



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 15, 2011

Ms. Victoria Huynh
Deputy City Attorney
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358

OR2011-18508

Dear Ms. Huynh:

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# 439150.

The City of Plano (the "city") received three requests for the evaluation and scoring sheets and submitted proposals pertaining to RFP# 2011-36-C, EMS Billing and Collection Services. You state the city has released some of the information. You claim some the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also state the proprietary interests of certain third parties might be implicated. Accordingly, you notified Credit Systems International, Inc. (CSI), Digitech Computer, Inc. ("Digitech"), Emergicon, L.L.C. ("Emergicon"), EMS Management & Consultants ("EMSMC"), Intermedix Corp. ("Intermedix"), and MED 3000, Inc. ("MED 3000"), of the requests and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from Digitech, Emergicon, EMSMC, and MED 3000. We have reviewed the submitted information and considered the submitted arguments.

Initially, we note you have submitted e-mails that are not responsive to the request, which we have marked. This ruling does not address the public availability of information that is not responsive, and the city is not required to release non-responsive information.

Next, 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 arguments from CSI or Intermedix. Thus, neither of these third parties has demonstrated it has a protected proprietary interest in any of 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, the city may not withhold the responsive information on the basis of any proprietary interest CSI or Intermedix may have in the information.

Although Digitech, Emergicon, EMSMC, and MED 3000 each seek to withhold portions of the responsive information, none of them has raised any specific exceptions to disclosure or otherwise explained why its information should not be released. *See* Gov't Code § 552.305(b) (interested third party may submit reasons why information pertaining to that party should be withheld). Accordingly, we have no basis for finding Digitech, Emergicon, EMSMC, or MED 3000 has a protected proprietary interest in the responsive information, and the city may not withhold any of it on that basis.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. You raise section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. §§ 1320d–1320d-9. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act in Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information

to the extent such use or disclosure is required by law and the use or disclosure complies with, and is limited to, the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We, therefore, held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make information subject to disclosure under the Act confidential, the city may not withhold any portion of the responsive information on this basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681–82. This office has concluded certain personal financial information not relating to the financial transaction between an individual and a governmental body is protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). This office has also concluded certain medical information and information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked is highly intimate and embarrassing and of no legitimate concern to the public. The city must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

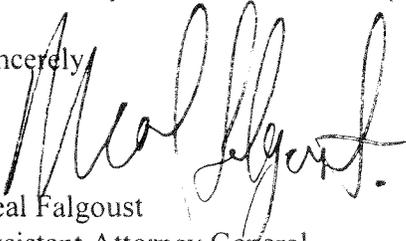
We note some of the responsive information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released in accordance with copyright law.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/agn

Ref: ID# 439150

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Michael Mannion
Digitech Computer, Inc.
555 Pleasantville Road
Suite 110N
Briarcliffe Manor, New York 10510
(w/o enclosures)

Mr. Dave Culham
EMS Sales Support
MED 3000, Inc.
3131 Newmark Drive, Suite 100
Dayton, Ohio 45342
(w/o enclosures)

Mr. Christopher Turner
Emergicon, L.L.C.
P.O. Box 180446
Dallas, Texas 75218
(w/o enclosures)

Credit Systems International, Inc.
c/o Ms. Victoria Huynh
Deputy City Attorney
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358
(w/o enclosures)