HARDY MYERS
ATTORNEY GENERAL

DAVID SCHUMAN
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97310-0506
Telephone: (503) 378-4400
TDD: (503) 378-5938

September 4, 1998

Dan Spatz, Editor
THE DALLES CHRONICLE
414 Federal Street
The Dalles, OR 97058

Dear Mr. Spatz:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law. ORS 192.410 to 192.505. Your petition, which we received on August 5, 1998,[1/] asks the Attorney General to direct the Oregon Department of Forestry (ODF) to make available for inspection and provide copies of "Global Atmospherics Lightning Strike Map" for Wasco County for the period July 1998 and later. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. ORS 192.420. The information you seek is a "public record" under the Public Records Law. ORS 192.410(4).[2/] Thus, ODF must make the requested records available to you, unless they are exempt from disclosure under ORS 192.501 or 192.502. Before discussing possible exemptions from disclosure, we first describe the statutory and factual background for ODF's acquisition of the information you seek.

In ORS 477.005, the Oregon Legislature declared the state's policy in relevant part, as follows:

[1/] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

[2/] A "'[p]ublic record' includes any writing containing information relating to the public's business * * * prepared, owned, used or retained by a public body regardless of physical form or characteristics." ORS 192.410(4).

> (1) The preservation of the forests and the conservation of the forest resources through the prevention and suppression of forest fires hereby are declared to be the public policy of the State of Oregon.
>
> (2) In order to accomplish the purposes of the policy stated in this section:
>
> (a) The need for a complete and coordinated forest protection system is acknowledged and the primary mission of the State Forestry Department in such a system is protecting forest resources, second only to saving lives. Structural protection, though indirect, shall not inhibit protection of forest resources[.]

Under ORS chapter 477, forestland owners have a duty to provide fire protection for their land and may do so in one of three ways: (1) by having a self-protection plan approved by the Board of Forestry; (2) by belonging to a forest protection association that has a contract with the State Forester; or (3) by having ODF provide protection directly. ORS 477.210. We are informed by Mike Beyerley, ODF Deputy State Forester, that no private landowners have approved self-protection plans and that there are only three forest protection associations in Oregon. Thus, virtually all privately-owned forestland in Oregon, most state-owned forestlands, and all of Western Oregon Bureau of Land Management (BLM) forestlands (approximately 2 million acres) are protected from fire and fire hazards by ODF.[3/] The total amount of forestland protected by ODF is approximately 12.4 million acres. In addition, ODF is required to establish and implement "a complete and coordinated forestland-urban interface fire protection system." ORS 477.023(1). In carrying out these duties, ODF places a great deal of emphasis on fire prevention and early detection. Joan M. Tenny, ODF Dispatch Coordinator, informs us that the lightning strike data you seek is the core of an "essential" and one-of-a-kind tool that ODF has relied on since 1993 to quickly and accurately identify the intensity and location of lightning strikes, and to dispatch appropriate resources accordingly.

The lightning strike data is available to ODF through a license from Global Atmospherics, Inc. (GAI).[4/] GAI creates the data through a lightning detection system known as the National Lightning Detection Network™ (NLDN), which GAI developed, owns and operates. According to GAI's advertising brochure, the NLDN

[3/] Federal range lands and federal timberlands "for which adequate protection is provided" are generally exempt from the mandatory provisions of ORS ch 477, unless ODF provides protection pursuant to a cooperative agreement approved by the Federal Government and the State Board of Forestry. Such an agreement exists as to the referenced BLM lands.

[4/] The licensing agreement is between Geo-Met Data Services, which is a subsidiary of GAI, and ODF. The current license is in effect for the period from July 1, 1998 through June 30, 1999.

> consists of over 100 remote, ground-based sensing stations that monitor cloud-to-ground lightning activity across the contiguous 48 states. Using exclusive, patented technologies and powerful electronics, lightning strikes are differentiated from the vast amount of background noise found in the atmosphere.
>
> Within seconds of a lightning strike, central analyzers at the Network Control Center process information on the location, time, polarity, and amplitude of each strike via an advanced, satellite-based communications network. Unprecedented location accuracy has been achieved by combining the very precise capabilities of waveform processing, Global Positioning System (GPS) time synchronization, high-speed signal processing, and wide-band peak gated magnetic direction finding techniques. The result is extremely accurate location information and a high level of redundancy for improved data integrity and reliability.
>
> * * * * *
>
> NLDN data is accessible to subscribers through * * * high performance graphical systems designed for effective interpretation and analysis of lightning information. Real time lightning data is received for display via satellite broadcast and dial-up telephone communications. * * * Lightning data can be displayed in contour or other formats to identify high-risk areas, and can be color-coded or animated to track developing storms.

The current licensing agreement (the License) between ODF and GAI gives ODF "a nonexclusive and nontransferable license" to "access" and "reproduce, perform, display and to use L.DATA, in any and all forms and in any manner solely for the benefit of [ODF] in its internal operations." The License defines "L.DATA" as

> proprietary and confidential information consisting of the position, time, and polarity of the latest lightning flash in regional areas covered by the NLDN, and any historical archive of such flashes, together with the proprietary software used to display this information.

As we understand your petition, this definition describes the information you seek, except that you are not seeking copies of the proprietary software. Thus, for ease of reference, we will use the terms "L.DATA" and "the Information" interchangeably.

The License further provides:

2.1(b) The License granted hereunder excludes the right:

(1) to grant license to others;

(2) to distribute L.DATA in any form to third parties

(3) to distribute lightning data to internal users on a network, file server, or virtual disk unless associated data fees are paid for a network license.

LICENSEE shall at all times hold in confidence the L.DATA and shall never disclose, or permit disclosure of, L.DATA to anyone, except to employees of LICENSEE to whom disclosure is necessary for the purposes licensed hereunder, and only after such employees have agreed to be bound by the terms of this Agreement. LICENSEE further agrees to exercise all reasonable precautions to prevent access to the L.DATA by unauthorized persons. LICENSEE shall never decompile or otherwise generate source code for or attempt to reverse engineer the software provided as part of the L.DATA.

ODF refused to allow you access to L.DATA in any form, citing the terms of the License. For the following reasons, we conclude that the Information at issue is exempt from disclosure as either (or both) information submitted in confidence or a trade secret. ORS 192.502(4), 192.501(2). We also conclude that the Information is a "trade secret" under the Uniform Trade Secrets Act and exempt from disclosure under ORS 192.502(9) because its disclosure is prohibited as a "misappropriation" of a trade secret by ORS 646.461.

1. **Information Submitted in Confidence**

The Public Records Law exempts from disclosure:

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

ORS 192.502(4). There are five elements under this exemption, all of which must be satisfied for the exemption to apply: (1) the information must be submitted in confidence; (2) the information must not be required by law to be submitted; (3) the information must be of a nature that reasonably should be kept confidential; (4) the public body must have obliged itself in good faith not to disclose the information; and (5) disclosure must cause harm to the public interest.

We find that the Information satisfies each element. First, GAI has submitted the Information to ODF on the express condition that ODF will hold and use it in confidence, limiting access within ODF only to those "to whom disclosure is necessary for the purposes of the license." License, ¶ 2.1(b). Second, GAI is not required by law to submit the Information to ODF or any other entity.[5/] Third, the Information is of a nature that reasonably should be kept confidential. The information is not only regarded by GAI as "proprietary and confidential," but it has significant commercial value as discussed below under the Trade Secret analysis, which would be diminished if the Information were not kept confidential. Fourth, by accepting the License, ODF has obligated itself in good faith not to disclose the Information to anyone.[6/]

Fifth, disclosure of the Information would cause harm to the public interest. In a letter to Joan Tenny, ODF Dispatch Coordinator, dated August 17, 1998, Lynne Shumaker, GAI Forestry Marketing Manager states that disclosure would be viewed by GAI as a breach of the License, prompting GAI to terminate the License.[7/] ODF advises that loss of the right to L.DATA would hamper its ability to quickly detect and suppress lightning-caused fires.[8/] If

---

[5/] The term "law" as used in the phrase "not otherwise required by law" means governmental enactments; it does not include contracts or similar agreements entered into voluntarily. See Public Records Order, March 3, 1997 (Poo-sa'-key) at 4-5 ("law" means government enactments and not a Tribal-State Compact).

[6/] ODF takes this obligation seriously, as evidenced by its denial to you. ODF also informs us that it has separately refused access to the information to the Oregon State Police and the Oregon State Fire Marshall.

[7/] Article VI, paragraph 6.1(b) of the License states that "[f]ailure by LICENSEE to comply with any of the obligations and conditions contained in this Agreement shall constitute a breach of the Agreement and shall entitle" GAI to terminate the License after giving ODF an opportunity to "cure or make good such breach."

[8/] In her letter, Ms. Shumaker offered a preliminary pricing quote for a lightning detection network covering the State of Oregon, and owned and operated by ODF. The letter states that "[e]xcluding your ongoing operations and maintenance costs, the hardware procurement alone (necessary to establish the network) is roughly equal to the expense of twelve (12) years of lightning data access from the NLDN." The quote from GAI estimates the price for the hardware required to set up a lightning detection network for Oregon at $511,676.00. ODF paid $44,100 for the current, one-year license from GAI.

Ms. Shumaker also suggests that ODF could acquire a license that would allow distribution privileges. However, the fee for such a license would reflect "the entire market value (i.e. all customers and potential customers we could serve in Oregon and 1/48 of all revenue derived from

detection and suppression of lightning-caused fires is delayed, those fires would necessarily pose a greater safety hazard to the citizens of Oregon and greater financial liability to the state in terms of fire suppression costs and increased losses of forest resources. That result is harmful to the public interest because it defeats the state policy of "conserv[ing] forest resources through the prevention and suppression of forest fires." ORS 477.005.

Thus, we conclude that the Information you seek is exempt from disclosure under ORS 192.502(4).

2. Trade Secrets

The Public Records Law exempts from disclosure, unless the public interest requires disclosure in the particular instance,

> Trade secrets. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it[.]

ORS 192.501(2).

The L.DATA is a "compilation of information" which is not patented. We understand from GAI that access to the Information is limited within that organization. The Information is clearly used in the business GAI conducts, and has real commercial value, since it is the commodity GAI creates and sells to its customers. Joan Tenny informs us that ODF has not been able to find any other vendor in the United States or Canada that can provide comparable information. In fact, before acquiring its first license to access and use L.DATA in 1993, ODF contracted with the BLM for lightning strike data. We understand from Ms. Tenny that those data were incomplete and inaccurate by comparison, and that the BLM is now negotiating with GAI for a license to access and use the L.DATA in favor of its own data. The L.DATA is more comprehensive, more complete and more accurate than that of its competitors, which clearly gives GAI a business advantage over its competitors.

We find that the L.DATA is a "trade secret" as defined in ORS 192.501(2). Hence, we now analyze whether the public interest nevertheless requires disclosure in this particular

(..continued)

customers and potential customers who access NLDN data on a full national scale)." ODF would be required to pay a fee calculated to cover GAI's cost to quantify the market for L.DATA specific to Oregon.

instance.

The Court of Appeals has said that "the Public Records Law expresses the legislature's view that members of the public are entitled to information that will facilitate their understanding of how the public business is conducted." *Guard Publishing v. Lane County School Dist.*, 96 Or App 463, 468-69, 774 P2d 499 (1989). The public interest in disclosure is "the right of the citizens to monitor what elected and appointed officials are doing on the job." *Jensen v. Schiffman*, 24 Or App 11, 17, 544 P2d 1048 (1976). And the term "public" means that "the focus is on the effect of the disclosure in general, not disclosure to a particular person at a particular time." *Morrison v. School Dist.*, 53 Or App 148, 156, 631 P2d 784 (1981).

This office advises state agencies that when responding to public records requests, the agency should

> measure confidentiality interests against the public interest in learning not only how the public bodies generally are conducting their business but also how they are administering particular programs. In analyzing the public interest in disclosure, public bodies should examine the statutory uses of the records at issue. If none of those uses is involved in the request, it is unlikely that there is any overriding public interest in disclosure. And, if disclosure would prejudice or prevent the carrying out of the public body's functions, that would *always* be relevant.

ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 21 (1997) (emphasis in original), citing *Jordan v. MVD*, 308 Or 433, 443, 781 P2d 1203 (1989).

You state in your petition that you would like to publish the information as illustration for fire stories, or as a service to the community, informing fire departments and landowners of recent lighting strikes that may warrant investigation. These objectives have no bearing on ODF's use of the information and so disclosure in this particular circumstance would not further the public's interest in monitoring what ODF "is doing on the job." *Jensen v. Schiffman*, 24 Or App at 17. Furthermore, as explained above, disclosure would hamper ODF's ability to quickly detect and suppress lightning-caused fires, thereby harming the public interest.

Therefore, we do not find that the public interest requires disclosure in this particular instance. Accordingly, we conclude that the Information is exempt from disclosure under ORS 192.501(2).

3. Misappropriation of a Trade Secret

The Public Records Law exempts from disclosure "[a]ny public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." ORS 192.502(9). The Uniform Trade Secrets Act prohibits (UTSA) "misappropriation" of "trade secrets." "Misappropriation" is defined to include

> Disclosure or use of a trade secret of another without express or implied consent by a person, who at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was:
>
> * * * * *
>
> (B) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.

ORS 646.461(2)(d). Consequently, if the Information is a "trade secret" under the UTSA, ODF must withhold the Information from disclosure.[9/]

The UTSA defines a "trade secret" somewhat differently than the Public Records Law. Under the UTSA, "trade secret" means:

> information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

ORS 646.461(4). This definition is less specific, and may be broader than the definition in the Public Records Law. In previous Public Records Orders, we have considered six factors

---

[9/] We observe that "misappropriation" also includes "[d]isclosure or use * * * by a person who knew or had reason to know that knowledge of the trade secret was * * * [d]erived from or through a person who owed a duty to * * * maintain its secrecy or limit its use." ORS 646.461(2)(d)(B). Even if we ordered ODF to disclose the Information, any person who received it from ODF and then disclosed or used it could be enjoined and be liable to GAI for damages and attorney fees. ORS 646.463, 646.465, 646.467.

derived from Comment b to the Restatement (Second) Torts, § 757 to determine whether information is a "trade secret" under the UTSA,[10/] and we do so again here. The six factors are: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to safeguard the secrecy of the information; (4) the value of the information to the business or its competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

These factors overlap somewhat with the definition of a "trade secret" contained in the Public Records Law, and we rely on our previous explanations for why we consider the second, third and fourth factors to be satisfied in this case. We turn our attention to the other three factors.

The first factor concerns the extent to which the Information is known outside the business. The Information, some portion or a comparable set of it, is known to those in the global market to whom GAI grants access. However, the fact that GAI sells the Information in a global market does not destroy the "secret" nature of the information as a "trade secret." According to the U.S. Supreme Court:

> The subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business. * * * This necessary element of secrecy is not lost, however, if the holder of the trade secret reveals the trade secret to another "in confidence, and under an implied obligation not to use or disclose it." * * * These others may include those of the holder's "employes to whom it is necessary to confide it, in order to apply it to the uses for which it is intended." * * * Often the recipient of confidential knowledge of the subject of a trade secret is a licensee of its holder.

Kewanee Oil Co. v. Bicron Corp., 416 US 470, 475, 40 L Ed 2d 315, 322, 94 S Ct. 1879 (1974) (citations omitted).[11/] We understand that GAI does not disclose the Information except

---

[10/] *See, e.g.*, Public Records Order, August 4, 1997 (Susan Riley and Leslie Lupenko), citing *Citizens' Utility Board v. Public Utility Commission*, 128 Or App 650, 658-59, __ P2d __ (1994).

[11/] *See also Chicago Bd. of Trade v. Christie G. & S. Co.*, 198 US 236, 49 L Ed 1031, 1039, 25 S Ct 637 (1905) ("[T]he plaintiff's collection of [price] quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has a right to keep the work which it has done, or paid for doing, to itself. * * * The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust, and using

to its Licensees who are each under express obligations to keep the Information confidential. The Information satisfies the first factor as described in Comment b, Restatement (Second) Torts, § 757.

As to the fifth and sixth factors from the Restatement, the NLDN is based on over 20 years of research and development, and it is an expensive system. Based on the information available to us, GAI has expended a great deal of effort and expense to develop the Information. Finally, we understand that the Information, or subsets of it depicting lighting strike data on a daily basis, or even for a specific point in time, is readily available to anyone who is willing to pay GAI for it.[12/]

We conclude that the Information meets the six factors that define a "trade secret" under the Restatement, and therefore, it is a "trade secret under the UTSA. Disclosure by ODF would be a "misappropriation" under the UTSA. Therefore, the Information is exempt from disclosure pursuant to ORS 192.502(9).

For the above reasons, we conclude that the Information is exempt from disclosure under the Public Records Law. ORS 192.502(4), 192.501(2) and 192.502(9). Accordingly, we respectfully deny your petition.

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

CJD:AV/JGG129DD

(..continued)
knowledge obtained by such a breach.")

[12/] The GAI advertising brochure is accompanied by order forms, including a "Lightning Verification Order Form," which invites the purchaser to request lightning data by location and for any period identified by the purchaser by the date and time of the start of the period and the date and time of its end.

August 5, 1998

State of Oregon
Attorney General's Office
Attention: Terry Cogswell, Public Affairs Assistant

Re: Oregon State Forestry Department lightning strike maps

Dear Mr.Cogswell:

Oregon Department of Forestry contracts with a private firm in Arizona to generate maps of lightning strikes. The company, Global Atmospherics of Tucson, owns and maintains a national detector network that can pinpoint the location and intensity of individual strikes, and provides this information for a fee to private and public clients.

I'd like to publish these maps occasionally, since they'd make a useful illustration with a fire story. I can see considerable value in informing a rural fire district, for instance, that there was a concentration of strikes within its jurisdiction in last night's storm, or telling a rancher that he had a ground strike on the 'back forty.'

Unfortunately, from my perspective as a newspaper editor, the maps are proprietary. The state's contract specifically prohibits transferring the maps in any form to a third party, except for another government agency. This was confirmed to me by a company spokesman. Apparently this company supplies many other public agencies, including even the National Weather Service, with the same restrictions.

After a recent lighting storm in this region (a storm which started a 15,000-acre fire that destroyed several homes in neighboring Klickitat County, Wash.), I requested a copy of a lightning strike map from the local state forestry office, but was denied access. I was later told by the office of John Boro, fire protection program, that the maps were unavailable to the public. Access was also denied by Rod Nichols, public affairs specialist with Oregon Forestry. Both parties cited the state agency's contract language with Global Atmospherics.

The maps in question are not generic, like a copyrighted Rand-McNally atlas; they're an historic record of a specific event, generated for a specific area. This type of data ought to be a fundamental part of the public record. I understand why the software is proprietary, but I'm not asking for a copy of that -- just the map produced with the software, which shouldn't be any different from a public-domain text document produced with a licensed word-processing program, or a public-domain logo produced with a licensed design program. Granted, the maps are produced by the company rather than by the client, but the information is still very local, useful only to the client and those served by the client -- in this case, Oregon taxpayers living within a given fire protection area served by Oregon Department of Forestry.

I can see a troubling trend here: If an agency is prohibited from supplying map data it purchases, what other information will it be prohibited from disclosing next? Engineering reports? Consultants' findings? Research data? This information, too, is generated by private contractors to public entities, yet it becomes public record as soon as it's accepted by the client.

I hereby request formal review by the attorney general's office of Oregon Forestry Department's denial of public access to its lightning strike maps.

Thank you for your assistance.

Sincerely,

Dan Spatz, Editor
The Dalles Chronicle
414 Federal Street
The Dalles, Oregon 97058

(541) 506-4601

Petition for Attorney General's or District Attorney's Review

A petition to the Attorney General or district attorney requesting him or her to order a public record to be made available for inspection or to be produced shall be in substantially the following form, or in a form containing the same information:

08-06-98 (date)

I (we), Daniel Spatz (name(s)), the undersigned, request the Attorney General (or District Attorney of _____ County) to order Oregon Forestry Department (name of governmental body) and its employees to (make available for inspection) (produce a copy or copies of) the following records:

1. Global Atmospherics Lightning Strike Map —
(Name or description of record)

2. Wasco County – July 1998 & any later
(Name or description of record)

I (we) asked to inspect and/or copy these records on 7-28-98 (date) at The Dalles and Salem (address). The request was denied by the following person(s):

1. Rod Nichols, public affairs specialist, Salem
(Name of public officer or employee; title or position, if known)

2. Office of John Boro, Fire Protection Program, Salem
(Name of public officer or employee; title or position, if known)

[signature]
(Signature(s))

Note: This form should be delivered or mailed to the Attorney General's office in Salem (1162 Court St. NE, Salem, Oregon 97310), or to the district attorney's office in the county courthouse.