



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 5, 2015

Ms. Ana Ayala
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2015-20836

Dear Ms. Ayala:

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# 581826 (OGC# 163216).

The University of Texas M. D. Anderson Cancer Center (the "center") received a request for a specified contract with Epic Systems Corporation ("Epic"). The center does not take a position as to whether the submitted information is excepted from disclosure under the Act. However, the center states, and provides documentation showing, it notified Epic of the center's receipt of the request for information and of Epic's 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 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). In correspondence to his office, Epic asserts some of its information is excepted from release under sections 552.104 and 552.110 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

The center states the responsive contract and the first six amendments to that contract were the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-09102 (2015). In response to our ruling, Epic filed a lawsuit against our office, which is pending. *See Epic Systems Corp. v. Paxton*, Cause No. D-1-GN-15-002042 (126 Dist. Ct. Travis County, Texas.). Accordingly, we will allow the

trial court to resolve whether the information at issue must be released to the public. We will address Epic's arguments against disclosure of the remaining amendments.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party's property interest, the court concluded a private third party may invoke this exception. *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at *7 (Tex. June 19, 2015). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Id.* at *9. Epic states it has competitors. In addition, Epic seeks to withhold certain terms of the submitted contract, arguing disclosure of the information at issue could allow its competitors to use the information to develop their own software to offer features Epic offers or "to adjust their own implementation, training, support, pricing, payment, or business methods to mimic those that have been developed by Epic over a substantial period of time and at substantial cost." For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to the *Boeing* decision, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 2015 WL 3854264, at *1, *8. After review of the information at issue and consideration of the arguments, we find Epic has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the center may withhold the information that Epic has marked in the remaining amendments under section 552.104(a) of the Government Code.¹

To conclude, we will allow the trial court to resolve whether the responsive contract and the first six amendments to that contract must be released to the public. The center may withhold the information that Epic has marked in the remaining amendments under section 552.104(a) of the Government Code. The center must release the remaining information.

¹As our ruling is dispositive, we do not address Epic's other arguments to withhold this information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/akg

Ref: ID# 581826

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)