



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 18, 2016

Mr. Robert Davis
Assistant City Attorney
Law Department
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2016-18714

Dear Mr. Davis:

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# 623378.

The City of Austin (the "city") received a request for a request for the amount of fees collected each month by the Austin-Bergstrom International Airport (the "airport") from near-airport parking companies and two specified companies during a specified period of time.¹ Although you take no position regarding whether the submitted information is excepted from disclosure, you state its release may implicate the proprietary interests of Airport Fast Park, Ltd. ("AFP"); Lyft, Inc. ("Lyft"); PRG Parking Austin, LLC ("PRG"); and Uber, Inc. ("Uber"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request and their rights to submit arguments to this office. *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

¹We note the city did not comply with section 552.301 of the Government Code in requesting this decision. *See Gov't Code § 552.301(b), (e)*. Nonetheless, third party interests can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* § 552.302; Open Records Decision No. 150 at 2(1977). Because third party interests are at stake in this instance, we will consider whether the information at issue must be withheld under the Act.

received comments from PRG, Lyft, and Uber. We have considered the submitted arguments and reviewed the submitted information.

We note some of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-13909 (2016). In that ruling, we determined (1) to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude the city must continue to rely on Open Records Letter No. 2016-05716 (2016) as a previous determination and withhold or release the information in accordance with that ruling, (2) to the extent the submitted information is not subject to Open Records Letter No. 2016-05716, the city may withhold Lyft's and Uber's information we marked under section 552.104(a) of the Government Code, and (3) the city must release the remaining information. We note, however, PRG did not raise section 552.104 in its comments to our office for Open Records Letter No. 2016-13909 and now seeks to withhold some of the submitted information under section 552.104 of the Government Code. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); see also Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law).* Accordingly, pursuant to section 552.007, the city may not now withhold any of PRG's information previously ordered released in Open Records Letter No. 2016-13909 unless its release is expressly prohibited by law or the information is confidential by law. Although PRG raises section 552.104 of the Government Code, this exception does not prohibit the release of information or make information confidential. *See Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104).* Thus, the city may not now withhold any of PRG's information previously ordered released in Open Records Letter No. 2016-13909 under section 552.104 of the Government Code. 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 must continue to rely on Open Records Letter No. 2016-13909 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. 2016-13909, we will address the submitted arguments against release of the submitted information.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See Gov't Code § 552.305(d)(2)(B).* As of the date of

this letter, we have not received any comments from AFP explaining why any of the submitted information should not be released. Therefore, we have no basis to conclude AFP has protected proprietary interests in the 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. Consequently, the city may not withhold any of the submitted information on the basis of any proprietary interests AFP may have in the information.

PRG, Lyft, and Uber claim their information is excepted under section 552.104 of the Government Code. Section 552.104(a) 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. PRG, Lyft, and Uber state they have competitors. We understand PRG to argue release of its information would cause it substantial competitive harm. Lyft states disclosure of the information at issue would cause it competitive harm because it would provide competitors with insight into its current market share, allowing them to gauge the efficacy of different marketing and promotional strategies at the airport. Uber states disclosure of the information at issue would enable competitors to reverse engineer an accurate picture of its operating costs, profit margins, and the size of the city’s transportation network companies market, thus enabling the competitor to undercut its position in the marketplace. After review of the information at issue and consideration of the arguments, we find PRG, Lyft, and Uber have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold PRG’s, Lyft’s, and Uber’s information under section 552.104(a) of the Government Code.²

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 must continue to rely on Open Records Letter No. 2016-13909 as a previous determination and withhold or release the information in accordance with that ruling. To the extent the submitted information is not subject to Open Records Letter No. 2016-13909, the city may withhold PRG’s, Lyft’s, and Uber’s information under section 552.104(a) of the Government Code. 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.

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of the information at issue.

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,



Britni Ramirez
Assistant Attorney General
Open Records Division

BR/bhf

Ref: ID# 623378

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Parties
(w/o enclosures)