



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 8, 2017

Mr. Neal Falgoust
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2017-12654

Dear Mr. Falgoust:

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# 661188 (COA PIR# 33259).

The City of Austin (the "city") received a request for records pertaining to information reported by Transportation Network Companies during a specified time period. Although the city takes no position as to whether the submitted information is excepted under the Act, the city states release of some of this information may implicate the proprietary interests of Fare-Rideshare, L.L.C.; Fasten, Inc.; Get Me, L.L.C. ("Get Me"); Instaride, L.L.C.; Lyft, Inc. ("Lyft"); RideAustin; ScoopMe; Tride; Uber Technologies, Inc. ("Uber"); Wingz, Inc. ("Wingz"); and Z-Trip. Accordingly, the city states it notified the third parties of the request for information and of their rights to submit arguments to this office as to why the information at issue 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 Wingz, as well as Rasier, L.L.C. ("Rasier"), a wholly owned subsidiary of Uber. We have considered the submitted arguments and reviewed the submitted information.

Initially, Get Me asserts the present request for information is “broad, vague, and arbitrary.” This office has held a written communication that reasonably can be judged to be a request for public information constitutes a request for information under the Act. *See* Open Records Decision Nos. 497 at 3 (1988), 44 at 2 (1974). In addition, we note the Act requires a governmental body to make a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because the city has submitted information for our review, we find the city has made a good-faith effort to submit information that is responsive to the request, and we will address the arguments against disclosure of this information.

Next, we note, and Rasier and Lyft inform us, some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2017-12241 (2017), 2017-08827 (2017), 2017-05089 (2017), 2017-03951 (2017), 2017-00906 (2017), 2016-20899 (2016), 2016-19913 (2016), 2016-18933 (2016), 2016-14022 (2016), 2016-12319 (2016), 2016-01313 (2016), 2015-23851 (2015), 2015-19359 (2015), 2015-15679 (2015), and 2015-08936 (2015). Additionally, we note portions of the information pertaining to Lyft that were at issue in Open Records Letter Nos. 2016-19913 and 2016-01313 are currently the subject of pending litigation (the “pending litigation”) between Lyft and the Office of the Attorney General. *See Lyft, Inc. v. Ken Paxton, Attorney Gen. of Tex.*, No. D-1-GN-16-004946 (353rd Dist. Ct., Travis County, Tex.); *Lyft, Inc. v. Ken Paxton, Attorney Gen. of Tex.*, No. D-1-GN-16-000487 (419th Dist. Ct., Travis County, Tex.). Accordingly, to the extent the submitted information is subject to the pending litigation, we will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public. We note Open Records Letter No. 2015-08936 was subsequently modified on appeal by an Agreed Final Judgment in *Rasier, L.L.C. v. Honorable Ken Paxton, Attorney General of Texas*, Cause No. D-1-GN-15-001956 (353rd Dist. Ct., Travis County, Tex.). With regard to the information in the current request that is identical to the information previously requested and ruled upon in Open Records Letter No. 2015-08936, the city must rely on the Agreed Final Judgment to withhold or release the information at issue. We have no indication there has been any other change in the law, facts, or circumstances on which Open Records Letter Nos. 2017-12241, 2017-08827, 2017-05089, 2017-03951, 2017-00906, 2016-20899, 2016-19913, 2016-18933, 2016-14022, 2016-12319, 2016-01313, 2015-23851, 2015-19359, and 2015-15679 were based. Therefore, to the extent the submitted information is not subject to the pending litigation, we conclude the city must rely on Open Records Letter Nos. 2017-12241, 2017-08827, 2017-05089, 2017-03951, 2017-00906, 2016-20899, 2016-19913, 2016-18933, 2016-14022, 2016-12319, 2016-01313, 2015-23851, 2015-19359, and 2015-15679 as previous determinations and withhold or release the remaining information at issue in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely

same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the pending litigation, the Agreed Final Judgment, or these rulings, we will consider the submitted arguments against disclosure.

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) of the Government Code 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 only received comments from Get Me, Lyft, Rasier, and Wingz explaining why their information should not be released. Therefore, we have no basis to conclude the remaining third parties have protected proprietary interests in the information at issue. *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 the remaining information on the basis of any proprietary interest the remaining third parties may have in the information.

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 (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, Rasier, and Wingz state they have competitors. In addition, Rasier and Wingz state release of their information would give advantage to their competitors. Lyft states release of the information it indicated would give advantage to its competitors. After review of the information at issue and consideration of the arguments, we find Lyft, Rasier, and Wingz have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the information pertaining to Rasier and Wingz and the information indicated by Lyft under section 552.104(a) of the Government Code.¹

Get Me asserts its information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets obtained from a person and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code

¹As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

§ 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.² RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See Open Records Decision No. 552 at 5 (1990)*. However, we

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980)*.

cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular contract is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of the business,” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that 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, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (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).

Get Me asserts portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Get Me has failed to establish a *prima facie* case that any portion of its information meets the definition of a trade secret. We further find Get Me has not demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORD 402. Therefore, the city may not withhold any of Get Me’s information under section 552.110(a) of the Government Code.

Get Me further argues portions of its information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Get Me has demonstrated a portion of the information at issue constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the city must withhold this information, which we have indicated, under section 552.110(b) of the Government Code. However, we find Get Me has failed to demonstrate the release of any of its remaining information would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110).

Accordingly, the city may not withhold any of Get Me's remaining information under section 552.110(b) of the Government Code.

Lyft raises section 552.137 of the Government Code for some of its remaining information. Section 552.137 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* Gov't Code § 552.137(a)-(c). 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). Upon review, we find the city must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies.

In summary, to the extent the submitted information is subject to pending litigation, we will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public. The city must rely on the Agreed Final Judgment that was issued as a result of Open Records Letter No. 2015-08936, as well as our rulings in Open Records Letter Nos. 2017-12241, 2017-08827, 2017-05089, 2017-03951, 2017-00906, 2016-20899, 2016-19913, 2016-18933, 2016-14022, 2016-12319, 2016-01313, 2015-23851, 2015-19359, and 2015-15679 and withhold or release the remaining information previously ruled on in accordance with those rulings and Agreed Final Judgment. The city may withhold the information pertaining to Rasier and Wingz and the information indicated by Lyft under section 552.104(a) of the Government Code. The city must withhold Get Me's information we have indicated under section 552.110(b) of the Government Code. The city must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies. The city must release the remaining information.

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,

A handwritten signature in black ink, appearing to read "Gerald A. Arismendez". The signature is written in a cursive style with a large initial "G".

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/tdw

Ref: ID# 661188

Enc. Submitted documents

c: Requestor
(w/o enclosures)

11 Third Parties
(w/o enclosures)