

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



February 21, 2002

Ms. Sarajane Milligan  
Assistant County Attorney  
Harris County  
1019 Congress, 15<sup>th</sup> Floor  
Houston, Texas 77002-1700

OR2002-0821

Dear Ms. Milligan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158865.

Harris County (the "county") received a request for copies of "proposals, agreements, and contracts relating to proposal job # 00/00138 titled Core Patient Clinical/Patient Administration System," excluding those relating to the requestor. Although the county claims that the release of the requested information may implicate the proprietary interests of particular third parties under section 552.110 of the Government Code, the county takes no position as to whether the requested information is so excepted. We have considered the arguments of interested third parties and have reviewed the submitted information.

Pursuant to section 552.305(d) of the Government Code, the county notified fourteen third parties whose proprietary interests may be implicated by the release of the requested information of the county's receipt of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act (the "Act") in certain circumstances). The fourteen third parties notified by the county are as follows: 3M Health Information Systems ("3M"), Compaq Computer ("Compaq"), Compliance Data Systems, Inc. ("Compliance"), Eclipsys Corporation ("Eclipsys"), Epic Systems Corporation ("Epic"), Healthcare.com, now Quovadx, Inc. ("Quovadx"), IDX

Information Systems Corporation (“IDX”), Keane, Inc. (“Keane”), McKessonHBOC, Inc. (“McKesson”), MedicaLogic, Inc. (“MedicaLogic”), Per-Se Technologies, Inc. (“Per-Se”), QuadraMed (“QuadraMed”), Shared Medical Systems (“Shared”), and The SSI Group, Inc. (“SSI”).

We note that 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 requested information relating to that party should be withheld from disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, the following third parties notified pursuant to section 552.305 have not submitted any comments to this office explaining why the requested information should not be released: 3M, Compaq, Compliance, IDX, Keane, McKesson, MedicaLogic, Per-Se, QuadraMed, Shared, and SSI. Therefore, we have no basis to conclude that the release of the requested information pertaining to any of the aforementioned parties would implicate their proprietary interests. *See* Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under Gov’t Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (stating that if governmental body takes no position, attorney general will grant exception to disclosure under statutory predecessor to Gov’t Code § 552.110(a) if third party makes *prima facie* case that information qualifies as trade secret under section 757 of Restatement of Torts, and no argument is presented that rebuts claim as matter of law). Accordingly, we conclude that no portion of the requested information pertaining to these eleven business entities is excepted from disclosure pursuant to section 552.110 of the Government Code.

Three entities whose proprietary interests may be implicated by the release of the requested information, Eclipsys, Epic, and Quovadx, did respond to the county’s section 552.305 notice and we, in turn, address their arguments. Quovadx contends in part that portions of its information are excepted from disclosure under sections 552.101 and 552.131 of the Government Code.<sup>1</sup> However, because Quovadx has not submitted any comments explaining why this information is excepted from disclosure under sections 552.101 or 552.131, we conclude that the county may not withhold any portion of Quovadx’s information from disclosure under sections 552.101 and 552.131. However, all three of these entities contend that portions of their respective information are excepted from disclosure pursuant to section 552.110 of the Government Code. Therefore, we will address their arguments under that exception to disclosure.

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<sup>1</sup> We note that although Quovadx argues that portions of the three contracts with the center are excepted from disclosure under section 552.110, we did not receive any of this information from the county. Accordingly, this ruling does not address whether any portion of Quovadx’s three contracts with the center may be withheld from disclosure and is limited to the responsive information submitted to us by the county.

Section 552.110(a) protects trade secrets of private parties. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law.<sup>2</sup> *See* Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) excepts from disclosure "[c]ommercial 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." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

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<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Epic argues that portions of its bid proposal and the entirety of its contract with the Harris County Hospital District (the "district") are excepted from disclosure under section 552.110 because the district agreed that the information constituted trade secret information and agreed that it would maintain the information in confidence. We note that information is not confidential under the Act simply because the party submitting the information to the governmental body anticipates or requests that it be kept confidential. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), cert. denied 430 U.S. 931 (1977). Additionally, information is not excepted from disclosure merely because it is furnished with the expectation that access to it will be restricted. *See Open Records Decision No. 180* (1977). Finally, we note that governmental bodies may not enter into agreements to keep information confidential except where specifically authorized to do so by statute. *See Open Records Decision Nos. 605* (1992), *585* (1991), *514* (1988). Accordingly, the county may not withhold any portion of Epic's bid proposal or contract with the district under section 552.110 on these bases. Epic also argues that this information should be excepted from disclosure under section 552.110 because the information either contains trade secret information or constitutes information the release of which would cause substantial competitive harm to Epic. However, based on our review of Epic's remaining arguments and all of the related responsive information, we conclude that Epic has not demonstrated that the release of this information would constitute a release of trade secret information or would cause substantial competitive harm to Epic. Accordingly, we conclude that the county may not withhold any portion of the contract between Epic and the district or any portion of Epic's bid proposal from disclosure pursuant to section 552.110 of the Government Code.

Quovadx argues that section 552.110 excepts from disclosure portions of three contracts between Quovadx and the Harris County Psychiatric Center (the "center") and portions of its bid proposal because the information either contains trade secret information or constitutes information the release of which would cause substantial competitive harm to Quovadx. However, based on our review of Quovadx's arguments and all of the related responsive information, we conclude that Quovadx has not demonstrated that the release of this information would constitute a release of trade secret information or would cause substantial competitive harm to Quovadx. Accordingly, we conclude that the county may not withhold any portion of Quovadx's bid proposal from disclosure pursuant to section 552.110 of the Government Code.

Eclipsys argues that its bid proposal should be withheld from disclosure under section 552.110 because each proposal either contains trade secret information or constitutes commercial or financial information the release of which would cause substantial competitive harm to Eclipsys. Based on our review of Eclipsys' arguments and bid proposal, we conclude that Eclipsys has not sufficiently demonstrated that the release of any portion of its proposal would constitute a release of trade secret information. However, Eclipsys also argues that the release of its bid proposal would enable Eclipsys' competitors to gain a tactical advantage against it in the marketplace beyond the current bid process. Such disclosure, Eclipsys argues, would provide those competitors with information regarding Eclipsys' products, product functionality, and implementation methodologies that were developed over an extended period of time and that are not presently available to its

competitors. Thus, we conclude that Eclipsys has demonstrated that the release of some portions of its bid proposal would cause substantial competitive harm to Eclipsys. Accordingly, we conclude that the county must withhold most portions of Eclipsys' bid proposal from disclosure pursuant to section 552.110(b) of the Government Code. *See* Open Records Decision No. 639 at 4 (1996). However, the county may not withhold the marked portion of Eclipsys' bid proposal from disclosure under section 552.110, since Eclipsys has not sufficiently demonstrated how this information either contains trade secret information or constitutes information the release of which would cause substantial competitive harm to Eclipsys. *See* Open Records Decision Nos. 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, and experience not excepted under section 552.110).

We note that the information that is not excepted from disclosure under section 552.110 contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Accordingly, unless the members of the public in question have affirmatively consented to their release, the county must withhold from disclosure all email addresses that were provided for the purpose of communicating electronically with the county pursuant to section 552.137 of the Government Code. We have marked a representative sample of the e-mail addresses that are subject to section 552.137.

However, we also note that some of the information that is not excepted from disclosure appears to be protected by copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). However, a governmental body must allow inspection of copyrighted materials, unless an exception to disclosure applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. We note that, in making such copies, a member of the public assumes a duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Accordingly, the county must allow the requestor to inspect the copyrighted information. However, if the requestor wishes to make copies of such materials, the requestor assumes a duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, with the exception of the marked portion, the county must withhold Eclipsys' bid proposal from disclosure pursuant to section 552.110(b) of the Government Code. The county must withhold from disclosure all e-mail addresses that were provided for the purpose of communicating electronically with the county pursuant to section 552.137 of the Government Code, unless the members of the public in question have affirmatively consented to their release. The county must release the remaining information to the requestor in compliance with copyright law, where applicable.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

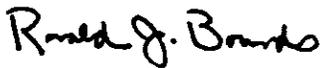
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/sdk

Ref: ID# 158865

Enc: Marked documents

cc: Mr. Jesse Anderson  
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CAUSE NO. GN200719

EPIC SYSTEMS CORPORATION,  
Plaintiff,

V.

GREG ABBOTT, ATTORNEY GENERAL  
OF TEXAS, AND THE STATE OF TEXAS,  
Defendant.

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IN THE DISTRICT COURT OF  
  
TRAVIS COUNTY, TEXAS  
  
98<sup>TH</sup> JUDICIAL DISTRICT

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for entry of an agreed final judgment. By their motion, Plaintiff Epic Systems Corporation (EPIC), and Defendants Greg Abbott, Attorney General of Texas, and the State of Texas announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, Jesse Anderson, Cerner Corporation, was sent reasonable notice of this setting and of the parties' agreement that Harris County must withhold some of the information at issue; that the requestor was also informed of its right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. EPIC's Proposal for Core Patient Care and Administration Systems for Harris County Hospital District contains trade secrets and commercial and financial information and is excepted

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*Monica Rodriguez-Hernandez*

DISTRICT CLERK  
TRAVIS COUNTY, TEXAS

from disclosure by Tex. Gov't Code § 552.110.

2. Harris County must withhold from the requestor EPIC's Proposal except as provided in Paragraph 3 of this Judgment.

3. Harris County must release to the requestor the following portions of EPIC's Proposal: **Main Binder:** Title page; Section 1, Table of Contents; Section 2, Preface: Harris County Request for Proposal Cover Sheet, Addenda 1, 2 and 3, and Residence Certification; Tab 1, pages 1-2 (with redactions marked by the Attorney General); Section 3, Tab 2, Summary Quotation, Net Total Amount; Section 4, Tab 11, Corporate Profile, Items 1-3, Pricing Proposal, Total Proposal Amount; Section 5, Tab 12, Client References; **Attachments Binder:** Tab 1, Corporate Background, Management Philosophy, General Chart of Organization, Standard License and Support Agreement, Exhibit 3, Change Order, Intersystem Software Addendum, Implementation Team; Tab 5, Product Literature; **Exhibits Binder:** Tab 1, Standard License and Support Agreement; Tab 2, Exhibit 1(a) (with redactions marked by the Attorney General); Exhibit 2, How You Can Help Yourself; Exhibit 3; Exhibit 5, Cover sheets for Exhibit 5 and Appendix A; Exhibit 9; Exhibit 10, Table of Contents; Exhibit 11, Vendor Award; Exhibit 15; the eight Addenda listed on the List of Exhibits; Tab 3, Third Party Agreements (with redactions marked by the Attorney General).

4. All costs of court are taxed against the parties incurring the same;

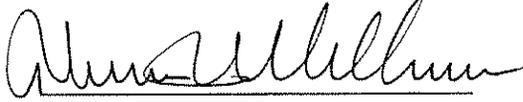
5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendants and is a final judgment.

SIGNED this the 10 day of August, 2005.

  
PRESIDING JUDGE

APPROVED:



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