

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 4, 2009

Ms. L. Renée Lowe
Assistant County Attorney
Harris County
2525 Holly Hall, Suite 190
Houston, Texas 77054

OR2009-17205

Dear Ms. Lowe:

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# 363671 (CA File No. 09HSP1369).

The Harris County Hospital District (the "district") received a request for the contract between the district and the winning bidder and the pricing information submitted by the non-winning bidders in two specified requests for proposal.¹ Although you take no position with regard to the submitted information, you state that release of this information may implicate the proprietary interests of third parties. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the district has notified the interested third parties of the request and of their right to submit arguments to this office explaining why their information should not be released.² *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why

¹We note the district sought and received clarification of the request from the requestor. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear, governmental body may ask requestor to clarify or narrow request).

²The notified third parties are: Cerner Corporation ("Cerner"); Compaq Computer; Compliance Data Systems, Inc.; Eclipsys Corp.; Epic Systems Corporation ("Epic"); Healthcare.com; IDX Systems Corp.; Keane, Inc.; McKesson Information Systems, LLC; Medialogic, Inc.; Per-Se Technologies, Inc.; QuadraMed; Shared Medical Systems; Siemens Medical Solutions USA, Inc.; SoftMed Systems, Inc.; The SSI Group, Inc. ("SSI"); and 3M Health Information Systems.

requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that 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). You state that SSI has consented to the release of its information; therefore, you have released its pricing information to the requestor. We have received correspondence from Cerner and Epic. We have considered the submitted arguments and reviewed the submitted information, some of which is a representative sample.³

Initially, we note that a portion of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2002-0821 (2002). Epic filed a lawsuit against the Office of the Attorney General challenging Open Records Letter No. 2002-0821 over the release of the document titled "2001 Main Agreement." A settlement agreement was reached amongst the parties regarding the disposition of certain documents and was adopted by the court in an Agreed Final Judgment. Epic has provided this office with a copy of the Agreed Final Judgment in *Epic Systems Corporation v. Attorney General of Texas, Greg Abbott*, Cause No. GN-200719 (53rd Jud. Dist., Travis County, Tex. July 25, 2005). Thus, we find that, with regard to the information at issue in Open Records Letter No. 2002-0821, the district must continue to rely on the Agreed Final Judgment to release or withhold the "2001 Main Agreement." We will address the submitted arguments for the remaining information.

We note 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, only Epic and Cerner have submitted to this office reasons explaining why their information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have protected proprietary interests in any of the submitted information. *See* 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 (1990). Therefore, the district may not withhold any portion of the submitted information on the basis of any proprietary interests that the remaining third parties may have in this information. We will, however, address Cerner's and Epic's arguments to withhold portions of the submitted information.

³We assume that the "representative sample" of information 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.

Epic asserts that its amendment dated 08/06/2007 (Epic Standard Enterprise Coding Interface) is excepted from public disclosure under section 552.110 of the Government Code. We note, however, that the district did not submit this information for our review. This ruling does not address information beyond what the district has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Therefore, we do not address Epic's arguments for this information.

Cerner and Epic assert that portions of the submitted information may not be disclosed because they were marked confidential or have been made confidential by agreement or assurances. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Cerner indicates its submitted information is confidential under section 552.101 of the Government Code in conjunction with section 262.030 of the Local Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 262.030(c) of the Local Government Code provides a competitive proposal procedure for the purchase of high technology items by a county, and states in pertinent part:

(c) If provided in the request for proposals, proposals shall be opened so as to avoid disclosure of contents to competing offerors and kept secret during the process of negotiation. All proposals that have been submitted shall be available and open for public inspection after the contract is awarded, except for trade secrets and confidential information contained in the proposals and identified as such.

Local Gov't Code § 262.030(c). In general, section 552.101 only excepts information from disclosure where the express language of a statute makes certain information confidential or states that information shall not be released to the public. Open Records Decision No. 478 (1987). The plain language of section 262.030(c) does not expressly make bid proposals confidential. Section 262.030(c) only requires a governmental body to take adequate precautions to protect bid proposals from competing bidders. Accordingly, we determine

that Cerner's information is not confidential pursuant to section 262.030(c). Thus, the district may not withhold any portion of Cerner's information pursuant to section 552.101 of the Government Code in conjunction with section 262.030 of the Local Government Code.

Cerner claims its information is excepted under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the district does not argue that section 552.104 is applicable in this instance, we conclude that none of Cerner's information may be withheld under section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

Cerner and Epic raise also section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of trade secret from section 757 of the RESTATEMENT OF TORTS. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* ORD 552 at 2. Section 757 provides a trade secret is:

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 single or ephemeral events in the conduct 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 also Huffines*, 314 S.W.2d at 776. There are six factors to be assessed in determining whether information qualifies as a trade secret:

(1) the extent to which the information is known outside of [the company];

- (2) the extent to which it is known by employees and others 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). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[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[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); *see also* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

In advancing its arguments, Epic relies, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in the future. *National Parks*, 498 F.2d 765. However, section 552.110(b) has been amended since the issuance of *National Parks*. Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information. The current statute does not incorporate this aspect of the *National Parks* test; it now requires only a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (1999)

(discussing enactment of section 552.110(b) by Seventy-sixth Legislature). Thus, the ability of a governmental body to obtain information from private parties is no longer a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Epic's interests in its information.

Upon review of the arguments submitted by Cerner and Epic, we conclude that Cerner and Epic have failed to demonstrate how any portion of their information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). We note that pricing information pertaining to a particular proposal or contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORD Nos. 319 at 3, 306 at 3 (1982). Therefore, the district may not withhold any of the submitted information under section 552.110(a) of the Government Code.

Upon review of the arguments and information at issue, we find Cerner and Epic have demonstrated that release of a portion of their submitted information would cause them substantial competitive harm, and thus, the information that we have marked must be withheld under section 552.110(b). However, Cerner and Epic have made only conclusory allegations that release of the remaining information at issue would cause each company substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. *See* ORD Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3. Therefore, the district may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note that portions of the information at issue are 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. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, the district must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released, but any information that is protected by copyright may only 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,



Greg Henderson
Assistant Attorney General
Open Records Division

GH/dls

Ref: ID#363671

Enc. Submitted documents

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(w/o enclosures)

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CAUSE NO. D-1-GN-09-004287

EPIC SYSTEMS CORPORATION,
Plaintiff,

v.

GREG ABBOTT, ATTORNEY GENERAL,
STATE OF TEXAS, AND HARRIS
COUNTY,
Defendants.

§ IN THE DISTRICT COURT OF
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§
§
§ 98TH JUDICIAL DISTRICT

Filed in The District Court
of Travis County, Texas

DEC 08 2010 TH

At J. Lopez M.
Amalia Rodriguez-Mendoza, Clerk

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Epic Systems Corporation and Defendant Greg Abbott, Attorney General of Texas appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. Epic has nonsuited its claims against Harris County and it is no longer a party to this suit. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestor, Colin Regan, was sent reasonable notice of this setting and of the parties' agreement that Harris County Hospital District must withhold some of the information at issue; that the requestor was also informed of his 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. The text in brackets, regardless of color of brackets, in Bates 000255, 256,

257, 260, 261, 262, 514, 549, 563, 564, 565, 583, 609 reflect information that should be redacted pursuant to Letter Ruling OR2009-17205.

2. The information at issue, information marked by the Attorney General, in Bates 000211, 221-223, 280, 535, is excepted from disclosure by Tex. Gov't Code § 552.110.

3. Harris County Hospital District must withhold from the requestor the information described in Paragraphs 1 and 2 of this Agreement.

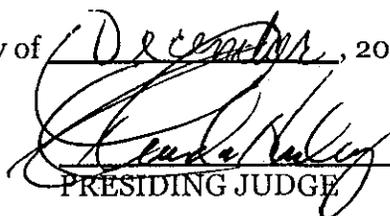
4. Epic no longer contests the disclosure of the remaining information at issue in this lawsuit. Harris County Hospital District must release to the requestor all information pertaining to Epic that is responsive to the request for information and that was not held excepted from disclosure in Letter Ruling OR2009-17205 or by Paragraphs 1 and 2 of this Agreement or by the previous Agreed Final Judgment between Epic and the Attorney General, which is referenced in Letter Ruling OR2009-17205.

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

6. All relief not expressly granted is denied; and

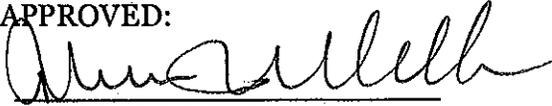
7. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 8 day of December, 2010.



PRESIDING JUDGE

APPROVED:



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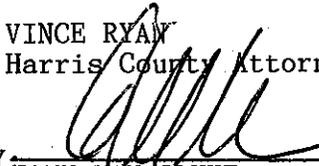


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