BEFORE THE PUBLIC UTILITIES COMMISSION OF THE

STATE OF CALIFORNIA

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

RESPONSE OF THE SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY, SAN FRANCISCO COUNTY TRANSPORTATION AUTHORITY, AND SAN FRANCISCO CITY ATTORNEY'S OFFICE TO MOTIONS OF UBER TECHNOLOGIES, INC., LYFT, INC., AND HOPSKIPDRIVE, INC. FOR LEAVE TO FILE CONFIDENTIAL INFORMATION UNDER SEAL

JEFFREY P. TUMLIN
Director of Transportation
San Francisco Municipal Transportation Agency
One South Van Ness Avenue, 7th Floor
San Francisco, CA 94013
jeffrey.tumlin@sfmta.com
(415) 701-4720

TILLY CHANG
Executive Director
San Francisco County Transportation Authority
1455 Market Street, 22nd Floor
San Francisco, CA 94103
tilly.chang@sfcta.org
(415) 522-4800

DENNIS HERRERA
City Attorney
JOHN I. KENNEDY
NICHOLAS NIIRO
Deputy City Attorneys
Office of the City Attorney
1390 Market Street, 7th Floor
San Francisco, CA 94102-4682
john.kennedy@sfcityatty.org
nicholas.niiro@sfcityatty.org
(415) 554-3978

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Pursuant to the Commission Rule of Practice and Procedure 11.4(b), the San Francisco Municipal Transportation Agency and the San Francisco City Attorney's Office, collectively "the City," and the San Francisco County Transportation Authority (together, the "City and County") submit this joint response ("Response") to (1) the Motion of Lyft, Inc. ("Lyft") for Confidential Treatment of Certain Data in Its 2021 Annual Report ("Lyft Motion"), (2) the Motion of Uber Technologies, Inc. ("Uber") for Leave to File Confidential Information Under Seal ("Uber Motion"), and (3) the Motion of HopSkipDrive, Inc. ("HopSkipDrive") for Confidential Treatment of Certain Types of Data and Information Requested in the Annual Report 2021, all filed on June 21, 2021.[1]

INTRODUCTION

Decision 20-03-014 ("D. 20-03-014") acknowledged that Commission approval of Decision 13-09-045 footnote 42 obscured from the general public and from other public entities essential information about the use, delivery, and impacts of Transportation Network Company ("TNC") services. The footnote's blanket effects ran afoul of the California Public Records Act ("CPRA"), and it prevented public entities from carrying out their obligations under federal, state, and local law to evaluate and assess impacts of TNCs, make informed public policy decisions, and enforce state and local laws applicable to TNCs. In 2021, the TNCs continue unabated in their efforts to hide data and other information related to their business operations from public disclosure, even after additional Commission decisions requiring disclosure of aggregated, anonymized data: (1) the Assigned Administrative Law Judge's Ruling on Uber's and Lyft's Motion for Confidential Treatment of Certain Information in Their 2020 Annual Reports issued on December 21, 2020 ("ALJ Ruling"); and (2) Decision 21-06-023 ("D. 21-06-023") Modifying Decision 20-03-014 and Denying Rehearing of Decision, As Modified on June 4, 2021 ("Order Modifying Decision 20-03-014"). As of today, there has been no public disclosure of any information contained in the TNC annual reports submitted to the Commission. The current TNC motions largely present the same arguments the Commission has previously rejected, and they present no persuasive new evidence to support a different outcome. We

[1] We collectively reference Lyft, Uber and HopSkipDrive as "the TNCs."

urge the Commission to put an end to TNCs' efforts to obscure TNC service data from public disclosure.

I. LEGAL ARGUMENT

A. The TNCs Have Not Met Their Burden of Demonstrating That Information Contained in Their Annual Reports Should Be Protected from Public Disclosure.

D. 20-03-014 states that TNC Annual Reports should *not* be presumed to be confidential and requires that TNCs specify the basis for confidential treatment under an applicable provision of the CPRA.[2] The Commission requires that a TNC "must specify the basis for the Commission to provide confidential treatment with specific citation to an applicable provision of the California Public Records Act. A citation or general marking of confidentiality, such as General Order-66 and/or Pub. Util. Code § 583 without additional justification is insufficient to meet the burden of proof."[3] A TNC which cites the public interest balancing test, California Government Code § 6255(a), as the basis for withholding a document from public release "must demonstrate with granular specificity on the facts of the particular information why the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. A private economic interest is an inadequate interest to claim in lieu of a public interest."[4]

The TNCs have failed to satisfy their burden of demonstrating that information contained in their Annual Reports for which they request confidential treatment should be protected from public disclosure under one or more exemptions to the CPRA, and make the same arguments made in their 2020 motions seeking confidential treatment of TNC data, which were addressed by the City and County in its response.[5]

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[2] D. 20-03-014, pp. 2-3, 37.

[3] D. 20-03-014, pp. 28-29.

[4] D. 20-03-014, p. 29.

[5] *See* Motion of Lyft, Inc. for Confidential Treatment of Certain Information in Its 2020 Annual Report; Motion of Uber Technologies, Inc. for Leave to File Confidential Information Under Seal; and Response of the San Francisco Municipal Transportation Agency, San Francisco County Transportation Authority, San Francisco City Attorney's Office, and San Francisco International Airport to Motions of Uber Technologies, Inc. and Lyft, Inc. for Leave to File Confidential Information Under Seal ("City and County's Response").

1. Privacy

Lyft restates its position that private companies compelled to submit information to regulatory agencies do not lose the right to protect their data from public disclosure, and that regulated entities retain both a possessory and ownership interest in data generated in the course of their business operations.[6] However, the City and County have already dispensed with that argument.[7] First, Lyft offers no new statutory or case law to support that this interest applies to aggregated and de-identified TNC trip data. Rather, the cases cited by Lyft discuss protections when private or commercially sensitive information are produced on an *individualized* basis. Although Lyft concedes that the Commission can require the submission of data for its own regulatory purposes, it objects that the Commission cannot publicly disclose that data. This argument directly contradicts the CPRA, which requires that public agency records be open to public inspection unless they are exempt. "Public records" are broadly defined to include all records "concerning the conduct of the people's business" including the regulation of regulated industries.[8]

Uber again argues that TNC trip data for both drivers and passengers is exempt from public disclosure based on privacy.[9] Again, the City and County refuted this assertion because Uber failed to provide any specificity regarding how data fields that do not identify individuals would impair individual privacy and did not cite any legal authority to support its claims.[10] Uber's legal arguments are simply recycled again and again. The same holds true with respect to Uber's claim that the California Consumer Privacy Act ("CCPA") precludes public disclosure of this data.[11] The TNC trip data the Commission has previously determined should be publicly disclosed does not fall within the protection of the CCPA because it contains no "personal information" about individual passengers or drivers.[12] Moreover, spatially aggregated geolocation data does not fall with the protections of the

[6] *See* Lyft Motion; p. 9.

[7] *See* City and County's Response, pp. 10-13.

[8] *See* Lyft Motion, p. 10; Cal. Gov. Code § 6250; D. 20-03-014, pp. 11-12.

[9] *See* Uber Motion, p. 5.

[10] *See* City and County's Response, p. 11.

[11] *See* Uber Motion, p. 6.

[12] D. 20-03-014, pp. 11, 28-29; ALJ Ruling, pp. 4-8.

CCPA.[13] Uber again restates its argument that the risk of re-identification of aggregated TNC trip data warrants confidential treatment because publicly releasing it violates federal privacy laws.[14] Poppycock. The ALJ's field-by-field direction as to data that are not subject to disclosure protects both driver and passenger privacy interests.[15] Uber simply recycles its previously discredited and debunked arguments.

2. Trade Secret

Lyft argues that the CPRA does not require disclosure of trade secrets involving private consumer data.[16] However, public records are defined broadly enough to include all records concerning the conduct of the people's business, including governmental regulation of TNCs.[17] Next, Lyft re-asserts its prior argument that de-identified trip data aggregated by census-block constitutes a trade secret and cannot be disclosed in the absence of fraud or injustice.[18] This argument has also been debunked and discredited.[19] First, Lyft has not demonstrated that aggregated, de-identified TNC trip data constitutes a trade secret. And second, Lyft has failed to show that it has derived additional independent economic value from such data.[20] The case law Lyft's cites is simply irrelevant.

Uber's trade secret arguments fare no better. As the City and County noted in its prior response, Uber cites cases that set forth only general standards for what constitutes a "trade secret" and provides no support for its contention that data required to be reported and disclosed by the Commission is protected by the trade secret doctrine.[21] Further, Uber fails to demonstrate that it derives independent economic value from aggregated, de-identified TNC trip data not being generally known to the public or other persons who can obtain such economic value.[22]

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[13] *See* City and County's Response, pp. 6-7; ALJ Ruling, pp. 4-8.

[14] *See* Uber Motion, p. 7.

[15] *See* ALJ Ruling, pp. 5-6.

[16] *See* Lyft Motion, pp. 14-16.

[17] *See* City and County's Response, pp. 12-13.

[18] *See* Lyft Motion, pp. 17-21.

[19] *See* ALJ Ruling, pp. 20-22.

[20] *See* City and County's Response, pp. 13-14.

[21] *See* City and County's Response, p. 13.

[22] *See* City and County's Response, p. 9; ALJ Ruling, pp. 17-19.

3. Public Interest Balancing Test

Finally, Uber re-asserts its prior argument that, under the public interest balancing test set forth in California Government Code section 6255(a), keeping complaint and driver discipline information confidential clearly outweighs the public interest in making some of this information public, because disclosure of complaints may chill future reporting from those who wish to keep their complaints confidential or is likely to confuse the public.[23] This is simply not true. As addressed previously, this argument is disingenuous at best and has been rejected by the Commission.[24] Further, Uber completely fails to demonstrate with "granular specificity" how the public interest under this balancing test weighs in its favor.[25]

B. The TNCs New Arguments Do Not Have Merit.

Although the vast majority of the TNCs' arguments have already been addressed, the present motions present a few new legal arguments and data privacy sources that warrant further discussion.[26]

1. Lyft's Argument of Unlawful Misappropriation Erroneously Assumes that TNC Trip Data Constitutes a Trade Secret.

Lyft argues that "agency use or disclosure of trade secrets may constitute unlawful misappropriation in violation of the California Uniform Trade Secrets Act ("CUTSA")," citing case law.[27] Lyft's argument, however, assumes that TNC trip data constitutes a trade secret. As Lyft states in its motion, under CUTSA, a trade secret is "information, including a formula, pattern, compilation,

[23] *See* Uber Motion, pp. 28-30.

[24] *See* City and County's Response, pp. 5-6; ALJ Ruling, p. 23.

[25] *Id*.; ALJ Ruling, p. 23.

[26] We reject Lyft's misleading use of the term "Census Block Trip Data" to characterize all additional data for which Lyft now seeks Confidential Treatment beyond that the ALJ approved for confidential treatment in December, 2020. Many data fields listed on pp. 7-8 of Lyft's Motion are not driven by census geography, including trip date and time and miles traveled by trip and trip period. We also urge the Commission to decline to adopt the imprecise term "other geolocation data' for these fields, whose public disclosure is essential to understanding the impacts of TNC service on California transportation networks and travelers.

[27] *See* Lyft Motion, p. 12 (citing *Syngenta Crop Protection, Inc. v. Helliker*, 138 Cal.App.4th 1135 (2006); *Ruckelhaus v. Monsanto Co.*, 467 U.S. 986 (1984)).

program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[28] While Lyft cites the sworn declaration of Alix Rosenthal in this motion to support its contention that the company derives "independent economic value" from aggregated trip data, Lyft "can point to no persuasive case law to support that aggregated trip data, including fare paid, is a trade secret."[29] Thus, Lyft's argument that required public disclosures constitute unlawful misappropriation of trade secrets fails, for the simple reason that the data at issue does not satisfy the standards for being a trade secret.

2. The TNCs' New Legal and Factual Sources Do Not Support Modification of the Commission's Previous Decisions.

Lyft contends that public disclosure of de-identified trip location data geospatially aggregated at the census-block level may be used to identify specific individuals and track their movements, "potentially revealing intimate personal details."[30] Lyft cites two new information privacy sources to support its argument that the potential for re-identification of individuals from de-identified trip location data that is spatially aggregated at the census-block level warrants nondisclosure of all trip data, despite the strong public interest in its disclosure. As discussed below, these sources do not support changing Commission policy.

Lyft states that the Census Bureau has initiated a disclosure avoidance modernization project to ensure that its data cannot be re-identified to expose private details regarding individuals. But Census data is fundamentally different from the Trip Location Data in the Requests Accepted Report because Census data contains detailed personal information across a number of dimensions, including age,

[28] Cal. Civ. Code § 3426.1(d).

[29] *See* City and County's Response, p. 14; ALJ Ruling pp. 20-22.

[30] *See* Lyft Motion, pp. 27-31.

gender, income, race, and other individual attributes, and it is the presence of these multiple data dimensions that may make it possible to impute original individual-level Census survey responses. In contrast, the aggregated de-identified Census block-level TNC trip data reported to the Commission contains exactly zero private details regarding individuals, and thus the analogy to Census data is entirely misleading.

Both Lyft and Uber also cite a non-peer reviewed paper entitled "*The Tradeoff between the Utility and Risk of Location Data and Implications for Public Good*," with Lyft asserting that "census block level presents a serious risk of de-identification." But Lyft again seeks to mislead the Commission, as the authors assert this risk in the context of "Spatially coarsened location data," or "Level 2" within the authors' taxonomy. In fact, the data the Commission has directed to be publicly available is "Coarsened Aggregated Location Data," or "Level 4" data within the authors' taxonomy, who use the example of Census block groups[31] to state, "Data aggregated at this level presents significantly less risk…Individuals are not directly linked to locations, and locations are recorded at a low spatial resolution…It's quite difficult to abuse this data to identify an individual using this method."[32]

The correct standard for assessing an unwarranted invasion of privacy is determined by statute or case law, and Lyft fails to cite any pertinent statute or case law that supports its argument. For example, Lyft cites *Pineda v. Williams-Sonoma Stores, Inc.,* 51 Cal.4th 524, 531 (2011), to support its

[31] Census blocks are the most detailed Census geographies, and are aggregated to Census Block Group geographies, which are in turn aggregated to Census Tract geographies. In the City and County's Response, San Francisco recommended the use of Census Tracts as the geography for TNC trip aggregation and general public data disclosure. We note that Uber supports use of Census tracts for TNC trip reporting stating in its Motion for Confidential Treatment, "In order to ensure the privacy of individuals and minimize the risk of re-identification, data regarding rider and driver locations released publicly should be no more granular than the census tract levels." *See*, Uber Motion p. 10.

[32] "*The Tradeoff between the Utility and Risk of Location Data and Implications for Public Good*" by Dan Calacci, et al. pp. 14-15 https://arxiv.org/abs/1905.09350.

claims.[33] This case involved the Song-Beverly Credit Card Act, which prohibits merchants from requesting and recording "personal identification information" concerning the cardholder, in which a customer filed a class action lawsuit against a retailer for requesting and recording her zip code when purchasing merchandise using her credit card in defendant's store which was later used to locate her home address.[34] Spatially aggregated trip location data from which personally identifying information has been severed has almost nothing in common with credit card information – which by its very nature and purpose is essentially and explicitly linked to individuals. The statute at issue in this case has no relevance to public disclosure of aggregated, de-identified TNC trip data. The other case cited by Lyft, *Tyler v. Michaels Stores, Inc.*, was decided in Massachusetts and has no application here.[35] In that case, the plaintiff brought a class action lawsuit against a retail store alleging that the store unlawfully wrote customers' personal identification on credit card transaction forms and used them to contact customers with unsolicited and unwanted marketing materials. The Massachusetts Supreme Court held that zip code information constituted personal identification information within the meaning of the credit card transaction privacy statute. Again, this case addressed prohibited collection of home zip code information for individual customers and has no application to the issue of public disclosure of de-identified TNC trip data that is spatially aggregated by zip code.

Uber, like Lyft, provides no case law to support its claims that remote re-identification risks constitute an unwarranted invasion of privacy that justifies non-disclosure of information where strong public interests support disclosure. In support of its assertion that census-block data may be de-anonymized to identify specific individuals and track their movements,[36] Uber points to a Census

[33] *See* Lyft Motion p. 31.

[34] 51 Cal.4th 524, 538-39 (2011).

[35] 984 N.E.2d 737 (2013).

[36] *See* Uber Motion, p. 10.

Bureau newsletter from June 9, 2021, stating that releasing "block-level perfect accuracy data" would "compromise the privacy of individuals."[37] But the Census Bureau is concerned with re-identification of individuals from data that specifically seeks to define the characteristics of populations in an area by collecting personal information across multiple dimensions. Even individual rider data – which is not at issue in the Commission's reporting and disclosure requirements – has little in common with census data. The de-identification and spatial aggregation of TNC trip locations mitigates privacy concerns and avoids unwarranted invasion of privacy. Because the Census Bureau's statement concerns a completely different type of block-level data, the Census Bureau's statement is not relevant to disclosure of de-identified TNC trip data.

Uber also claims that 16 C.F.R. § 312.2 imposes a high bar for the release of geolocation information,[38] but this regulation – part of a chapter titled "Children's Online Privacy Protection Rule" – protects only to children under the age of 13.[39] Moreover, this regulation only applies when "personal information" is involved.[40] But de-identified and aggregated TNC trip data contains no such information. The Children's Online Privacy Protection Rule defines "personal information" to include "geolocation information sufficient to identify the street name and name of a city or town" where a child lives. De-identified and spatially aggregated trip location data does not do so. Further, we are not aware that passenger age is identified in any data submitted to the Commission; thus, trips taken by passengers under 13 are indistinguishable from those taken by an adult. Even if such trips could be distinguished from adult trips, this regulation would only provide a basis for non-disclosure of passenger trip location data for children under 13 years old. In conclusion, Uber cites no applicable

[37] *Id*. at 11.

[38] *Id*.

[39] 16 C.F.R. § 312.1.

[40] 16 C.F.R. § 312.2.

legal authority, regulation, or case law to support that aggregated, de-identified TNC trip data is private information that must be protected from public disclosure.

3. Information About Pending and Unresolved Complaints Is Not Confidential.

The Commission previously rejected Uber's assertion that most information regarding complaints should be treated as confidential.[41] With the exception of settlement amounts paid by a third party involved in an collision, or the driver or TNC's insurance covering the collision, the Commission previously determined that "there is no credible justification for treating [other information] as confidential."[42] Further, the Commission has already determined that if the details of a complaint are part of a confidential settlement agreement, or if a court seals the record of a proceeding, that information may be treated as confidential.[43] The Commission should reject Uber's attempt to make the same failed argument yet again.

4. HopSkipDrive's Motion

HopSkipDrive asserts that the California Welfare and Institutions Code and Government Code prohibit disclosure of certain information it is required to report to the Commission.[44] For example, HopSkipDrive seeks confidential treatment from public disclosure of TNC trip data involving foster youths, citing California Welfare and Institutions Code section 16001.9.[45] Section 16001.9 pertains to the rights of foster care children, such as living in a safe home, being free from abuse, and having access to healthy food and adequate clothing.[46] HopSkipDrive's argument that this statute constitutes

[41] ALJ Ruling, pp. 10-11, 22-23.

[42] *Id*.

[43] ALJ Ruling, p. 11.

[44] HSD Motion, pp. 6-8.

[45] *Id.* at 7-8.

[46] *See* Cal. Welf. & Inst. Code § 16001.9.

a legal basis for non-disclosure misses the mark. Nothing in the statute addresses the disclosure of de-identified and spatially aggregated information that may perhaps reflect – without identifying – the travel of a youth who may be in foster care, and nothing in Commission data submission requirements would distinguish such riders from any other riders. HopSkipDrive has not established how disclosure of de-identified aggregated information about trips generally implicates any relevant provision of the statute.

Next, HopSkipDrive contends that the balancing test in Government Code section 6225(a) favors non-disclosure.[47] However, the Commission previously determined that for a TNC to be granted protection under that test, a TNC "must demonstrate with granular specificity on the facts of the particular information why the *public interest* served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."[48] HopSkipDrive fails to satisfy its burden. HopSkipDrive argues that public policy reasons for disclosure of TNC trip data that apply to larger TNCs should not apply to them because of its size and clientele; however, they fail to clearly establish why non-disclosure serves the public interest when the de-identification and spatial aggregation of their passenger trip data is just as effective at protecting user privacy for their clients as it is for the passengers of other TNCs.[49]

CONCLUSION

In conclusion, the City and County believe that the Commission should reject the TNC claims for confidential treatment of data submitted to the Commission beyond that which the ALJ approved such treatment in December, 2020, because neither Lyft, Uber, nor HopSkipDrive have met their burden of demonstrating why such information should be withheld from public disclosure.

[47] HSD Motion, p. 8.

[48] D. 20-03-014, p. 29.

[49] HSD Motion, p. 9.

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Respectfully submitted,

DENNIS J. HERRERA
City Attorney
JOHN I. KENNEDY
john.kennedy@sfcityatty.org
NICHOLAS NIIRO
nicholas.niiro@sfcityatty.org
Deputy City Attorneys

By: /s/
JOHN I. KENNEDY

On behalf of:
THE SAN FRANCISCO MUNICIPAL TRANSPORTATION AUTHORITY, SAN FRANCISCO COUNTY TRANSPORTATION AUTHORITY, AND SAN FRANCISCO CITY ATTORNEY'S OFFICE