



September 5, 2001

Ms. Sarajane Milligan
Assistant County Attorney
County of Harris
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR2001-3946

Dear Ms. Milligan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151527.

The Harris County Purchasing Agent (the "county") received several requests for all proposals submitted in response to the county's Job #01/0092.¹ Although the county has taken no position as to the release of the requested information, you advise this office that the requested information may involve the proprietary interests of Global, ES&S, Hart, and Sequoia Voting Systems, Inc. ("SVS"), and, therefore, the county is asking this office for a decision under section 552.305(a) of the Government Code.² You have submitted a copies of letters notifying Global, ES&S, Hart, and SVS of the request for information pursuant to section 552.305(d) of the Government Code. We have considered the arguments of Global, ES&S, Hart, and SVS, and reviewed the submitted information.

We must first address a procedural matter. Among other requirements, the county was required to submit to this office copies of the specific information requested, or representative samples if the information is voluminous, not later than the fifteenth business day after the date of receiving the written request. *See Gov't Code § 552.301(e)(1)(D).*

¹The four requestors, Unisys Corporation ("Unisys"), Global Election Systems ("Global"), Elections Systems and Software, Inc. ("ES&S"), and Hart Intercivic ("Hart"), all seek either access to or copies of all proposals submitted for the enumerated county job number.

²*See Gov't Code § 552.305(b)* (permitting interested third party to submit to attorney general reasons why requested information should not be released); *Open Records Decision No. 542 (1990)* (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

In its arguments supporting exceptions to disclosure, SVS refers to several items of information which, as of the date of this decision, are not found among the materials that the county has submitted to this office for review.³ We are unable to ascertain whether this information was submitted to the county by SVS as part of its proposal. This decision does not address information that the county did not possess when it received the requests because such information is not responsive to the requests. However, to the extent that the county possesses information described by SVS that was not submitted to this office for review, the county failed to comply with section 552.301(e)(1)(D) with regard to such information, and we therefore have no basis upon which to conclude that such information is excepted from disclosure. Any such information must therefore be released to the requestor. *See* Gov't Code §§ 552.301(e)(1)(D), .302.

In addition, we note that some of the information submitted to this office for review appears to be copyrighted. 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).

Global, ES&S, Hart, and SVS have submitted briefs claiming that their respective proposal information is excepted by section 552.110 of the Government Code. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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.

As to section 552.110(a), a "trade secret:"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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,

³The items we did not find among the submitted SVS information are as follows: 12) Sequoia Pacific Systems Engineering Change Order Policies and Procedures; 13) Sequoia Pacific Systems Hardware Document Control, Version 1.00; 14) Ballot Counter System Maintenance Manual, Version 1.00; 15) Approved Parts List for Sequoia 400-C; 16) Sequoia 400-C Ballot Counter System Quality Assurance Test and Inspection Procedures, Version 1.00; 17) Sequoia Pacific Systems Quality Assurance Policies and Procedures, Version 1.00; 18) Sequoia 400-C Ballot Counter Software Specifications, Version 1.00; and 20) Sequoia 400-C Vendors List.

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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 No. 232 (1979). 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. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983).

Although Hart makes generalized assertions regarding the six trade secret factors, Hart fails to demonstrate how its proposal information meets the definition of a trade secret, and we therefore conclude that none of the Hart proposal information may be withheld from public disclosure under section 552.110(a). Similarly, with the exception of its customer lists, Global makes assertions using the six trade secret factors, but fails to discuss how most of its proposal information meets the *Restatement* definition of a trade secret. ES&S, and SVS, however, by demonstrating continuous use of portions of their proposal information and providing specific representations regarding the trade secret factors, have made a *prima facie* case that some of the information in their proposals constitutes trade secrets. Accordingly, we have marked the information in the Global, ES&S, and SVS information that the county must withhold under section 552.110(a).

Section 552.110(b) requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999).⁴ Although Global, ES&S, and SVS claim exception for portions of their information under section 552.110(b), only ES&S and SVS demonstrate by specific factual and evidentiary arguments that substantial competitive injury would result from disclosure of portions of their respective bid proposal information. Accordingly, we have marked those portions of the proposal information of ES&S and SVS that the county must withhold from public disclosure under section 552.110(b).

In summary, to the extent that the county possesses responsive proposal information that was not submitted to this office for review, the county must release such information. We have marked portions of the submitted Global, ES&S, and SVS proposal information that must be withheld from disclosure under sections 552.110(a) and (b). The remaining information must be released to the respective requestors. To the extent this information is copyrighted, it must be made available to the requestors, but the county must comply with the copyright law and is not required to furnish copies of information that is copyrighted.

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

⁴Hart makes no claim of exception from public disclosure under section 552.110(b).

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).

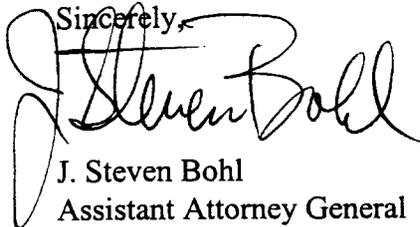
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public 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 General Services Commission 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,



J. Steven Bohl
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Open Records Division

JSB/sdk

Ref: ID# 151527

Enc: Marked documents

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