



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 9, 2012

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

OR2012-03621

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# 448280 (CA File No. 11HSP1248).

The Harris County Hospital District (the “district”) received a request for the contract and all amendments between the district and Epic Systems Corporation (“Epic”) for the electronic health records system, and for all proposals submitted in relation to this contract.<sup>1</sup> You state the requested proposals have been disposed of in accordance with the district’s records retention policy.<sup>2</sup> Although the district takes no position with respect to the public availability of the submitted information, you state its release may implicate the proprietary interests of Epic. You inform us, and provide documentation showing, that pursuant to

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<sup>1</sup>You state the district sought and received clarification from the requestor. *See* Gov’t Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *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 of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

<sup>2</sup>We note the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

section 552.305 of the Government Code, the district notified Epic of the request and of the company's right to submit arguments to this office explaining why its 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. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note most of the requested information was the subject of two previous requests for information, as a result of which this office issued Open Records Letter Nos. 2009-17205 (2009) and 2002-00821 (2002). Epic filed lawsuits against the Office of the Attorney General challenging Open Records Letter Nos. 2009-17205 and 2002-0821 over the release of the document titled "2001 Main Agreement" and certain related information. Settlement agreements were reached among the parties regarding the disposition of certain documents and were adopted by the courts in two Agreed Final Judgments. Epic has provided this office with copies of the Agreed Final Judgments in *Epic Systems Corp. v. Abbott*, Cause No. D-1-GN-09-004287 (98th Dist. Ct., Travis County, Tex. Dec. 8, 2010); and *Epic Systems Corp. v. Abbott*, Cause No. GN-200719 (53rd Dist. Ct., Travis County, Tex. July 25, 2005). Thus, we find that, with regard to the information at issue in Open Records Letter Nos. 2009-17205 and 2002-00821, the district must continue to rely on the Agreed Final Judgments to release or withhold the "2001 Main Agreement" and certain related information under section 552.110 of the Government Code.<sup>3</sup> We will address the submitted arguments for the remaining information, numbered by the district as pages EPIC 0001-0140 and 0153-0154.

Next, we must address the district's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e)(1)(D).

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<sup>3</sup>The district has numbered this information as pages EPIC 0141-0152 and 0155-0560.

You state the district received the request for information on December 5, 2011. You further state, and provide documentation showing, the district received clarification of the request for information on December 13, 2011. *See id.* § 552.222; *see also City of Dallas v. Abbott*, 304 S.W.3d at 387. We note December 26, 2011 was a holiday.<sup>4</sup> You do not inform us the district was closed for any additional business days between December 14, 2011, and January 4, 2012. Accordingly, you were required to request a ruling from this office by December 28, 2011, and to provide the information required by section 552.301(e) by January 4, 2012. However, you did not submit your request for a ruling or the required information until January 12, 2012. *See Gov't Code* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the district failed to comply with the requirements of section 552.301 of the Government Code.

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). Because third-party interests can provide a compelling reason to withhold information, we will consider the submitted third-party arguments against disclosure.

Epic asserts 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 also raises 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:

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<sup>4</sup>This office does not count the date the request was received or holidays as business days for the purpose of calculating a governmental body's deadlines under the Act.

(1) “[a] trade secret obtained from a person and privileged or confidential 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>5</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>5</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).

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. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the 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). The ability of a governmental body to continue to obtain information from private parties is not 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 Epic, we find Epic has demonstrated that release of most of the information at issue would cause the company substantial competitive harm. Thus, the district must withhold the information we have marked under section 552.110(b). However, Epic has made only conclusory allegations that release of the remaining information at issue would cause the company substantial competitive injury and has 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 at issue under section 552.110(b) of the Government Code.

Upon further review of the arguments and information at issue, we find Epic has failed to demonstrate how any portion of the remaining information at issue meets the definition of a trade secret, nor has Epic demonstrated the necessary factors to establish a trade secret claim for the remaining information. 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). Therefore, the district may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

In summary, with regard to pages EPIC 0141-0152 and 0155-0560, which were the records at issue in Open Records Letter Nos. 2009-17205 and 2002-00821, the district must continue to rely on the Agreed Final Judgments to release or withhold this information. The district must withhold the information we have marked under section 552.110(b) 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,



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Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 448280

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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