



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 3, 2016

Mr. Taylor Cooper
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OR2016-05085

Dear Mr. Cooper:

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# 600500 (CA File No. 15HSP0493).

The Harris County Hospital District d/b/a Harris Health System (the "system") received a request for certain e-mail communications between system staff and KLAS Enterprises, Inc. ("KLAS"), as well as certain e-mail correspondence between system staff and Athena Health, Inc. ("Athena"), Cerner Corporation ("Cerner"), and Epic Systems Corporation ("Epic").¹ You state the system has released some of the requested information to the requestor. You argue portions of the submitted information are not subject to the Act. You also claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. Further, you state release of the submitted information may implicate the proprietary interests of Athena, Cerner, Epic, and KLAS. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights to submit arguments to this office as to why the submitted information should

¹We note the system received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

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 received comments from Epic. We have considered the submitted arguments and reviewed the submitted information.

The system and Epic assert portions of the submitted information are not subject to the Act. Section 552.002(a) of the Government Code defines "public information" as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. The system and Epic argue some of the requested information consists of information used solely for the purpose of maintenance, manipulation, or protection of public property and has no other significance. Upon review, we conclude the username and password information, in addition to the source code information we have indicated, is not "public information" for purposes of the Act, and the system is not required to release it in response to this request.² However, the remaining information has significance other than its use as a tool for the maintenance, manipulation, or protection of public property. Accordingly, we conclude the remaining information is "public information" as defined by section 552.002, and it is subject to disclosure under the Act. We will address the arguments against disclosure of that information.

²As we are able to make this determination, we need not address the arguments under the Act against disclosure of this information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from Epic explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining third parties have protected proprietary interests in the submitted 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the system may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You raise section 552.101 of the Government Code in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") for the submitted information. 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* HIPAA, 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, excepted 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 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 (2004); *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 confidential information that is subject to disclosure

under the Act, the system may not withhold any portion of the information at issue on that basis.

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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, a private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831, 839 (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. Epic states it has competitors. In addition, Epic states release of the information at issue will give advantage to its competitors. After review of the information at issue and consideration of the arguments, we find Epic has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold the information Epic has indicated under section 552.104(a) of the Government Code.³

Section 552.101 of the Government Code also encompasses section 181.006 of the Health and Safety Code, which provides the following:

[F]or a covered entity that is a governmental unit, an individual’s protected health information:

- (1) includes any information that reflects that an individual received health care from the covered entity; and
- (2) is not public information and is not subject to disclosure under [the Act].

Health & Safety Code § 181.006. Section 181.001(b)(2)(A) defines “covered entity” to include any person who:

(A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school,

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

Id. § 181.001(b)(2)(A). The system generally asserts section 181.006 for the information at issue. However, we note the system does not assert it is a covered entity for purposes of section 181.006 of the Health and Safety Code. Further, the system has not explained the remaining responsive information consists of protected health information. Therefore, we find the system has failed to demonstrate the applicability of section 181.006 of the Health and Safety Code to the remaining information, and the system may not withhold any portion of the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 241.152 of the Health and Safety Code, which states, in relevant part:

(a) Except as authorized by Section 241.153, a hospital or an agent or employee of a hospital may not disclose health care information about a patient to any person other than the patient or the patient's legally authorized representative without the written authorization of the patient or the patient's legally authorized representative.

Id. § 241.152(a). Section 241.151(2) of the Health and Safety Code defines "health care information" as "information . . . recorded in any form or medium that identifies a patient and relates to the history, diagnosis, treatment, or prognosis of a patient." *Id.* § 241.151(2). The system generally asserts the remaining information consists of medical records maintained by the district related to the history, diagnosis, treatment, or prognosis of identified patients. Upon review, we find the system has not demonstrated the information at issue relates to the history, diagnosis, treatment, or prognosis of an identified patient; accordingly, the system may not withhold any portion of the information at issue under section 552.101 of the Government Code in conjunction with section 241.152 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses information protected by other statutes. As part of the Texas Homeland Security Act (the "HSA"), sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. Section 418.182 of the Government Code provides, in relevant part:

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

Gov't Code § 418.182(a). The fact that information may generally be related to emergency preparedness does not make the information *per se* confidential under the provisions of the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). As with any confidentiality statute, a governmental body asserting these sections must adequately explain how the responsive information falls within the scope of the provisions. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You assert the information at issue relates to “one of the electronic security systems used [by the system] to protect health and other information from criminal activity.” You state the release of this information would “expose the weaknesses and other glitches within [the system’s] information management system . . . [and] has the potential of exposing [the system’s] information system to illegal computer attacks or ‘criminal activity.’” However, upon review, we find the system has failed to demonstrate any of the remaining information at issue relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity. Accordingly, the system may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 418.182 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code.⁴ *See* Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body’s receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request confidentiality under section 552.024. The remaining information includes cellular telephone numbers of system employees. Therefore, to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the system must withhold the cellular telephone numbers of system employees within the remaining information at issue under

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470.

section 552.117(a)(1) of the Government Code; however, the system may not withhold the cellular telephone numbers if a governmental body pays for the cellular telephone service. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the system may not withhold the cellular telephone numbers at issue under section 552.117(a)(1).

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). *See Gov’t Code § 552.137(a)-(c)*. Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). To the extent the e-mail addresses at issue are not of a type specifically excluded by section 552.137(c), the system must withhold the e-mail addresses in the remaining responsive information under section 552.137, unless the owners affirmatively consent to release of their e-mail addresses. However, to the extent the e-mail addresses at issue are excluded by section 552.137(c), or the owners affirmatively consent to release of their e-mail addresses, the system may not withhold these e-mail addresses under section 552.137 of the Government Code.

In summary, the username and password information, in addition to the source code information we have indicated, is not “public information” for purposes of the Act, and the system is not required to release it in response to this request. The system may withhold the information Epic has indicated under section 552.104(a) of the Government Code. To the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the system must withhold the cellular telephone numbers of system employees within the remaining information at issue under section 552.117(a)(1) of the Government Code; however, the system may not withhold the cellular telephone numbers if a governmental body pays for the cellular telephone service. To the extent the e-mail addresses at issue are not of a type specifically excluded by section 552.137(c), the system must withhold the e-mail addresses in the remaining information under section 552.137, unless the owners affirmatively consent to release of their e-mail addresses. The system 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,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/som

Ref: ID# 600500

Enc. Submitted documents

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(w/o enclosures)

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