



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 18, 2011

Mr. Allan S. Graves  
Adams, Lynch & Loftin, P.C.  
For Tarrant County Hospital District  
3950 Highway 360  
Grapevine, Texas 76051

ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

OR2011-02510

Dear Mr. Graves:

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# 409649.

The Tarrant County Hospital District d/b/a JPS Health Network (the "district"), which you represent, received a request for the contract between the district and the winning bidder, and the proposals submitted by all bidders in response to a request for proposals for electronic health records. 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 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.<sup>1</sup> 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 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). We have received correspondence from Cerner,

---

<sup>1</sup>The notified third parties are: Cerner Corp. ("Cerner"); Eclipsys Corp. ("Eclipsys"), an Allscripts Healthcare Solutions, Inc. company; Epic Systems Corporation ("Epic"); McKesson Provider Technologies ("McKesson"); and Medical Information Technology, Inc. ("MEDITECH").

Eclipsys, Epic, and MEDITECH. We have considered the submitted arguments and reviewed the submitted 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, McKesson has not submitted to this office reasons explaining why its information should not be released. Therefore, McKesson has provided us with no basis to conclude that it has a protected proprietary interest 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 interest that McKesson may have in this information. We will, however, address the arguments of Cerner, Eclipsys, Epic, and MEDITECH to withhold portions of the submitted information.

We next note that Epic seeks to withhold certain information that the district has not submitted to this office for our review. Because some of the information that Epic seeks to withhold was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted by the district. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Thus, we will only address Epic's arguments against disclosure of the information that was actually submitted to this office for our review.

Epic asserts that its information may not be disclosed because it was marked confidential or has 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.

Eclipsys claims its information is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. In

this instance, Eclipsys does not present any arguments against disclosure under that section nor has the company directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). In addition, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2000), 575 at 2 (1990). Accordingly, none of the company's information may be withheld under section 552.101 of the Government Code.

Eclipsys next 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 the company's information may be withheld under section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

Cerner, Eclipsys, Epic, and MEDITECH argue that some or all of their submitted information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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." Gov't Code § 552.110(a). 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* Open Records Decision No. 552 at 2 (1990). 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 . . . . 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 also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>2</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). 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. ORD 552 at 5. However, we cannot conclude section 552.110(a) applies 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. *See Open Records Decision No. 402 (1983)*.

Section 552.110(b) of the Government Code 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." Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See Open Records Decision No. 661 at 5-6 (1999)* (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*

---

<sup>2</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes 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)*.

*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 ORD 661 at 5-6 (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.

Cerner, Eclipsys, Epic, and MEDITECH claim some or all of their information is excepted from disclosure under section 552.110(b). Upon review, we find Cerner and Eclipsys have established release of their pricing information would cause these companies substantial competitive injury. Further, we find Epic has demonstrated that release of some of its submitted information would cause the company substantial competitive harm. Accordingly, we have marked the information that must be withheld under section 552.110(b). However, we find Cerner, Eclipsys, Epic, and MEDITECH have made only conclusory allegations that release of the remaining information would result in substantial damage to their competitive positions and have provided no specific factual or evidentiary showing to support such allegations. See ORD 661 at 5-6; see also ORD 319 at 3. Furthermore, we note that pricing information of a winning bidder, as Epic is in this case, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a company contracting with a governmental body is generally not excepted under section 552.110(b). See Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); see generally Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Therefore, we determine none of the remaining information is excepted from disclosure under section 552.110(b).

Upon further review, we find Cerner, Eclipsys, Epic, and MEDITECH have failed to demonstrate how their remaining information meets the definition of a trade secret, nor have Cerner, Eclipsys, Epic, and MEDITECH demonstrated the necessary factors to establish a trade secret claim for this information. See ORDs 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 3 (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to 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;

ORDs 319 at 3, 306 at 3. Therefore, the district may not withhold any of the remaining information under section 552.110(a) of the Government Code.

We note some of the remaining information 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 district must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released, but 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 responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 409649

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Eric Gray  
Corporate Counsel  
Cerner Corp.  
2800 Rockcreek Parkway  
Kansas City, Missouri 64117  
(w/o enclosures)

Mr. Gregory S. Bianchi  
Associate General Counsel  
Eclipsys Corp.  
Three Ravinia Drive  
Atlanta, Georgia 30346  
(w/o enclosures)

Mr. Michael B. Gerdes  
Epic Systems Corporation  
1979 Milky Way  
Verona, Wisconsin 53593  
(w/o enclosures)

General Counsel  
McKesson Provider Technologies  
5995 Windword Parkway  
Alpharetta, Georgia 30005  
(w/o enclosures)

Ms. Maryanne Emmanuel Giglia  
Assistant Corporate Counsel  
Medical Information Technology, Inc.  
MEDITECH Circle  
Westwood, Massachusetts 02090  
(w/o enclosures)