



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 16, 2005

Ms. Sheri Bryce Dye
Assistant Criminal District Attorney
Bexar County Criminal District Attorney's Office
300 Dolorosa, Fifth Floor
San Antonio, Texas 78205-3030

OR2005-07393

Dear Ms. Dye:

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# 230276.

The Bexar County Elections Office (the "county") received a request for six categories of information related to the San Antonio city council election held on May 7, 2005 for District 7. You inform us that the county does not maintain some of the requested information.¹ You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. You also state that some of the submitted information may implicate the proprietary interests of Election Systems & Software, Inc. ("ES&S"). You inform us that you notified ES&S of the request and of its 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 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received correspondence from ES&S and have reviewed the company's arguments. We have also considered the exception you claim and reviewed the submitted information.

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request for information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Initially, we address ES&S's assertion that the Act does not apply to the ballot programming source code. This office has determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Open Records Decision No. 581 at 6 (1990) (construing predecessor statute). You state that the submitted "computer programming code pertains to the embedded hardware code for the voting system[.]" Having considered this representation and reviewed the submitted records, we find that, like the computer-related information at issue in Open Records Decision Number 581, the information at issue here functions solely as a tool to maintain, manipulate, or protect public property and has no independent relevance. *Id.* As such, this type of information is not public information as defined by section 552.002 of the Government Code, and, therefore, is not subject to the Act. We have marked this information that need not be released in response to this request.

Next, we note that, in response to a public information request dated May 10, 2005, the county has already released some information related to this election. To the extent the county has already released to the public any of the information at issue here, it may not now withhold such information. *See* Gov't Code § 552.007. Thus, to the extent the county has already released any portion of the submitted information to the public, it must now release the same information to the requestors here. To the extent the county has not previously released the submitted information, such information is subject to this ruling as provided below.

You claim that the submitted information is excepted from required public disclosure in its entirety under section 552.103 of the Government Code. This section provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The county has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular

situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the county received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The county must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that, if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

In this instance, you inform us that the submitted information relates to a Petition for Election Contest filed in the 150th Judicial District in Bexar County on behalf of the requestors’ client. You claim that the county reasonably anticipates litigation because the “[c]ontestant suggests that some votes may have been lost, the ballot programming of ES&S may have malfunctioned, and that the functions of the [county’s] equipment may not have been satisfactory.” Although the Petition for Election Contest was dismissed by the district court, you argue that the county anticipates the contestant is seeking an appeal. However, you also inform us that the county was not a party to this litigation. Upon review of your arguments, we find that you have not adequately explained how the county reasonably anticipates litigation upon possible appeal of a case to which it was not a party. We therefore conclude that the county has not met its burden of demonstrating that it reasonably anticipated litigation for purposes of section 552.103, and none of the submitted information may therefore be withheld on this basis.

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

We next address ES&S's arguments regarding section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "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." *See* Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a "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 a single or ephemeral event 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 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private party's claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.³ *See* Open Records Decision No. 552 at 5 (1990). The private party must provide information that is sufficient

³The 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See* Open Records Decision No. 402 at 3 (1983). 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 information at issue. *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).

After reviewing ES&S's arguments and the submitted information pertaining to the company, we agree that ES&S has presented a *prima facie* claim that some of its customer references and some information related to product functionality and implementation qualify as trade secrets under section 552.110(a). We have received no arguments that rebut the company's trade secret claims as a matter of law. We therefore conclude that the county must withhold this information, which we have marked, pursuant to section 552.110(a). However, we note that pricing information pertaining to a particular contract or project 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 (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Thus, we find that ES&S's pricing information does not qualify as a trade secret under section 552.110(a). We also note that the pricing information of a winning bidder such as ES&S is generally not protected by section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Gov't Code § 552.022(a)(3) (information in contract relating to receipt or expenditure of public or other funds generally not excepted from disclosure); Open Records Decision Nos. 514 at 5 (1988) (general terms of governmental body's contracts may not properly be withheld under Act), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing); *see generally* Freedom of Information Act Guide & Privacy Act Overview at 219 (2000) (citing federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is cost of doing business with government). As such, we conclude that ES&S's pricing information may not be withheld under section 552.110. We also find that the company has not established by specific factual evidence that any of the remaining submitted information is excepted from disclosure as either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also, e.g.,* Open Records Decision No. 661 (1999). As such, we conclude that none of the remaining submitted information pertaining to ES&S may be withheld under either section 552.110(a) or section 552.110(b).

We note, however, that some of the remaining submitted information is subject to section 552.136 of the Government Code. This section states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The county must, therefore, withhold the insurance policy and account numbers that we have marked pursuant to section 552.136.

In summary, the county need not release the ballot programming source code that is not subject to the Act. The remaining submitted information must be released to the requestors to the extent the county has already released such information to the public. To the extent the remaining submitted information has not previously been released to the public, the county must (1) withhold the information we have marked pursuant to sections 552.110(a) and 552.136 of the Government Code; and (2) release the remaining submitted information to the requestors.

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); *Tex. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



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Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 230276

Enc. Submitted documents

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