IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF WASHINGTON

WASHINGTON COUNTY,

Plaintiff,

v.

TIM SIPPEL,

Defendant.

22CV07782
Case No._____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Not subject to Mandatory Arbitration)

Action under ORS 192.411(2)

ORS 20.140 – Deferred fees
ORS 21.135 – Standard Filing Fee

Plaintiff alleges:

1.

This is a civil action brought pursuant to ORS 192.411(2) wherein Plaintiff (hereinafter "Washington County" or "County") is requesting declaratory relief against Defendant, Tim Sippel, after a ruling by the Washington County District Attorney requiring Washington County Elections to turn over the May 2021 public test SQL database. This SQL database was created by the County's Election vendor, Clear Ballot.

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2.

The SQL database created by Clear Ballot and utilized by Washington County Elections under a software licensing agreement is the intellectual property of Clear Ballot.

3.

Clear Ballot and Washington County believe the architecture design within the SQL database is proprietary to Clear Ballot and created a competitive advantage for Clear Ballot.

4.

The release of the SQL database as a public record also creates security risks in the administration of the elections in Oregon.

5.

Disclosure of the internal components of the voting system, such as the SQL database architecture, can allow for malicious actors to identify additional ways to attack the elections system and compromise Washington County's elections infrastructure specifically, and Oregon elections infrastructure more broadly. Further, such a disclosure creates risks to elections infrastructure to any jurisdiction nationally using this system.

6.

Disclosure of the internal components of the Clear Ballot SQL database, would create additional risk regardless of whether a test database or a live database is used because the architecture of the system remains the same.

7.

Washington County is a home rule political subdivision of the State of Oregon, existing under the laws of Oregon.

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8.

Tim Sippel, an individual, on information and belief is a resident of the state of Oregon.

9.

On October 29, 2021 Mr. Sippel initiated a public records request of an electronic copy of the ballot database from a public test of the voting system in an email to the Washington County Elections Manager. Shortly after receiving Mr. Sippel's request, Washington County Elections staff made inquiries to Clear Ballot as well as the Washington County IT department to determine whether Washington County Elections was the custodian of records and if there were any exemptions to Mr. Sippel's records request that would apply.

10.

. On November 12, 2021, Washington County Elections staff informed Mr. Sippel that his request for the ballot SQL database was being denied as a trade secret, proprietary information, and an exempt computer program. The County later clarified these were protected from disclosure under ORS 192.345(2) and ORS 192.345(15). The County further offered to make the 180,000 ballot images from the May 2021 test available to Mr. Sippel.

11.

Mr. Sippel appealed Washington County Election's public records request denial to the Washington County District Attorney's office via email on November 16, 2021.

12.

In a November 16, 2021 email, Mr. Sippel wrote under the Washington County contract with Clear Ballot that the information within the database should be work product not subject to an exemption, as there was no express agreement to mark this information as confidential in

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Washington County's Contract with Clear Ballot. Mr. Sippel opined that it was unlikely that the database tables contained propriety information or trade secrets. Furthermore, he noted that he was not requesting the computer program, only information and data from the program.

13.

Working with David Pitcher in the Washington County District Attorney's Office, Washington County Election's and Mr. Sippel (the "Parties") agreed to a schedule that allowed both sides to provide input prior to the District Attorney's Office deciding on Mr. Sippel's appeal. Washington County was initially given until December 10, 2021 to prepare a response to Mr. Sippel's appeal. Mr. Sipple was to respond by December 17, 2021 and the District Attorney's Office would issue an opinion on or before December 23, 2021.

14.

Washington County Elections staff did provide its initial written response to the District Attorney's Office on December 10, 2021, outlining its belief that the requested information was protected under Washington County's contract with Clear Ballot, and that Washington County and Clear Ballot had an ongoing subjective belief that the information was proprietary.

15.

After the December 23, 2021 date had elapsed, Mr. Pitcher continued to have some additional questions for the Parties, which extended the time needed for the District Attorney's Office to issue an opinion.

16.

On or about February 15, 2022, the Washington County District Attorney's Office through David Pitcher issued an opinion finding in favor of Mr. Sippel and ordering the

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Washington County Elections Office to release the information or records. A copy of the District Attorney's opinion and order is attached here as exhibit A.

17.

On February 22, 2022, the County sent written notice to the Washington County District Attorney's Office and Mr. Sippel informing them of Washington County's intention to institute proceedings as provided under ORS 192.411 and ORS 192.431.

18.

A certified copy for receipt of the notice to institute a proceeding was signed at Mr. Sippel's registered address on February 26, 2022.

CLAIM OF RELIEF

19.

The County seeks a declaratory judgment that the documents and information ordered to be produced by the Washington County District Attorney's Office are exempt from disclosure under ORS 192.345(2) (trade secrets), ORS 192.345(15) (computer programs developed or purchased by or for a public body), and ORS 192.345(23) (records or information that would reveal or otherwise identify security measures or potential weakness in security measures).

NOW THEREFORE, Washington County prays for a judgment as follows:

1. Finding and declaring that the documents order produced by the Washington County District Attorney's Office are exempt and protected from disclosure to Defendant under the Oregon Public Records Law.
2. Finding that Washington County is the prevailing party, such that it is entitled to prevailing party fees, including costs and disbursements incurred herein; and

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3. Awarding Washington County any other such relief as the court deems fit.

DATED: February March 4, 2022.

s/ Jason Bush
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Assistant County Counsel II
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Of Attorneys for Plaintiff

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February 15, 2022

Tim Sippel
timnsippel@gmail.com

Mickie Kawai
Washington County Elections Manager
Mickie_kawai@co.washington.or.us

VIA EMAIL ONLY

Re: Petition of Tim Sippel

Dear Mr. Sippel and Ms. Kawai:

Mr. Sippel made a public records request to the Washington County Assessment & Taxation - Elections Division ("Washington County Elections" or the "County") for the following information:

> An electronic copy of the ballot database from a public test of the voting system. [The request] include[s] not only ballot image files, but also the MySQL database and all data files that it references. [T]his request is for the database from a public test of the voting system, rather than of actual election results.

Mr. Sippel further clarified his request by stating the test database for "the May 18 2021 public test is preferred, but any recent public test is acceptable."

The County denied Mr. Sippel's request for a copy of the test ballot database citing three statutory exemptions. The County cites ORS 192.345(15), which protects from disclosure "computer programs developed or purchased for any public body for its own use." The County also relies on ORS 192.345(2), which provides protection for trade secrets. Finally, the County cites ORS 192.345(23), which excludes from disclosure records that would "identify security measures, or weaknesses or potential weaknesses in security measures" taken to protect information systems.

On October 18, 2021, we (the District Attorney's Office) decided a similar, but slightly different, issue involving these same parties. In that dispute, Mr. Sippel had requested the

County provide the "Clear Ballot server database." Mr. Sippel acknowledged that the server database sought contained "machine code." In that case, we upheld the County's decision to withhold the documents because it seemed clear that the "server database" sought contained proprietary software owned by Clear Ballot and licensed to the County. And the County would be breaching its licensing agreement if it released the software to Mr. Sippel.

The current dispute is less clear cut. Mr. Sippel indicates the records he is seeking are not proprietary Clear Ballot software or object code, but instead data stored in a MySQL database related to a test election run by the County.

The County responds that "both Washington County and Clear Ballot believe that the SQL folder contains protected proprietary information." In support of the County's position, Clear Ballot sent an email indicating that "the release of this data would constitute a violation of the signed contract between Washington County and Clear Ballot."

The "signed contract" referenced by Clear Ballot is a Personal Services Contract entered into by the County and Clear Ballot in October 2015 (the "PSC"). Resolution of this public-records dispute requires us to first resolve an issue as to the interpretation of the PSC. Mr. Sippel suggests that the County has the absolute right to control and disseminate the electronic version of the test database because of the "work product" clause of the PSC. That clause reads:

> All work products of the Contractor [Clear Ballot] which result from the contract ("the work products") except material previously and mutually identified as confidential and proprietary, shall be provided to County upon request and shall be considered the exclusive property of the County. In addition, if any of the work products contain intellectual property of the Contractor that is or could be protected by federal copyright, patent, or trademark laws, or state trade secret laws, Contractor [Clear Ballot] hereby grants County a perpetual, royalty-free, fully paid-up, nonexclusive and irrevocable license to copy, reproduce, perform, dispose of, use and re-use, in whole or in part, and to authorize other to do so. Such work products include, but are not limited to: databases, templates, file formats, scripts, links, procedures, materials, training manuals and other training materials, specially created key commands, and any other information, designs, plans, or works provided or delivered to the County or produced by Contractor under this contract.

When read in isolation, we agree that this "work product" clause gives the County the right to essentially do whatever it wants with anything provided to the County by Clear Ballot under the PSC including "databases, templates, file formats, scripts, . . . training manuals . . . information, design, plans, or works."

The County argues, however, that the SQL database, falls within an exception to the Work Product Clause. Specifically, the County notes that work product specifically excludes "material previously and mutually identified as confidential and proprietary." The County asserts that the SQL database was identified as confidential through another portion of the contract. Specifically, the County directs our attention to Software License and Services Agreement (the "License Agreement") addendum to the PSC. Section 3.2 of the License Agreement specifically restricts the County from transferring the "Licensed Software" to third parties without the express authorization of Clear Ballot. The County reconciles the Work Product Clause and License Agreement as follows:

> Both, Clear Ballot and Washington County, viewed the software itself as propriety from the outset of the PSC, as notated in [the License Agreement], which was incorporated into the PSC under Section 4.2 upon ratification of the PSC. If we take a step back, it only makes logical sense that a software license agreement by its very nature is not a wholesale transfer of all the rights and privileges to disclosure or grant propriety information, including unique database architectural design, to others.
>
> The ideal way to read a contract is such that the parts fit together. Here, the County does not see anything in the language that prevents paragraph 22 [the Work Product Clause] from working in conjunction with Attachment B sub-section 3.2 - Restrictions of Use (of the Licensing Agreement). Paragraph 22 contemplates certain conditions when proprietary information will not be disclosure and sub-section 3.2 explicitly excludes the Clear Ballot software as proprietary. Based solely upon the language itself, paragraph 3.2 of Attachment B and paragraph 22 of the PSC can, and do, work together.

We agree with the County that the rules of contract interpretation require contract provisions to be interpreted harmoniously. And, if possible, potentially inconsistent provisions should be reconciled by reading the contract as a whole. In this instance, the broad "work product" clause of the contract specifically excludes from the definition of work product "material previously and mutually identified as confidential and proprietary." We agree with the County that the License Agreement was the parties' mechanism for "mutually identifying" what Clear Ballot intellectual property is to remain confidential and proprietary. And, in the License Agreement, the parties specifically agreed that the "Licensed Software" is protected intellectual property of Clear Ballot. (Licensing Agreement § 3.4), which would thus not be subject to the "work product" clause of the PSC.

This leaves is with a final disputed factual question. Does the SQL test ballot database requested by Mr. Sippel contain "Licensed Software" as defined in the Licensing Agreement? If so, release by the County would breach the contract, and ORS 192.345(15) would arguably exempt the database from disclosure. If the SQL database does not contain "Licensed Software", then the County could release the records without breaching its contract, and its additional cited exemptions concerning "trade secrets" (ORS 192.345(2)) and "security measures" (ORS 192.345(23)) would not be compelling, particularly since this involves a test election database.

To answer this question, we sought further clarification from Mr. Sippel and from both parties to the PSC (Clear Ballot and the County). The County takes the position that the SQL database is "Licensed Software," which it cannot distribute without violating the PSC:

> Clear Ballot has expressed to the County on several occasions that the SQL.zip is a component of its Licensed Software. In the Statement of Work attached to the Agreement as Attachment A, the "Software Purchase" is identified as: "the Software described in the Personal Services Contract, Attachment B, Exhibit I ". Exhibit 1 to Attachment B of Professional Services Contract clearly identifies the Licensed Software as: "ClearVote Software (including the functionality of ClearDesign and ClearCount)". The SQL.zip file is a component of ClearCount, so it is clearly identified as Licensed Software under the Agreement. The County does not own the Licensed Software, it has purchased a license to use the Software subject to the terms and conditions of the Agreement, including the restrictions set forth in Attachment B.
>
> The Licensed Software, including without limitation, the SQL.zip file component of the ClearCount Licensed Software, is Clear Ballot's intellectual property. The schema or design of the SQL.zip file is not generated during the election; it is pre-existing Clear Ballot intellectual property. The schema or design of the records/fields/tables contained in the SQL.zip file is structured by Clear Ballot in unique ways to increase the Licensed Software's performance and are trade secrets of Clear Ballot. This valuable intellectual property gives Clear Ballot an important advantage over its competitors and is a market differentiator that Clear Ballot has invested years of engineering effort in creating. Release of the Licensed Software, including without limitation, the database schema as presented in the SQL.zip file, would provide invaluable insight into Clear Ballot intellectual property that would be extremely detrimental to Clear Ballot's business.
>
> [T]he County, like Clear Ballot, believes that the SQL database for the test election constitutes "Licensed Software" under the attachment B incorporated within the PSC. It was independently verified by County IT staff that the SQL database contains what the County considers to be unique intellectual property design under the definition of "Licensed Software. Inherent in the SQL database is a database architectural structure that Clear Ballot is trying to protect through the attachment B.

Like the County, Clear Ballot also argues that the SQL database constitutes contractually protected intellectual property:

> Clear Ballot's ClearVote system is a combination of application source code and database design; both of which are protected from disclosure because they contain confidential and proprietary information, including trade secrets, that give Clear Ballot a business advantage over its competitors. The content of SQL.zip consist of the SQL commands and data to restore a ClearCount election database schema as well as the ability to populate it with data specific to that election. Public disclosure of the database schema, as presented in SQL.zip, as a collection of SQL commands, would significantly undermine valuable intellectual property rights ("IP"), including how Clear Ballot has designed and structured the database. It is this database design and structure that, in large part, provides the performance advantages of our ClearVote system relative to our competitors' offerings and is the direct result of years of engineering effort and millions of dollars

Mr. Sippel indicates that he believes the SQL database would contain vote tally data with some type of format structure along with ballot images, not proprietary object code:

> I think our disagreement boils down to whether my requested Ballot Image Database falls under "Work Product" of paragraph 22 or under "Licensed Software" of the SLA. Or if both, which takes precedence.
>
> I think it helps to make a conceptual distinction between the software that Clear Ballot installs to support running any election, and a separate directory structure set up to contain election data from a specific election. My understanding is that for each election, a new directory structure is set up, on disk space that is separate from the Clear Ballot software. The Work Product is referring to that data, and explicitly recognizes that the data will contain "databases, templates, file formats, scripts, links, procedures, ..." etc. The Work Product paragraph explicitly grants the County the rights to this data even if it contains Clear Ballot intellectual property. An exception is for any "material previously and mutually identified as confidential or proprietary". The only thing I am aware of that has been "previously and mutually identified" would be the SLA of Attachment B. Paragraph 3.4 of the SLA explicitly excludes "any work product contracted for the Customer pursuant to a mutually agreed Statement of Work". So the Work Product and SLA appear to affirm each other.
>
> It is unreasonable to believe, as Mr. [Bush] claims, that the County has rights to the data without also having rights to the format or structure of that data. Data without any structure is noise, not data. There is good reason for the Work Product definition to specify that the County has rights to "databases, templates, file formats, scripts, links, procedures, ..." etc. Mr. [Bush's] arguments also continue to imply that my request includes Clear Ballot Object Code. I still expect that Clear Ballot has not intermingled any of their Object Code in the specific election data directories. If Object Code has been intermingled, then it should be redacted from the electronic copy to be delivered for my public records request.

To resolve this dispute, we look to the language of the contract. The Licensing Agreement defines "Licensed Software" as "Object Code":

> "Licensed Software" means the Object Code version of Clear Ballot's ClearVote Software . . . and the Object Code version of any other computer programs to be licensed by Clear Ballot to Customer under a Software Order . . ."Object Code" means computer programs assembled or compiled, which are readable and usable by machines, but not generally readable by humans without reverse-assembly, reverse compiling, or reverse engineering.

The County argues that the SQL database is considered part of the "ClearVote Software." But neither Clear Ballot nor the County has specifically claimed that the SQL database contains "Object Code." Instead, the County states that the SQL database contains "unique intellectual property design" with "a database architectural structure that Clear Ballot is trying to protect" through the Licensing Agreement. Clear Ballot says "public disclosure of the database schema, as presented in SQL.zip, as a collection of SQL commands, would significantly undermine valuable intellectual property rights including how Clear Ballot has designed and structured the database."

Perhaps "Clear Ballot" contends that "SQL commands" constitute "Object Code." But this would be a generous reading of their statement. In a public records dispute, the public body is not entitled to the benefit of the doubt. Instead, the public body, (the County) has the burden to prove any exemptions apply. ORS 192.411(1); ORS 192.431(1); *Guard Publ'g Co. v. Lane County Sch. Dist. No. 4J*, 310 Or 32, 38 (1990) ("[T]he burden of proof is on the public body to sustain its action by a preponderance of the evidence.")

For these reasons, we find that the SQL database for the test election does not constitute "Licensed Software" as that term is defined in the Licensing Agreement. We therefore conclude that the database is not a "computer program" protected from disclosure pursuant to ORS 192.345(15). Although purchased or developed software can be exempted from a public-records request, ORS 192.345(15) specifically excludes from protection "original data" or "analyses, compilations, and other manipulated forms of the data produced by use of the program." We believe the SQL database is best understood as a compilation of data produced by the Clear Ballot software, and thus not a computer program itself.

The County also cites ORS 192.345(2), which provides protection for trade secrets. Because we have concluded that the SQL database is not "Licensed Software" protected from disclosure under the contract, we disagree with the County and Clear Ballot's contention that the SQL database is a "trade secret." Finally, the County relies on ORS 192.345(23), which excludes from disclosure records that would "identify security measures, or weaknesses . . . in security measures" taken to protect information systems. We do not have sufficient evidence to conclude that release of a database from a test election implicates security concerns for the County.

ORDER

For these reasons, we issue the following order:

The Washington County Assessment & Taxation - Elections Division shall, within seven days of this order, either:

(1) Produce an electronic copy of the ballot database from a public test of the voting system. The production shall include not only ballot image files, but also the SQL database and all data files that it references. The database should be from a public test of the voting system. The May 18, 2021 public test is preferred, but any recent public test is acceptable; or

(2) Provide Mr. Sipple with a fee estimate for these records pursuant to ORS 192.324(4).

We would like to add one final note. In a typical public-records appeal decided by the District Attorney, we can resolve the matter by conducting a review of the specific documents at issue. Mr. Sippel's petition is unusual in that it involves a complicated factual dispute, and the District Attorney does not possess the technical expertise to independently analyze the software or the electronic ballot database at issue. Furthermore, there is no mechanism for the parties to obtain discovery, and the District Attorney cannot require the parties to provide sworn testimony on the disputed issues. This matter would best be addressed by a trial court, with the benefit of a fully developed evidentiary record, and we note that ORS 192.411 and ORS 192.431 provide either party with the ability to litigate these issues in Circuit Court.

Sincerely,

David Pitcher
Deputy District Attorney
For District Attorney Kevin Barton