



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 29, 2013

Ms. Melanie Rodney  
Assistant County Attorney  
Harris County Attorney's Office  
2525 Holly Hall, Suite 190  
Houston, Texas 77054

OR2013-15173

Dear Ms. Rodney:

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# 496274 (C.A. File No. 13HSP0419).

The Harris County Hospital District d/b/a Harris Health System (the "district") received a request for (1) all district contracts with Epic Systems of Wisconsin and (2) all correspondence, invoices, and payment checks associated with any "true-up" for a specified time period. You state you have released some information to the requestor. You state you will redact account and routing numbers under section 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim a portion of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Additionally, you state release of portions of the submitted information may implicate the proprietary interests of third parties. You inform us, and provide documentation showing,

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<sup>1</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended section 552.136 to allow a governmental body to redact the information described in subsection 552.136(b) without the necessity of seeking a decision from the attorney general. *See Gov't Code* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(e). Thus, the statutory amendments to section 552.136 of the Government Code supercede Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsection 552.136(b) in accordance with section 552.136, not Open Records Decision No. 684.

that pursuant to section 552.305 of the Government Code, the district notified Adobe Systems Incorporated; CDW Government, LLC; EPIC Implementation Services (“Epic”); Fujifilm Holdings America Corporation (“Fujifilm”); Mythics; Oracle Corporation (“Oracle”); and Surgical Information Systems (“SIS”) of the request and of the companies’ rights to submit arguments to this office explaining why their information should not be released. *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 received correspondence from Epic, Oracle, and SIS. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, Epic asserts some of the submitted information is not responsive to the request for information. A governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). The district has reviewed its records and determined the documents it has submitted are responsive to the request. Thus, we find the district has made a good-faith effort to relate the request to information within its possession or control. Accordingly, we will determine whether the district must release the submitted information under the Act.

Next, we note some of the requested information, which we have indicated, was the subject of a previous request for information as a result of which this office issued Open Records Letter No. 2012-03621 (2012). As we have no indication the law, facts, and circumstances on which the prior rulings were based have changed, the district must continue to rely on Open Records Letter No. 2012-03621 as a previous determination and withhold or release the information at issue in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances, on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we must address the district’s obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general’s decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov’t Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body’s claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for

information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D).

You state the district received the original request for information on May 13, 2013. You also state, and provide documentation showing, the district received clarification of the request for information on May 22, 2013. *See id.* § 552.222; *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, 10-day period to request attorney general ruling is measured from date request is clarified or narrowed). You further state the district provided the requestor with a written itemized estimate of the charges for responding to the request and required full payment of those charges as a bond pursuant to sections 552.2615 and 552.263 of the Government Code on May 23, 2013. *See id.* §§ 552.2615 (providing governmental body shall provide requestor with estimate of charges if charges exceed \$40), .263(a) (governmental body may require deposit or bond for payment of anticipated costs in certain instances if governmental body provides requestor with written itemized statement). In response to the itemized statements, you inform us the requestor modified his request on May 31, 2013. *See id.* § 552.263(e-1) (if requestor modifies request in response to requirement of deposit, modified request is considered received on date governmental body receives written modification). Therefore, we agree May 31, 2013 is the date the district is deemed to have received the request for information. *See id.* §§ 552.263(f), .301(b), (c). Accordingly, the ten-business-day deadline for requesting a ruling from this office was June 7, 2013, and the fifteen-business-day deadline was June 14, 2013. Although the district timely submitted some of the responsive information on June 6, 2013, and June 14, 2013, we note the district submitted additional responsive information on June 24, 2013. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we conclude the district failed to comply with the procedural requirements mandated by section 552.301(e) of the Government Code with respect to the information submitted on June 24, 2013.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 319 (1982). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). You assert the information at issue is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. However, this exception and rule are discretionary in nature and may be waived, and, thus, do not provide compelling reasons to withhold information under section 552.302.

*See* Gov't Code § 552.007; Open Records Decision Nos. 676 at 11-12 (2002) (attorney-client privilege under Gov't Code § 552.107 or Texas Rule of Evidence 503 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Thus, the district has waived its claims under section 552.107 of the Government Code and Texas Rule of Evidence 503 and may not withhold any of the information at issue on that basis. However, because third-party interests can provide a compelling reason to withhold information, we will consider the submitted third-party arguments against disclosure.

Next, an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received arguments from Epic, Oracle, and SIS.<sup>2</sup> Thus, the remaining third parties have not demonstrated they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); 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. Accordingly, the district may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

Epic, Oracle, and SIS 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.

Epic, Oracle, and SIS raise 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: (1) “[a] trade secret obtained from a person and privileged or confidential

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<sup>2</sup>Although we received correspondence from a representative of Fujifilm informing this office arguments against disclosure of Fujifilm's information were forthcoming, as of the date of this letter, this office has not received any such arguments.

by statute or judicial decision,” and (2) “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.” See Gov’t Code § 552.110(a)-(b).

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.” *Id.* § 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 ORD 552 at 2. 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>3</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. 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). We note pricing information pertaining to a particular 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.” RESTATEMENT OF TORTS § 757 cmt. b; see also *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

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

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<sup>3</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 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).

(business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find SIS has established the information we have marked constitutes trade secrets. Accordingly, the district must withhold the information we have marked under section 552.110(a). However, we find Epic, Oracle, and SIS have failed to demonstrate how any portion of the remaining information at issue meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for the remaining 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 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, the district may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Upon further review of the arguments and information at issue, we find Epic, Oracle, and SIS have demonstrated that some of their information at issue would cause the companies substantial competitive harm. Thus, the district must withhold the information we have marked under section 552.110(b). However, Epic, Oracle, and SIS have made only conclusory allegations that release of the remaining information at issue would cause the companies substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. *See* Open Records Decision 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 at issue under section 552.110(b) 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.<sup>4</sup> *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

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<sup>4</sup>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).

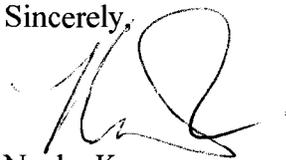
information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the 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 under section 552.024 the information be kept confidential. Therefore, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the district must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code. However, if the individual at issue did not timely request confidentiality under section 552.024 or if a governmental body does pay for the cellular telephone service, the district may not withhold the marked information under section 552.117(a)(1).

In summary, the district must continue to rely on Open Records Letter No. 2012-03621 as a previous determination and withhold or release the requested information in accordance with that ruling. The district must withhold the information we have marked under section 552.110 of the Government Code. To the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the district must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code. The remaining information must be released.

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,



Nneka Kanu  
Assistant Attorney General  
Open Records Division

NK/bhf

Ref: ID# 496274

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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

Ms. Ann K. Moceyunas  
Surgical Information Systems  
555 North Point Center East, Suite 700  
Alpharetta, Georgia 30022  
(w/o enclosures)

General Counsel  
Adobe Systems Incorporated  
345 Park Avenue  
San Jose, California 95110-2704  
(w/o enclosures)

Fujifilm Medical Systems  
c/o Mr. Christian J. Dunlay  
Dunlay Law Group  
500 Mamaroneck Avenue, Suite 320  
Harrison, New York 10528  
(w/o enclosures)

General Counsel  
CDW Government LLC  
230 North Milwaukee Avenue  
Vernon Hills, Illinois 60061  
(w/o enclosures)

Mr. Al Wergely  
Office of General Counsel  
Mythics  
8219 Leesburg Pike, Suite 450  
Vienna, Virginia 22182  
(w/o enclosures)

Oracle America  
c/o Ms. Meghan Paulk Ingle  
DLA Piper  
401 Congress Avenue, Suite 2500  
Austin, Texas 78701-3799  
(w/o enclosures)