



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 7, 2020

Mr. Jonathan Miles
Open Records Attorney
Texas Health and Human Services Commission
P.O. Box 149347
Austin, Texas 78714-9347

OR2020-30468

Dear Mr. Miles:

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# 856679 (ORR No. 20200623-9682).

The Texas Department of State Health Services (the "department") received a request for specified reports. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of NovaDx.¹ Accordingly, you state, and provide documentation showing, you notified NovaDx 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 received comments from NovaDx. We have reviewed the submitted information and considered the submitted arguments.

Initially, NovaDx asserts some of its information at issue is not subject to the Act pursuant to section 552.002(d) of the Government Code. The Act applies to "public information," which is defined in section 552.002(a) of the Government Code as "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in

¹ We note the department did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(b), (e). Nonetheless, because the interest of a third party can provide a compelling reason to overcome the presumption of openness, we will consider third party interests for the submitted information. *See id.* §§ 552.007, .302, .352.

connection with the transaction of official business[.]” *See* Gov’t Code § 552.002(a)(1). However, “protected health information” as defined by section 181.006 of the Health and Safety Code is expressly excluded from the Act’s definition of “public information.” *See id.* § 552.002(d). Section 181.006 of the Health and Safety Code provides, in pertinent part:

[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[.]

Health & Safety Code § 181.006(1). Section 181.001(b)(2)(A) defines “covered entity,” in part, as any person who:

for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, non-profit, 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 health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

Id. § 181.001(b)(2)(A). NovaDx generally asserts some of its information at issue consists of protected health information under section 181.006 of the Health and Safety Code. However, NovaDx does not demonstrate it is a covered entity under section 181.001 and has failed to demonstrate the information at issue consists of protected health information for section 181.006 purposes. Accordingly, we find the information at issue is subject to the Act, and the system must release it unless it falls within an exception to public disclosure under the Act. *See* Gov’t Code §§ 552.006, .021, .301, .302.

Section 552.110(c) of the Government Code excepts from disclosure “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(c). NovaDx argues some of its information consists of commercial or financial information subject to section 552.110(c). Upon review, we find NovaDx has demonstrated the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the department must withhold the information we marked under section 552.110(c) of the Government Code.²

² As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Section 552.137 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).³ *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, an e-mail address that a governmental entity maintains for one of its officials or employees, or a personal e-mail address belonging to a department employee or official used to conduct official government business. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). Because we are unable to discern whether the e-mail addresses within the responsive documents belong to department employees or officials or fall within the scope of section 552.137(c), we must rule conditionally. To the extent the e-mail addresses in the remaining information belong to members of the public, the department must withhold such e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See id.* § 552.137(b). However, to the extent the e-mail addresses at issue are excluded by subsection 552.137(c) or belong to a department employee or official, the e-mail addresses may not be withheld under section 552.137 of the Government Code.

We note some of the materials at issue may be 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). 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 department must withhold the information we marked under section 552.110(c) of the Government Code. To the extent the e-mail addresses in the remaining information belong to members of the public, the department must withhold such e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. The department must release the remaining information; however, any information that is subject to copyright may be released only 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

³ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Sean McCormick
Assistant Attorney General
Open Records Division

SMC/be

Ref: ID# 856679

Enc. Submitted documents

c: Requestor
(w/o enclosures)

1 Third Party
(w/o enclosures)