BEFORE THE PUBLIC UTILITIES COMMISSION OF THE

STATE OF CALIFORNIA

Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services.	R.12-12-011 (Filed December 20, 2012)

REPLY COMMENTS OF THE SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY, SAN FRANCISCO COUNTY TRANSPORTATION AUTHORITY, AND SAN FRANCISCO INTERNATIONAL AIRPORT REGARDING THE PROPOSED DECISION DENYING LYFT'S APPEAL OF THE RULING ON CONFIDENTIAL TREATMENT OF CERTAIN INFORMATION IN LYFT AND UBER'S 2020 ANNUAL REPORTS

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INTRODUCTION

Pursuant to the April 1, 2022 Proposed Decision Denying Appeal of Lyft, Inc. Re: Ruling Denying, in part, Motions by Uber Technologies, Inc. and Lyft Inc. for Confidential Treatment of Certain Information in Their 2020 Annual Reports (the "Proposed Decision" or "PD") filed by the California Public Utilities Commission ("Commission" or "CPUC"), the San Francisco Municipal Transportation Agency and the San Francisco International Airport, (collectively "the City"), and the San Francisco County Transportation Authority ("SFCTA") (together, the "City and County") submit these joint reply comments. These comments respond to the opening comments filed by Lyft, Inc. ("Lyft").[1]

DISCUSSION

A. Annual Reports are Public Records and the PD Did Not Hold Otherwise.

Lyft attempts to argue that the PD holds that the Annual Reports are not public records, but ignores language which firmly establishes that the PD considers information in the government's possession to constitute a public record.[2] Lyft's assertion is based on language in the PD responding to one of Lyft's arguments concerning Govt. Code § 6252(e).[3] Section 6252(e) defines "public record" for the purposes of the California Public Records Act ("CPRA") to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." The language of § 6252(e) clearly encompasses records retained by a state or local agency, and the City and County read the PD's discussion of § 6252(e) as expressing an opinion only as to the "prepared" prong of § 6252(e), i.e. not as excluding records owned, used, or retained by a state or local agency from the definition of public record.[4]

[1] Comments of Lyft, Inc. on Proposed Decision Denying Appeal of Lyft, Inc. Re: Ruling Denying, in part, Motions by Uber Technologies, Inc. and Lyft, Inc. for Confidential Treatment of Certain Information in their 2020 Annual Reports filed April 21, 2022 ("Lyft's Comments").

[2] *See* Lyft's Comments, at 2; PD, at 11-16. In fact, the very same section of the PD in which Lyft claims the PD holds Annual Reports to not be public records is entitled "California Policy Favors the Disclosure of Information in the Government's Possession." That same section goes on to state "Cal. Const. Article I, §3(b)(1) provides that the public has the right to access most Commission records." *See* PD, at 11-12.

[3] *See* PD, at 16.

[4] *See City of San Jose v. Superior Ct.*, 2 Cal. 5th 608, 620 (2017) (explaining that significance should be given to "every word, phrase, sentence, and part" of the CPRA).

An alternate construction of the PD's discussion of § 6252(e) (i.e., Lyft's) would work an absurd result. Not only does Lyft's reading not make sense within the context of the PD, it doesn't make sense within the context of established Commission-wide policy and practice.[5] In 2014, the Commission instituted rulemaking to improve public access to public records pursuant to the CPRA.[6] In the order instituting that rulemaking, the Commission clearly stated "'Public records' are broadly defined to include all records "relating to the conduct of the people's business . . . Since records received by a state regulatory agency from regulated entities relate to the agency's conduct of the people's regulatory business, the CPRA definition of public records includes records received by, as well as generated by, the agency."[7] In fact, the entire point of GO 66-D is to provide procedures for regulated entities to make claims for confidential treatment of information submitted to the Commission because such records are otherwise public records subject to full disclosure under the CPRA.[8] Lyft's interpretation of the PD's discussion of § 6252(e) would be directly contrary to this Commission precedent, and it strains the bounds of credulity to think that the PD would make such an incredible departure from this precedent without mentioning it at all.[9] We urge the Commission to modify the PD in order to provide clarity to the Commission's discussion of § 6252(e) and to ensure the PD is in accordance with established public records law.[10]

B. Lyft's Trade Secret Claims Have Been Exhaustively Considered and Properly Rejected.

Lyft continues to misstate the law in order to maintain trade secret claims that the Commission has thoroughly considered.[11] The City and County agree with the Commission that the anonymized

[5] Decision ("D.") 20-08-031 and GO-66 D.

[6] *See* Order Instituting Rulemaking to Improve Public Access to Public Records Pursuant to The California Public Records Act filed November 6, 2014 (CPUC Rulemaking R.14-11-001).

[7] *Id*. at 2-3 (emphasis added).

[8] *See generally*, GO 66-D.

[9] *See* PD, at 101-05. Nowhere in the PD's findings of fact, conclusions of law, or ordering paragraphs is it stated that the Commission only considers writings "prepared" by Commission employees to be public records.

[10] *See e.g., Sander v. State Bar of California*, 58 Cal. 4th 300, 323 (2013) (definition of public record is "…intended to cover every conceivable kind of record that is involved in the governmental process [and the] CPRA establishes a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency.")

[11] *See* Lyft's Comments, at 2-7. Lyft cites to *Kewanee Oil Co. v. Bicron Corp.*, (1974) 416 U.S. 470, 476, for the proposition that "[n]ovelty… is not required for a trade secret." In full, *Kewanee* stated "[n]ovelty, in the patent law sense, is not required for a trade secret," and went on in the next sentence to explain "[H]owever, some novelty will be required if merely because that which does not possess novelty is usually known; secrecy, in the context of trade secrets, thus implies at least minimal novelty." *See also* PD, at 32.

and aggregated Trip Data at issue does not constitute a bona fide trade secret.[12] Moreover, the Commission properly found that concealing the Trip Data would work an injustice due to the strong public interest in obtaining the Trip Data.[13] Lyft cites to a study undertaken by the SFCTA in 2018 to estimate the effects of TNCs on congestion in San Francisco to claim that local governments already have access to the Trip Data at issue and therefore there is no injustice in concealing the Trip Data.[14] This argument rings hollow. As the City and County have mentioned in the record of this proceeding on many occasions, this study, *TNCs and Congestion,* used partial one-time only data available for a single county, San Francisco, to conduct a snapshot analysis. The study that Lyft cites was developed at extraordinary expense with specialized knowledge and skills and expressly decried the limitations of the available data.[15] All jurisdictions should have access to the data collected by the CPUC on an ongoing basis in order to facilitate understanding of changes in TNC use over time. Additionally, Lyft's assertion that the Trip Data at issue is already accessible to local governments directly flies in the face of Lyft's trade secret arguments and should be taken as evidence of the disingenuous nature of those assertions.[16]

C. The PD does not Contradict D.21-06-023.

In D.21-06-023, the Commission upheld the requirement that TNCs submit a motion for confidential treatment 90-days before the submission of their annual reports.[17] The Decision held that "[a] successful demonstration that a particular data category is confidential does not depend upon the

[12] *See* Ruling on Uber Technologies, Inc.'s and Lyft's Motion for Confidential Treatment of Certain Information in Their Annual 2020 Annual Report*s* ("2020 Confidentiality Ruling"), at 17 ("…it does not appear that Moving Parties can satisfy their burden of demonstrating that a trade secret exemption applies to any of the categories of information that they wish to redact."); Assigned Administrative Law Judge's Ruling Granting, in part, the Motions of Uber Technologies, Inc., Lyft, Inc., Hopskipdrive, Inc., and Nomad Transit, LLC for Confidential Treatment of Portions of Their 2021 Annual Transportation Network Company Reports, ("Moving Parties have failed to carry their burden of establishing each of the three elements of a trade secret claim.")

[13] *See* PD, at 72.

[14] *See* Lyft's Comments, at 7-9.

[15] *See* TNCs & Congestion, SFCTA (October 2018), at 14, accessible at: https://www.sfcta.org/projects/tncs-and-congestion ("Note that, due to the data collection methodology, estimates of TNC volumes and pickups and drop off reflect only intra-SF TNC trips, and are thus an underestimate of total TNC activity.")

[16] *See* Lyft's Comments, at 8 ("…local agencies have access to alternative data but would prefer to have the Commission seize Lyft's data and turn it over to them at no cost."); Cal. Civ. Code § 3426.1(d)(1) (a trade secret is information that derives economic value from not being generally known to other persons who can obtain economic value from its disclosure).

[17] *See* D.21-06-023, at 16.

existence (or nonexistence) of a particular piece of responsive data." Lyft now claims that this decision should allow them to advance a slippery slope argument shielding *all* census block data from disclosure on the basis that some census blocks may contain few to no individuals.[18] This argument should be rejected. First, census blocks that "contain few to no individuals" are census blocks that may have few *residents with a home address within the block.* They may nonetheless have thousands, tens of thousands or even millions of people taking trips in and out of and around the census block every day depending on the nature of the land uses. It is disingenuous to suggest that risk of reidentification of individuals from trips starting or ending in these census blocks is heightened in such a census block as more often than not, the opposite conclusion is far more likely – that risks of reidentification are much lower. To the extent Lyft desires to seek confidential treatment of data for specific census blocks with few to no individual residents, the proper procedure would be for Lyft to make that particular motion demonstrating why information about trips starting or ending in the census block generate a high risk of reidentification of individuals.

D. Lyft Continues to Cite Inapplicable Case Law to Support Unfounded and Alarmist Privacy Arguments.

Lyft continues to fail to establish how disclosure of aggregated, anonymous Trip Data which contains no personally identifiable information amounts to a cognizable privacy concern. It's notable that when Lyft first moved for protection of the Trip Data on privacy grounds, the Commission did grant confidential treatment to those pieces of data which raised legitimate privacy concerns.[19] The hyperbolic nature of Lyft's continued privacy arguments stands in stark relief to those legitimate concerns and Lyft's present claims are diminished rather than supported by their citation to inapposite case law.

Lyft cites to *Carpenter v. United States*, but *Carpenter* involved Government use of a particular identified person's cell site location data over a four-month period with the specific intent of tracking the individual's location.[20] The passenger trip data at issue here is wholly different; it is not

[18] *See* Lyft's Comments, at 12.

[19] *See* 2020 Confidentiality Ruling. The Ruling granted Lyft's request for confidential treatment of certain pieces of data, including latitude and longitude of the driver and rider and driver personal information.

[20] *Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018); *see* Lyft's Comments at 13-14. It should also be noted that the Court in *Carpenter* expressly provided that their decision was a "narrow one" and that they were not expressing a view on matters not before them. *See Carpenter*, 138 S. Ct. at 2220.

linked to any particular person, it does not link one trip with another trip, and it does not document any one person's travel over time. The driver trip data at issue here is also wholly different. It is also not linked to any particular known person as driver names and identifiers are redacted, does not link trips by a driver over time, and the data only documents location when drivers are providing service to the public. Further, as has been firmly established in the record, there is a strong public interest in data related to these movements as they document service delivery and allow municipalities to measure the impact of TNCs.[21] Lyft's citation to *Sander v. Superior Court* is also distinguishable. There, Plaintiff's sought disclosure of records from the State Bar on all applicants to the Bar from 1972 to 2008, including applicants' race or ethnicity, law school, transfer status, year of law school graduation, law school, GPA, LSAT, and bar exam scores.[22] The case was considered by the California Supreme Court, which ruled that the public had the right to access the information, but that the information should be subject to deidentification because the State Bar had obtained the information from applicants under the promise of confidentiality.[23] These promises are not present here. Nor is the anonymous Trip Data at issue comparable to seeking detailed demographic and scholastic information for a discrete group of individuals.

CONCLUSION

The City and County maintain that the Trip Data should be publicly disclosed. Lyft presents no persuasive new legal precedents or facts to justify concealment of the Trip Data on privacy, trade secret, or any other basis. We urge the Commission to adopt the Proposed Decision so that the Trip Data can be made available and utilized by the public as soon as possible.

[21] *See* Opening Comments of the City and County on the Proposed Decision Denying Lyft's Appeal of the 2020 Confidentiality Ruling (April 21, 2020), at 2-3 (citing the necessity of trip data for measuring "the impact of TNC services on the environment, infrastructure, traffic patterns, and the overall quiet enjoyment of [of] cities and counties.")

[22] *Sander v. Superior Ct.*, 26 Cal. App. 5th 651, 655 (2018).

[23] *Sander*, *supra* note 10 at 325 (2013). The Court's basis for allowing deidentification of the applicant data was based on Evidence Code § 1040's official information privilege, not the privacy exemption of Govt. Code § 6254(c). Further, when *Sander* was heard in 2018, the Legislature had passed Bus. & Prof. Code § 6060.25 which made identifying information of applicants to the State Bar confidential. *See supra* note 22 at 657. Therefore, *Sander* is limited to its own facts.

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Respectfully submitted,

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