact pretext for the new TNC ordinance, or that public disclosure of zip code data was necessary to achieve this pretext.

## V. CONCLUSION

The permanent injunction furthers the TNC ordinance's policy of promoting innovative technologies for the benefit of Seattle citizens by providing a fair competitive environment. This injunction should be affirmed.

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DATED this 16th day of June, 2017.

GARVEY SCHUBERT BARER

By *s/Judith A. Endejan*  
Judith A. Endejan,  
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*s/Danny David*  
Danny David

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I had served Response Brief of Lyft, Inc. on the following counsel of record, as indicated:

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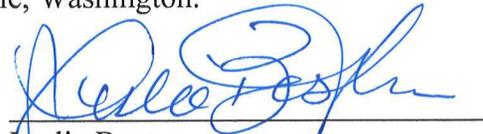
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