

Office of the Attorney General
State of Texas
Informal Letter Ruling No. OR2016-21679
September 26, 2016

Mr. James Kopp
Assistant City Attorney
Office of the City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

Dear Mr. Kopp:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 625973 (ORR ID#s W128217, W128313, W128316, W128474, W128500, and W129434, W131489, W133655).

The City of San Antonio (the "city") received several requests from different requestors for communications between city council members, named individuals, and Uber Technologies, Inc. ("Uber") and several categories of information pertaining to transportation network companies. You state the city will release some information. You also state the city does not maintain information responsive to some of the requests.¹ Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties.² Accordingly, you state, and provide documentation showing, you notified Bid My Ride; Get Me; Lyft; and Uber of the requests for information and of their rights to submit arguments to this office as to why the submitted information should not be released. See [Gov't Code § 552.305\(d\)](#); see also Open Records Decision No. 542 (1990) (statutory predecessor to [section 552.305](#) permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Get Me, Lyft, and Rasier LLC, a wholly owned subsidiary of Uber, on behalf of Uber. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, we note you have marked a portion of the submitted information as not responsive to the instant requests for information. We have marked additional information that is not responsive. This ruling does not address the public availability of non-responsive information, and the city need not release non-responsive information to the requestors.

We note some of the submitted information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter No. 2016-19913 (2016). We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude the city may continue to rely on Open Records Letter No. 2016-19913 as a previous determination and withhold or release the information in accordance with that ruling. See Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). To the extent the submitted information is not subject to Open Records Letter No. 2016-19913, we will consider the arguments against release of the submitted information.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the

governmental body's notice under [section 552.305\(d\)](#) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. See [Gov't Code § 552.305\(d\)\(2\)\(B\)](#). As of the date of this letter, we have not received comments from Bid My Ride explaining why its information should not be released. Therefore, we have no basis to conclude Bid My Ride has a protected proprietary interests in the submitted responsive information. See *id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any of the information at issue on the basis of any proprietary interest Bid My Ride may have in it.

We understand Lyft to assert that some of its submitted information is confidential because it was given to the city in confidence or it is confidential pursuant to a contract with the city. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. See [Indus. Found. v. Tex. Indus. Accident Bd.](#), 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. See [Attorney General Opinion JM-672 \(1987\)](#); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

[Section 552.104\(a\) of the Government Code](#) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” [Gov't Code § 552.104\(a\)](#). A private third party may invoke this exception. [Boeing Co. v. Paxton](#), 466 S.W.3d 831, 842 (Tex. 2015). The “test under [section 552.104](#) is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. Lyft and Uber state they have competitors. In addition, Lyft states release of some of its information would provide competitors with insight into Lyft's current market share in the city, the efficacy of its marketing and promotional policies, and Lyft's driver acquisition strategy. Uber states release of some of its information would allow its competitors to lure driver partners from Uber, to measure and assess the size of Uber's market share, and undermine one of Uber's key competitive advantages in the marketplace. After review of the information at issue and consideration of the arguments, we find Lyft and Uber have established the release of the information at issue, which we have marked, would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the information we have marked and indicated under [section 552.104\(a\) of the Government Code](#).⁴

Get Me claims its information is excepted from disclosure under [section 552.110\(b\) of the Government Code](#). [Section 552.110\(b\)](#) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” [Gov't Code § 552.110\(b\)](#). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.*; see also ORD 661 at 5.

Get Me argues its information consists of commercial information, the release of which would cause the company substantial competitive harm under [section 552.110\(b\) of the Government Code](#). Upon review, we find Get Me has demonstrated the information at issue, which we have marked and indicated, constitutes commercial or financial information, the release of which would cause substantial competitive injury.

Accordingly, the city must withhold the information we have marked under [section 552.110\(b\) of the Government Code](#).⁵

Some of the submitted information may be subject to [section 552.117 of the Government Code](#).⁶ [Section 552.117\(a\)\(1\)](#) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former employees or officials of a governmental body who request this information be kept confidential under [section 552.024 of the Government Code](#). See [Gov't Code § 552.117\(a\)\(1\)](#). [Section 552.117](#) is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. See Open Records Decision No. 506 at 5-6 (1988) ([section 552.117](#) not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by [section 552.117\(a\)\(1\)](#) must be determined at the time of the governmental body's receipt of the request for the information. See Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under [section 552.117\(a\)\(1\)](#) only on behalf of a current or former employee or official who made a request for confidentiality under [section 552.024](#) prior to the date of the governmental body's receipt of the request for information. Information may not be withheld under [section 552.117\(a\)\(1\)](#) on behalf of a current or former employee or official who did not timely request under [section 552.024](#) the information be kept confidential. Therefore, to the extent the individuals whose information we have marked timely requested confidentiality under [section 552.024 of the Government Code](#), the city must withhold the information we marked under [section 552.117\(a\)\(1\) of the Government Code](#); however, the city may only withhold the cellular telephone numbers at issue if the service is not paid for by a governmental body. Conversely, to the extent the individuals at issue did not timely request confidentiality under [section 552.024](#), the city may not withhold the marked information under [section 552.117\(a\)\(1\)](#).

[Section 552.136 of the Government Code](#) states "[notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." [Gov't Code § 552.136](#); see also [id. § 552.136\(a\)](#) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of [section 552.136](#). Upon review, the city must withhold the insurance policy numbers in the remaining information under [section 552.136 of the Government Code](#).

[Section 552.137 of the Government Code](#) excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See [id. § 552.137\(a\)-\(c\)](#). However, [section 552.137](#) does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. See [id. § 552.137\(c\)](#). Additionally, [section 552.137](#) does not apply to the private e-mail addresses of government officials who use their private e-mail addresses to conduct official government business. [Austin Bulldog v. Leffingwell](#), 490 S.W. 3d 240 (Tex. App.-Austin no pet.) (mem. op.). Therefore, the city must withhold the personal e-mail addresses we have marked under [section 552.137 of the Government Code](#), unless the owners affirmatively consent to their public disclosure.

In summary, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude the city may continue to rely on Open Records Letter No. 2016-19913 as a previous determination and withhold or release the information in accordance with that ruling. The city may withhold the information we have marked and indicated under [section 552.104\(a\) of the Government Code](#). The

city must withhold the information we have marked under [section 552.110\(b\) of the Government Code](#). To the extent the individuals whose information we have marked timely requested confidentiality under [section 552.024 of the Government Code](#), the city must withhold the information we marked under [section 552.117\(a\)\(1\) of the Government Code](#); however, the city may only withhold the cellular telephone numbers at issue if the service is not paid for by a governmental body. The city must withhold the insurance policy numbers in the remaining responsive information under [section 552.136 of the Government Code](#). The city must withhold the personal e-mail addresses we have marked under [section 552.137 of the Government Code](#), unless the owners affirmatively consent to their public disclosure. The city must release the remaining responsive information.

You also ask this office to issue a previous determination that would permit the city to withhold the types of information that are at issue in this decision without the necessity of again requesting a decision by this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2001) (previous determinations). We decline to issue such a decision at this time. This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Paige Lay
Assistant Attorney General
Open Records Division

Footnotes

- ¹ The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).
- ² We note the city did not comply with [section 552.301 of the Government Code](#) in requesting this decision. *See Gov't Code § 552.301(e)*. Nonetheless, because third party interests are at stake, and thus constitute a compelling reason to overcome the presumption of openness, we will consider whether the submitted information must be withheld under the Act based on third party interests. *See id.* §§ 552.001, .302, .352.
- ³ We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

- 4 As our ruling on this information is dispositive, we need not address the remaining arguments against its disclosure.
- 5 As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.
- 6 The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).