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ATTORNEY GENERAL OF TEXAS

February 26, 2018

Mr. C. Robert Heath
Counsel for Capital Metro Transit Authority
Bickerstaff, Health, Delgado, Acosta LLP
3711 South Mopac Expressway, Building One, Suite 300
Austin, Texas, 78746

OR2018-04436

Dear Mr. Heath:

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# 697306.

The Capital Metro Transit Authority ("Capital Metro"), which you represent, received a request for information pertaining to candidates for president and chief executive officer. You state you released some information. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also state, and provide documentation showing, you notified Krauthamer & Associates ("Krauthamer") of the request for information and of its right 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 considered the exception you claim and reviewed the submitted representative sample of information.¹

¹We assume that 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.

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 ruling, we have not received comments from Krauthamer. Thus, we have no basis to conclude Krauthamer has a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); 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, Capital Metro may not withhold any of the submitted information on the basis of any proprietary interest Krauthamer 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). 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." *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). You state Capital Metro has specific marketplace interests in the information at issue because Capital Metro is competing to hire a new chief executive officer "in a marketplace defined by a finite group of potential candidates who are likely to be considered by other transit providers[.]" You also state release of the information at issue could result in Capital Metro having to choose between "a diminished pool of candidates" or could "subject [Capital Metro] to a bidding war" with other competing authorities. However, this office has consistently interpreted section 552.104 to apply in competitive bidding and procurement situations. *See, e.g.*, Open Records Decision Nos. 604 at 1 (1992), 593 at 1 (1991) (statutory predecessor to section 552.104 "designed to protect interests in commercial transactions"), 592 at 5 (1991), 568 at 2 (1990), 541 at 3 (1990), 514 at 1 (1988) (statutory predecessor to section 552.104 protects purchasing interests), 463 at 1-2 (1987) (statutory predecessor to section 552.104 "has been construed to protect the sealed bid process"), 231 (1979) (statutory predecessor not applicable to feasibility study where no actual bidding process was under way). In light of this office's prior interpretations of section 552.104, we are not persuaded that a competition among applicants for a position of public employment is a competitive situation contemplated by section 552.104. *Cf.* ORD 463 at 2 (stating, by analogy, that "competition" between two job applicants seeking one job offered by the state is not a process the statutory predecessor to section 552.104 was intended to protect). Therefore, we find you failed to demonstrate the applicability of section 552.104 in this instance. Thus, Capital Metro may not withhold the submitted under section 552.104.

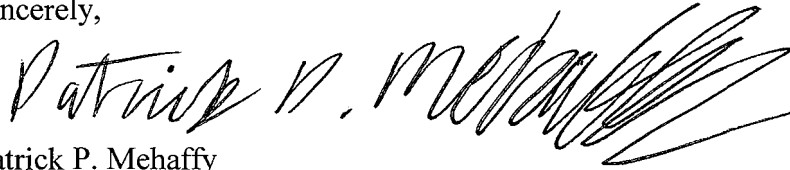
Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c).

The e-mail addresses at issue are not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, Capital Metro must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. Capital Metro 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,



Patrick P. Mehaffy
Attorney
Open Records Division

PPM/tdw

Ref: ID# 697306

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)