



January 23, 2002

Ms. Kristi LaRoe  
Assistant District Attorney  
County of Tarrant  
401 West Belknap  
Fort Worth, Texas 76196-0201

OR2002-0336

Dear Ms. LaRoe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157658.

The Tarrant County Purchasing Department (the “county”) received a request for copies of all proposals submitted to the county in response to RFP #2001-108, with the exception of the requestor’s proposal. You state that you have released some of the responsive information. However, you indicate that the release of other portions of the request may implicate third parties’ proprietary rights. Although you raise no exception to disclosure of this information on behalf of the county, you have notified the interested third parties—UniLect Corporation (“UniLect”), Hart InterCivic, Inc. (“Hart”), and Global Election System (“Global”)—pursuant to section 552.305 of the Government Code. *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 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).

As of the date of this letter, neither UniLect nor Global has submitted to this office its reasons explaining why the requested information should not be released. Consequently, UniLect and Global have provided this office with no basis to conclude that their responsive information is excepted from disclosure. *See* Gov’t Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision

Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Accordingly, we find that you must release the proposals of UniLect and Global to the requestor.

On the other hand, Hart timely submitted arguments to this office contending that portions of its proposal are excepted from disclosure under sections 552.104 and 552.110 of the Government Code. The purpose of section 552.104 of the Government Code is to protect a governmental body's interests in competitive bidding situations. Open Records Decision No. 592 (1991). Thus, section 552.104 protects the interests of governmental bodies, not third parties. *Id.* Because the county does not raise section 552.104, this section is not applicable to Hart's proposal. *Id.* (Gov't Code § 552.104 may be waived by governmental body).

Section 552.110 of the Government Code protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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. With respect to the trade secret prong of section 552.110, 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.), *cert. denied*, 358 U.S. 898 (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). 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).<sup>1</sup> 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).

On the other hand, the commercial and financial information prong of section 552.110 requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999).

Hart contends that its "eSlate Audit Log & Cast Vote Record," "Detailed System Purchase/Cost Information," and operations and training manuals are confidential under both subsection (a) and (b) of section 552.110. In addition, Hart indicates that a Harris County district court recently found that documents "essentially identical" to those at issue here were confidential and exempt from disclosure. The trial court entered a judgment in that case restraining Harris County from releasing certain documents provided to Harris County by Hart in response to another request for a bid for an electronic voting system. Based on Hart's arguments, we agree that the "eSlate Audit Log & Cast Vote Record" as well as the operations and training manuals are trade secrets and must be withheld under section 552.110(a). Furthermore, we find that Hart has demonstrated that the release of most of its "Detailed System Purchase/Cost Information" would cause it substantial competitive injury. However, we find that Hart has not adequately demonstrated that the total purchase price in its "Detailed System Purchase/Cost Information" consists of either a trade secret or commercial or financial information the release of which would result in substantial competitive injury. *See* Open Records Decision Nos. 509 at 5 (1988) (stating that 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 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted

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<sup>1</sup>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.

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).

under section 552.110 and that pricing proposals are entitled to protection only during bid submission process), 184 (1978); *cf.* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). Therefore, we find that while the county must withhold Hart's "eSlate Audit Log & Cast Vote Record," its operations and training manuals, and most of its "Detailed System Purchase/Cost Information" under section 552.110(a) and (b), the county must release the total purchase price as well as the remainder of Hart's proposal. We have marked the information that must be withheld under section 552.110.

We also note that Hart's proposal information contains several e-mail addresses that are excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]." Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, the county must withhold the e-mail addresses in the submitted information that we have marked under section 552.137.

With respect to the proposal information of Hart, UniLect, and Global that must be released, we note that some of the information appears to be protected by copyright. To the extent the information required to be released is protected by copyright, the county must comply with the copyright law and is not required to furnish copies of the copyrighted information to the requestor. Rather, the county must only allow the requestor to inspect the copyrighted information. Attorney General Opinion JM-672 at 2-3 (1987); *see* Gov't Code § 552.027(c). If the requestor wishes to make copies of copyrighted information, the person must do so unassisted by the county. In making copies, the requestor assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the county must withhold portions of Hart's proposal, which we have marked, under section 552.110(a) and (b) of the Government Code. The county must also withhold certain e-mail addresses, which we have marked, under section 552.137 of the Government Code. The county must release the remainder of the submitted information to the requestor, but must comply with the copyright law in so doing.

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).

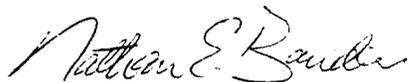
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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. 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,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 157658

Enc: Submitted documents

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