



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 11, 2015

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Ms. Cynthia Tynan
Attorney and Public Information Coordinator
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2902

OR2015-09102

Dear Ms. Tynan:

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# 563102 (OGC No. 160385).

The University of Texas M.D. Anderson Cancer Center (the "university") received a request for information pertaining to a specified university request for proposals and the resulting contract for specified software. You state the university will release some of the requested information. You claim portions of the submitted information are excepted from disclosure under section 552.139 of the Government Code. You also state release of the submitted information may implicate the interests of Epic Systems Corporation ("Epic"). Accordingly, you notified Epic of the request for information and of its right to submit arguments stating 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); Open Records Decision No. 542 (1990) (determining 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 comments from Epic. We have considered the submitted arguments and reviewed the submitted information.

Epic argues the information it seeks to withhold is confidential pursuant to the contract between Epic and the university. 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.

Section 552.139 of the Government Code provides, in part, as follows:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body’s or contractor’s electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov’t Code § 552.139(a)-(b). Section 2059.055(b) of the Government Code provides the following, in pertinent part:

Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). The university states Epic was the winning bidder in response to a request for proposals regarding an electronic health records system. The university asserts the information it has marked contains detailed information regarding “the requirements and operation of hardware and software, and security systems in place to ensure protection of certain [u]niversity information in the hands of [Epic].” The university further argues release of the information it marked would make the university’s data vulnerable to unauthorized access or harm. Based on these representations and our review, we find the information the university has marked relates to computer network security, and the design, operation, or defense of the system’s computer network. Accordingly, the university must withhold the information it marked under section 552.139(a) of the Government Code.¹

Epic raises section 552.110 of the Government Code for some of its information. Section 552.110 protects (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See id.* § 552.110(a)-(b). Section 552.110(a) protects trade secrets 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, which holds a trade secret to be:

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement’s definition of trade secret as well as the

¹As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

Restatement's list of six trade secret factors.² RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). 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.*; *see also* Open Records Decision No. 661 at 5 (1999).

Upon review, we find Epic has failed to establish a *prima facie* case that any portion of the remaining information at issue meets the definition of a trade secret. We further find Epic has not demonstrated the necessary factors to establish a trade secret claim for its information at issue. *See* ORD 402. Therefore, none of Epic's information may be withheld under section 552.110(a) of the Government Code.

Further, we find Epic has failed to demonstrate the release of any of the remaining information would result in substantial harm to its competitive position. *See* ORD 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

²The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).


injury would result from release of particular information at issue). Further, we note the pricing information of a winning bidder 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). Additionally, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public). Accordingly, the university may not withhold any of Epic's remaining information under section 552.110(b) of the Government Code.

In summary, the university must withhold the information it has marked under section 552.139 of the Government Code. The university must release the remaining 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-ori_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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/cbz

Ref: ID# 563102

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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

FEB 23 2017 SH

CAUSE NO. D-1-GN-15-002042

At 8:39 A.M.
Valva L. Price, District Clerk

EPIC SYSTEMS CORPORATION,	§	IN THE DISTRICT COURT OF
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	126th JUDICIAL DISTRICT
KEN PAXTON, ATTORNEY GENERAL,	§	
STATE OF TEXAS, and	§	
UNIVERSITY OF TEXAS M.D.	§	
ANDERSON CANCER CENTER	§	
<i>Defendants.</i>	§	TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This is an open records lawsuit brought under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which Plaintiff Epic Systems Corporation (Epic) challenged Attorney General Open Records Letter Ruling OR2015-09102 (the Letter Ruling), issued to Defendant University of Texas M.D. Anderson Cancer Center (the University) by Defendant Ken Paxton, Attorney General of Texas (the Attorney General). Epic sought the withholding of certain information requested from the University under the Public Information Act (the PIA). Epic, the Attorney General, and the University (collectively, the Parties) have settled all matters in controversy arising out of this lawsuit and agree to the entry of this Agreed Final Judgment. *See* Ex. A (Settlement Agreement).

Texas Government Code section 552.325(d) requires the Court to allow the requestor of information a reasonable period of time to intervene after receiving notice of a proposed settlement in a PIA lawsuit. The Attorney General represents to the Court and the Court hereby takes judicial notice that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent notice to the requestor on January 30, 2016, providing reasonable notice of this setting. *See* Ex. B (proof of mailing). The requestor was informed of the parties' agreement that the University must withhold portions of the

requested information, as agreed upon between the Parties. The requestor was also informed of his right to intervene in the suit to contest the withholding of the information. The requestor has neither informed the parties of his intention to intervene, nor has a plea in intervention been filed.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of this Agreed Final Judgment is appropriate, disposing of all claims between the Parties in this suit.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

1. The Parties have agreed that, in accordance with the PIA and under the facts presented, those portions of the requested information indicated by a marked copy of the requested information provided by Epic to the Attorney General are excepted from disclosure pursuant to Tex. Gov't Code § 552.104 (the Excepted Information);
2. The University must withhold the Excepted Information described in this order and release the remaining requested information to the requestor;
3. All court costs and attorney fees are taxed against the Party incurring the same;
4. All relief not expressly granted is denied; and
5. This Agreed Final Judgment fully and finally disposes of all claims between all Parties in this cause, and is a final judgment.

SIGNED this 23 day of February, 2017.



JUDGE PRESIDING

AGREED:



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/s/ Kyle Wolfe

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ATTORNEY FOR UNIVERSITY OF TEXAS M.D.
ANDERSON CANCER CENTER



CAUSE NO. D-1-GN-15-002042

EPIC SYSTEMS CORPORATION,	§	IN THE DISTRICT COURT OF
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	126th JUDICIAL DISTRICT
KEN PAXTON, ATTORNEY GENERAL,	§	
STATE OF TEXAS, and	§	
UNIVERSITY OF TEXAS M.D.	§	
ANDERSON CANCER CENTER	§	
<i>Defendants.</i>	§	TRAVIS COUNTY, TEXAS

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made by and between Plaintiff Epic Systems Corporation (Epic) and Defendants Ken Paxton, Attorney General of Texas (the Attorney General), and the University of Texas M.D. Anderson Cancer Center (the University) (collectively, Defendants). This Agreement is made on the terms set forth below.

BACKGROUND

On February 20, 2015, the University received a request under the Public Information Act (the PIA) for a specified response to a request for proposals and a specified contract relating to Epic. The University requested an open records ruling from the Attorney General pursuant to the PIA, Tex. Gov't Code § 552.301. The University also notified Epic, pursuant to Tex. Gov't Code § 552.305, of Epic's right to submit comments to the Attorney General explaining why any portion of the requested information pertaining to Epic should be withheld from public disclosure. Epic submitted comments to the Attorney General asserting portions of the requested information consisted of trade secret and commercial or financial information excepted from disclosure under Tex. Gov't Code § 552.110. The Attorney General issued Open Records Letter Ruling OR2015-09102

in response to the University's request. The ruling concluded, in relevant part, that the requested information pertaining to Epic was not excepted from required disclosure.

Epic disputed the ruling and filed a lawsuit, styled Cause No. D-1-GN-15-002042, Epic Systems Corporation v. Ken Paxton, Attorney General, State of Texas, and University of Texas M.D. Anderson Cancer Center, In the 126th District Court of Travis County, Texas (this lawsuit), to preserve its rights under the PIA. Epic provided notice of this lawsuit to the requestor as required by Tex. Gov't Code § 552.325(b). Tex. Gov't Code § 552.325(c) allows the parties to enter into a settlement under which the information at issue in this lawsuit may be withheld. The parties wish to resolve this matter without further litigation.

TERMS

For good and sufficient consideration, the receipt of which is acknowledged, the parties to this Agreement agree and stipulate that:

1. Epic has demonstrated that release of certain portions of the information at issue in this lawsuit would give advantage to a competitor or bidder. These portions of the information at issue are excepted from required public disclosure pursuant to Tex. Gov't Code § 552.104. By correspondence dated May 20, 2016, Epic provided the Attorney General with a marked copy of the responsive information, accurately indicating by yellow highlighting those portions of the requested information comprising the information excepted from disclosure under Tex. Gov't Code § 552.104 (hereinafter, the Excepted Information). The Attorney General and Epic agree the Excepted Information shall be withheld by the University pursuant to Tex. Gov't Code § 552.104. The information released by the University to the requestor shall be redacted consistent with this copy.

2. The University must withhold from the requestor the Excepted Information as described in Paragraph 1 of this Agreement and must release the remaining information to the requestor.

3. Epic, the Attorney General, and the University agree to the entry of an agreed final judgment, the form of which has been approved by each party's attorney. The agreed final judgment will be presented to the Court for approval, on the uncontested docket, with at least 21 days' prior notice to the requestor.

4. The Attorney General agrees to notify the requestor, as required by Tex. Gov't Code § 552.325(c), of the proposed settlement and of his right to intervene in this lawsuit, should he contest the withholding of the Excepted Information described in Paragraph 1 of this Agreement.

5. Should the requestor intervene in this lawsuit, a final judgment entered in this lawsuit will prevail over this Agreement, to the extent of any conflict.

6. Each party to this Agreement will bear its own costs, including attorneys' fees relating to this litigation.

7. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement.

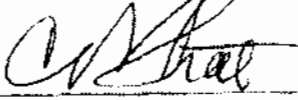
8. Epic warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims the parties have against each other arising out of the matters described in this Agreement.

9. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims the parties have against each other arising out of the matters described in this Agreement.

10. The University warrants that its undersigned representative is duly authorized to execute this Agreement on behalf of the University and its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims the parties have against each other arising out of the matters described in this Agreement.

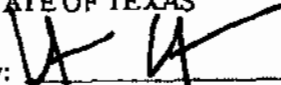
11. This Agreement shall become effective, and be deemed to have been executed, on the date upon which the last of the undersigned parties signs this Agreement.

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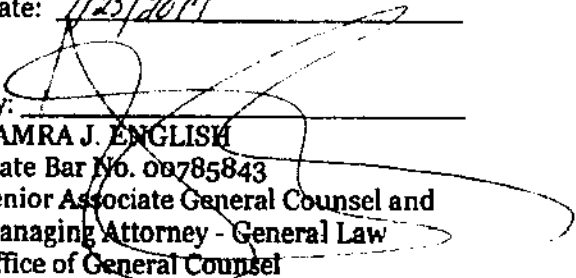
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