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October 13, 2022

**VIA ELECTRONIC FILING**

Justin Gordon, Chief  
Open Records Division  
Office of the Attorney General  
ATTN: Open Records Division  
P.O. Box 12548  
Austin, TX 78711-2548

**Re: Public Information Request by George Chamberlain to the Secretary of State,  
dated September 7, 2022 (SOS PIR No. 22-0919)**

Dear Mr. Gordon:

We represent Hart InterCivic, a Texas-based voting system manufacturer and solution provider, in connection with the above-referenced matter. This letter constitutes Hart InterCivic's formal objection to the disclosure of confidential, proprietary, competitively sensitive, election security, and trade secret information by the Office of the Texas Secretary of State in response to the following request by George Chamberlain ("Requestor") pursuant to the Texas Public Information Act, Texas Government Code Chapter 552 (the "Act"):

1. I request all communications between the Texas Secretary of State's Office and any person acting in the capacity of an election official, clerk, or County Commissioner in any county in the state between the dates of May 1, 2022 and the present that discuss the terms "Cast Vote Record", "CVR", or "Mike Lindell"

2. I request all communications between the Texas Elections Office and any person acting in the capacity of an election official, clerk, or County Commissioner in any county in the state between the dates of May 1, 2022 and the present that discuss the terms "Cast Vote Record", "CVR", or "Mike Lindell"



3. I request all communications between the Texas Secretary of State's Office and any representative of the following companies: Dominion Voting Systems Corp, Election Systems & Software, Inc, Microvote General Group, Unisyn Voting Solutions, Smartmatic or Hart InterCivic, Inc. that discuss the terms "Cast Vote Record", "CVR", or "Mike Lindell"

4. Definition of "communications": All letters, emails, texts, faxes, and voice call recordings between the parties specified in 1-3.

A list of the Hart InterCivic documents identified by Secretary of State as responsive to this request (which were reviewed by Hart InterCivic for purposes of drafting this objection) and a description of Hart InterCivic's requested treatment of each document is attached as Exhibit A.

As set forth in detail below, the records identified as responsive to the request are excepted from disclosure under the Act because they (1) are related to critical infrastructure pertaining to election security and (2) contain Hart InterCivic's confidential, proprietary, and trade secret information. Hart InterCivic respectfully requests that the responsive documents identified as protectible in Exhibit A be excepted from public disclosure pursuant to sections 552.101 and 418.181 of the Government Code, 552.110(c), 552.1101(a), and 552.110(a)-(b).<sup>1</sup> See TEX. GOV'T. CODE § 552.001; § 552.101 (information considered to be confidential by law); § 552.110(c) (information that if released would give advantage to a competitor or bidder); § 552.1101(a) (information submitted to a governmental body in response to a request for bid or proposal); § 552.110(a)-(b) (trade secrets and confidential commercial and financial information); see also TEX. GOV'T. CODE § 418.181 (critical infrastructure information confidential by law).

**A. Sections 552.101 & 418.181: The Requested Documents Contain Election Security Information Which Is Confidential by Law**

By letter dated September 27, 2022, the Secretary of State objected to the disclosure of Hart InterCivic's documents based on the confidentiality provisions contained in Section 552.101 and Section 418.181 of the Texas Government Code. Hart InterCivic likewise asserts that the documents sought must be protected from disclosure pursuant to Section 552.101 and Section 418.181.

The Act excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE § 552.101. Section 552.101 incorporates information that is protected by other statutes. Section 418.181, a provision adopted

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<sup>1</sup> Notably, some of the withheld information may have been duplicated in other files provided by Secretary of State. Hart InterCivic requests that any duplicative information be withheld entirely consistent with the documents identified in Exhibit A.

by the Texas Legislature as part of the Texas Homeland Security Act, makes confidential certain information related to terrorism. Specifically, that provision provides that “[t]hose documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.” TEX. GOV’T CODE § 418.181. Further, the Government Code defines “critical infrastructure” as “includ[ing] all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation.” TEX. GOV’T CODE § 421.001(2).

The Attorney General has repeatedly determined that certain elections software information is critical infrastructure information that must be withheld from disclosure pursuant to Section 418.181 and Section 552.101. Tex. Att’y Gen. ORD No. 2021-23872 (2021) (protecting “information pertaining to election software”); *see also* Tex. Att’y Gen. ORD No. 2021-34130 (2021) (determining that Hart InterCivic’s election software operation manuals is critical infrastructure information that should be protected pursuant to Section 418.181 and Section 552.101); Tex. Att’y Gen. ORD No. 2022-15060 at 3 (protecting Hart InterCivic election software documents from disclosure under section 418.181 and section 552.101 because they “would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism”); Tex. Att’y Gen. ORD No. 2022-00263 (2022) (protecting Hart’s “election equipment manuals” from disclosure under section 418.181 and section 552.101).

In ORD 2021-23872, it was argued that certain “information pertaining to election software” related to the state’s election system and constituted critical infrastructure information under Section 418.181. *Id.* at 2. The disclosure of such information would “reveal technical details of the election system and allow unauthorized use of the election system.” *Id.* The Attorney General agreed with this analysis and determined that the “release of the information at issue would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.” *Id.* The information was thus protected from disclosure under Section 552.101 and Section 418.181. *Id.*

Here, like the materials previously protected by the above Attorney General opinions, Requestor seeks documents that contain sensitive technical information concerning a Hart InterCivic voting system that is widely used in Texas.<sup>2</sup> Specifically, the document responsive to the Request contains information about certain security enhancements to the Hart Verity system.<sup>3</sup> These documents contain extensive discussion of the hardware and software related to Hart Verity—including technical information on how the system’s security operates.<sup>4</sup> As is detailed in the accompanying declaration, Hart Verity machines are widely used across Texas and thus providing access to requested information could lead to security risks and the unauthorized use of the election system, including a denial of service attacks on the Texas election system, which could

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<sup>2</sup> *See Exhibit B* (Declaration of Peter Lichtenheld in support of Hart InterCivic’s Objection to Disclosure), ¶¶ 7-8; *see also* Ex. A.

<sup>3</sup> Ex. B at ¶ 7.

<sup>4</sup> *Id.* at ¶ 8.

delay an election and cause heavy financial losses for the jurisdiction conducting the election.<sup>5</sup> Moreover, as the declaration demonstrates, releasing the requested information may also unintentionally result in the dissemination of false information in this current ultra-politicized climate where words are taken out of context and misused by those seeking to undermine faith in our election infrastructure, systems, and professionals.<sup>6</sup>

The requested document, which contains election system security details, is exactly the type of material that Sections 418.181 and 552.101 were designed to protect. The disclosure of this information could create a risk of disrupting election infrastructure security by revealing and identifying “technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.” TEX. GOV’T CODE § 418.181; Tex. Att’y Gen. ORD No. 2021-23872 at 2; Tex. Att’y Gen. ORD No. 2021-34130 at 2; Tex. Att’y Gen. ORD No. 2022-15060 at 3; Tex. Att’y Gen. ORD No. 2022-00263 at 2. Thus, such information is confidential by law and must remain so to maintain election security and the requested materials must be protected from disclosure.

**B. Section 552.110(c): The Requested Documents Contain Hart InterCivic’s Protected Commercial and Financial Information**

The Act excepts from disclosure “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause a substantial competitive harm to the person from whom the information was obtained.” TEX. GOV’T CODE § 552.110(c); *see also* Tex. Att’y Gen. ORD No. 639 at 4 (1996). The party objecting to disclosure has the burden of showing specific factual evidence that it would likely suffer substantial competitive injury by public release of the information at issue. Tex. Att’y Gen. ORD No. 661 (1999); Tex. Att’y Gen. ORD No. 02545, at 4 (2010) (objecting party need only show that substantial competitive injury would likely result from release). As explained herein, Hart InterCivic will suffer substantial competitive harm if the information sought is made publicly available and thus accessible to its competitors.<sup>7</sup>

The Attorney General has addressed what constitutes likely substantial competitive harm in Open Records Decision Number 669. Tex. Att’y Gen. ORD No. 669 (2000) (protecting information from disclosure based on Section 522.110(c)’s predecessor). In that case, a company argued that it operated in a small market, with only two primary competitors in Texas, and that the data requested gave the company an advantage over those two competitors. *Id.* at 5. The public release of such data would allow the competitors to create, enhance, and market their own products to the detriment of the company. *Id.* The Attorney General ultimately protected the information from public disclosure to prevent substantial competitive harm to the company. *Id.*

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<sup>5</sup> *Id.* at ¶ 10.

<sup>6</sup> *Id.* at ¶¶ 10, 21.

<sup>7</sup> Whether a competitor submitted the request for records at issue is not relevant to this analysis, as any information not excepted from disclosure under the Act would be deemed public and made available to any subsequent requestors, including Hart InterCivic’s competitors.

In the present scenario, the disclosure of Hart InterCivic's election software information, which includes materials that provide instructions and best practices for customers, would cause substantial competitive harm to Hart InterCivic.<sup>8</sup> The requested document—for which a detailed description is provided in the attached declaration (*see Exhibit B*)—are akin to operational guides for the Hart InterCivic's voting systems, containing extensive discussions of Hart Verity hardware and software, including security processes of Hart Verity machines and systems.<sup>9</sup>

The release of this information could jeopardize Hart InterCivic's customer relationships.<sup>10</sup> Moreover, like the business in Open Records Decision Number 669, Hart InterCivic operates in a small and fiercely competitive industry. Indeed, Hart InterCivic is one of the top three voting system providers in the United States—and one of only *two* certified voting system providers approved in Texas.<sup>11</sup> If the Attorney General were to release Hart InterCivic's confidential and sensitive election software information, its competitors could access this information and use it for public relations harm to Hart InterCivic and/or to create, enhance, and market their own products to Hart's InterCivic's detriment.<sup>12</sup>

Hart InterCivic has demonstrated that its competitors would benefit from and cause a substantial competitive injury to Hart InterCivic if its confidential and sensitive commercial and financial information were to be made publicly available. Hart InterCivic has met its burden of showing specific factual evidence that it would likely suffer substantial competitive injury by release of the information at issue. Tex. Att'y Gen. ORD No. 661 (1999); Tex. Att'y Gen. ORD No. 02545, at 4 (2010) (objecting party need only show that substantial competitive injury would likely result from release). The requested material should be protected from disclosure.

**C. Section 552.1101(a): The Requested Document Contains Hart InterCivic's Proprietary Information**

The information identified in the requested documents is also protected from disclosure because it contains Hart InterCivic's proprietary information, disclosure of which would advantage Hart InterCivic's competitors. The Act excepts from disclosure "information submitted to a governmental body by a [contractor] in response to a request for a bid, proposal, or qualification." TEX. GOV'T CODE § 552.1101(a). Specifically, this includes information that would:

- (1) reveal an individual approach to:
  - (A) work;
  - (B) organizational structure;

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<sup>8</sup> *Id.* at ¶¶ 3, 7-8.

<sup>9</sup> *Id.* at ¶¶ 8-9.

<sup>10</sup> *Id.* at ¶¶ 9-10.

<sup>11</sup> *Id.* at ¶¶ 4-5.

<sup>12</sup> *Id.* at ¶ 10.



- (C) staffing;
  - (D) internal operations;
  - (E) processes; or
  - (F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and
- (2) give advantage to a competitor.

*Id.*; see generally Tex. Att’y Gen. ORD. NO. 669 at 5.

The information sought reveals Hart InterCivic’s individual approach to the work and its processes, protected categories of information under Section 552.1101(a). The requested document, which contains information detailing how the Hart Verity machines function, are akin to operational guides for Hart InterCivic’s voting systems. As is demonstrated in the accompanying declaration (*see Exhibit B*), the document contains discussions of Hart Verity hardware and software operations, including details on how the security system operates and impacts the system.<sup>13</sup> As a result, such materials contain technical proprietary information that would reveal Hart InterCivic’s individual approach to its work and processes if publicly disclosed.<sup>14</sup> Indeed, the requested documents were designated “Confidential and Proprietary” from the outset.<sup>15</sup> Given the attention that election security has received in recent years, Hart InterCivic anticipates that Texas jurisdictions will require Hart InterCivic and its competitors to submit the same or similar technical security information at issue in this request during future bid processes. Indeed, certain jurisdiction already require more technical security information be disclosed in the bid process.<sup>16</sup>

Moreover, Hart Verity is widely used throughout Texas, and Hart InterCivic anticipates that its use in Texas will continue to grow. For example, there are 147 jurisdictions in Texas that use Hart voting solutions today, and nearly 30 percent are using Hart’s legacy voting systems, not Verity. Hart InterCivic anticipates that it will be bidding to win both new deals to upgrade those systems and also takeaways from our competition in the next one to two years.<sup>17</sup> That is, Hart InterCivic fully intends to bid in the future in counties seeking to upgrade their legacy Hart voting system or seeking to acquire new machines altogether. As noted in *Exhibit B*, Hart InterCivic is one of only two voting system providers certified by the Texas Secretary of State, meaning it is one of only two providers positioned to bid whenever Texas governmental bodies solicit bid for voting systems and related services.<sup>18</sup> The release of the requested information would put Hart

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<sup>13</sup> *Id.* at ¶ 8-9.

<sup>14</sup> *Id.* at ¶¶ 7-8.; see generally, Ex. A.

<sup>15</sup> *Id.* at ¶ 7.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at ¶ 6.

<sup>18</sup> Ex. B at ¶ 5

InterCivic at a competitive disadvantage in these bids by exposing information detailing how Hart Verity's security system operates. Such exposure would make Hart Verity's security system more vulnerable to attack and thus less competitive.

Thus, Hart InterCivic requests that the requested information be protected as containing confidential and proprietary information that would reveal Hart InterCivic's individual approach to its work and processes to its market competitors.

**D. Section 552.110(a)-(b): The Requested Documents Contain Hart InterCivic's Trade Secret and Confidential Information**

The records should be protected for the separate reason that they contain trade secrets and confidential information. Section 552.110(a)-(b) of the Act protects trade secrets 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, 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, 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, the Attorney General considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>19</sup> RESTATEMENT OF TORTS § 757 cmt. b. The Attorney General must accept

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<sup>19</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 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;



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* Tex. Att’y Gen. ORD No. 552 at 5 (1990).

The materials sought by Requestor provide a blueprint of technical details for the operation of Hart InterCivic’s voting systems.<sup>20</sup> Such information is extremely valuable, as it describes how the system works, including detailed instructions on how the security system protecting the voting system operates and other technical proprietary information.<sup>21</sup> As is further detailed in the accompanying declaration (*see Exhibit A*), information concerning the Hart Verity security system (including its operation, setup, etc.) is closely guarded and not widely available.<sup>22</sup>

Absent improper disclosure, the information contained in these records could not be ascertained or duplicated and could not be properly acquired by competitors or others who could obtain economic value from its use or disclosure.<sup>23</sup> Because the documents requested contain trade secret information regarding Hart InterCivic’s voting systems, disclosure of the requested documents would irreparably damage Hart InterCivic and its competitive position in the marketplace. The documents should thus be protected.

#### **E. Other Considerations for Protecting Confidential Information**

Disclosure of Hart InterCivic’s trade secret information would likely discourage Hart InterCivic, and others like it, from sharing sensitive information with governmental agencies.<sup>24</sup> It could also potentially have a chilling effect on innovation in the voting system market, as companies might decide that the effort and risk of innovation would produce negligible return because competitors need only wait and receive a detailed plan in response to a public information request.<sup>25</sup> Releasing information may also unintentionally result in the dissemination of false information—a serious problem following the 2020 election.<sup>26</sup>

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(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* Tex. Att’y Gen. ORD No. 319 at 2 (1982), No. 306 at 2 (1982), and No. 255 at 2 (1980).

<sup>20</sup> Ex. B at ¶¶ 7- 10.

<sup>21</sup> *Id.*; *see, e.g.*, Ex. A.

<sup>22</sup> Ex. B ¶¶ 8, 11-18.

<sup>23</sup> *Id.* at ¶ 18.

<sup>24</sup> *Id.* at ¶ 19.

<sup>25</sup> *Id.* at ¶ 20

<sup>26</sup> *Id.* at ¶ 21.



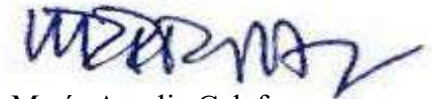


As the Attorney General has repeatedly acknowledged in prior rulings Hart InterCivic has a protected property interest in the highly proprietary, trade secret, and competitively sensitive information contained in the documentation requested here. *See* Tex. Att’y Gen. ORD No. 2021-23872; *see also* Tex. Att’y Gen. ORD No. 2018-20296; Tex. Att’y Gen. ORD No. 2021-34130. Thus, Hart InterCivic maintains that the requested information should be protected from production pursuant to Sections 552.110(c), 552.1101(a) and 552.110(a)-(b) of the Act. Additionally, these documents contain certain election system information that is confidential and must be protected pursuant to Sections 552.101 and 418.181 to prevent the risk of disrupting election security by identifying technical security details related to the Hart InterCivic voting systems. *See* Tex. Att’y Gen. ORD No. 2022-15060. For all the reasons set forth above, Hart InterCivic respectfully requests that the responsive documents identified in Exhibit A (and all duplicates thereof) be protected from public disclosure.

Please contact me if you have any questions or require any clarification on the scope of information Hart InterCivic seeks to protect. You may reach me at [mac@wittliffcutter.com](mailto:mac@wittliffcutter.com).

Sincerely,

WITTLIFF | CUTTER PLLC



María Amelia Calaf

cc:

w/o Enclosures

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