



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 15, 2007

Mr. Robert K. Eason, Jr.  
Assistant County Attorney  
Kendall County  
201 East San Antonio Street, Suite 101  
Boerne, Texas 78006-2050

OR2007-01967

Dear Mr. Eason:

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# 271448.

The Kendall County Clerk's Office (the "county") received a request for information pertaining to Election Systems & Software (ES&S). You do not take a position as to whether the submitted information is excepted under the Act; however, ES&S asserts that some of the submitted information is excepted under section 552.110 of the Government Code. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (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). We have considered the submitted arguments and reviewed the submitted information.

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." 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 that 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. RESTATEMENT OF TORTS § 757 cmt. b (1939). The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: (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. *Id.*; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that 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) 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." 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).

The submitted information consists of ES&S manuals and other records related to ES&S.<sup>1</sup> After reviewing the information at issue and the submitted arguments, we conclude that ES&S has established a *prima facie* case that the following records constitute trade secrets: Use of Direct Recording Electronic (DRE) and Central Accumulator System, Model 650 Election Day Checklist, ES&S Model 650 Central Ballot Scanner Operator's Manual, The iVotronic Voting System Operator's Manual (Version 8.0), The iVotronic Voting System Maintenance Manual (Version 8.0), Battery Primer, Election Reporting Manager Training Manual ("Unity Election Reporting Manager")(Version 2.4), and the User's Guide Version 6.4 ("Unity Election Reporting Manager"). Therefore, the county must withhold these records, which we have marked, under section 552.110(a). However, ES&S has failed to establish that any of the remaining information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. We also find that ES&S has made only conclusory allegations that release of any of the remaining information would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Thus, none of the remaining information may be withheld pursuant to section 552.110.

We note that some of the remaining materials include notice of copyright protection. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

To conclude, the county must withhold the information we have marked under section 552.110 of the Government Code. The county must release the remaining information to the

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<sup>1</sup> The submitted information includes the following documents: Coding and Candidate Information Forms; Invoices; Ballot Proof Sheets, 2006 November Election Schedule; Use of Direct Recording Electronic (DRE) and Central Accumulator System; Tips for a Secure Election Manual; ES&S Company Profile; ES&S Corporate Glossary; Model 650 Election Day Checklist; ES&S Model 650 Central Ballot Scanner Operator's Manual; The iVotronic Voting System Operator's Manual (Version 8.0); The iVotronic Voting System Maintenance Manual (Version 8.0); Battery Primer; Election Reporting Manager Training Manual ("Unity Election Reporting Manager")(Version 2.4); and the User's Guide Version 6.4 ("Unity Election Reporting Manager").

requestor, but any copyrighted information may only be released in accordance with copyright law.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

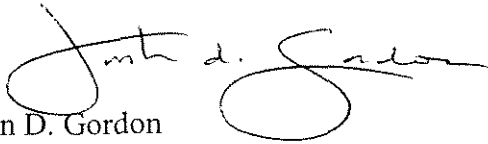
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Justin D. Gordon". The signature is fluid and cursive, with the first name "Justin" and last name "Gordon" clearly distinguishable.

Justin D. Gordon  
Assistant Attorney General  
Open Records Division

JDG/sdk

Ref: ID# 271448

Enc. Submitted documents

c: Ms. Bev Harris  
Black Box Voting, Inc.  
330 SW 43<sup>rd</sup> Street, Suite K  
PMB 547  
Renton, Washington 98057  
(w/o enclosures)

Mr. Timothy J. Hallett  
Election Systems & Software  
11209 John Galt Boulevard  
Omaha, Nebraska 68137  
(w/o enclosures)