



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 21, 2005

Ms. Julie Joe  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767

OR2005-02379

Dear Ms. Joe:

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# 220404.

The Travis County Clerk's Office (the "county clerk") received a request for "copies of all contracts, leases, and licensing agreements for all hardware and software used in voting, counting votes, tabulating votes, reporting votes, and reporting vote counts or totals for the 2004 [g]eneral [e]lection; and otherwise all contracts, leases and licensing agreements for all hardware and software used in any aspect of the voting and election processes for the 2004 [g]eneral [e]lection." You state that the county clerk has released some of the requested information. You claim that portions of the requested information are excepted from disclosure under sections 552.137 and 552.139 of the Government Code. You further claim that release of portions of the requested information may implicate the proprietary interests of third parties, although you take no position as to whether the information is so excepted. In accordance with section 552.305 of the Government Code, you state that you notified Hart InterCivic ("Hart") and Easy Access, Inc. ("Easy Access") of the request for information and of their right to submit arguments to this office as to why their information should not be released to the public. *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 to disclosure in certain circumstances). We have received arguments from Easy

Access. We have considered the exceptions you claim and Easy Access's arguments and reviewed the submitted information.

Initially, we note and you acknowledge that the county clerk has not complied with the procedural requirements of section 552.301 of the Governmental Code in requesting this ruling. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because third party interests and the application of sections 552.137 and 552.139 can provide compelling reasons for overcoming the presumption of openness, we consider whether any of the submitted information must be withheld under these sections or to protect the interests of the third parties.

Next, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Hart has not submitted to this office its reasons explaining why its information should not be released. Therefore, Hart has provided us no basis to conclude that its information is excepted from disclosure. *See, e.g.*, 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 conclude that the county clerk may not withhold any portion of the requested information pertaining to Hart on the basis of any proprietary interest that Hart may have in the information.

You argue, however, that e-mail addresses contained in information pertaining to Hart are confidential under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). Therefore, in accordance with section

552.137, the county clerk must withhold the e-mail addresses we have marked unless the county clerk receives consent to release them.

You also argue that a portion of the submitted information, which you have marked, is excepted from disclosure under section 552.139 of the Government Code.<sup>1</sup> This section provides in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139. Upon review of the submitted information at issue, we determine that you have not demonstrated that any of this information relates to computer network security or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Furthermore, you have not demonstrated that the information at issue consists of a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, the submitted information at issue is not excepted from disclosure under section 552.139.<sup>2</sup>

We now address Easy Access's arguments. Initially, Easy Access argues that portions of the submitted information are not responsive to the instant request. Specifically, Easy Access explains, and the submitted information reflects, that the submitted contract and its attachments pertain to two different software solution products provided by Easy Access to

---

<sup>1</sup>We note that we have received and reviewed the additional responsive information and arguments that you submitted to this office on March 8, 2005.

<sup>2</sup>We note that, although you state that you have submitted information reflecting a communication with Travis County's Information Security Officer regarding this information, we find no such submitted communication.

Travis County.<sup>3</sup> As such, Easy Access argues that only those portions of the submitted contract and its attachments that pertain to voter registration and election management services are responsive to the request, and that the portions of the contract and its attachments that pertain to Easy Access's contract for property tax billing and collection services are not responsive. The Act requires a governmental body to release only information that it believes to be responsive to a request. However, in determining whether information is responsive, a governmental body has a duty to make a good faith effort to relate the request to information that it holds. Open Records Decision No. 590 at 1 n. 1 (1991). In this instance, the county clerk has submitted Attachments B, C, D, E, F, and G of the contract as responsive to the request.<sup>4</sup> We note that these submitted attachments, like the contract, pertain to both the property tax billing and collection services and the voter registration and election management services. Whether all of the submitted information, including those portions that pertain to the property tax billing and collection services, is responsive to the instant request is a question of fact. This office cannot resolve disputes of fact in its decisional process. See Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. See Open Records Decision No. 552 at 4 (1990). Accordingly, we must accept the county clerk's representation that the information submitted to this office is responsive to the request for information.

We next address Easy Access's argument that it submitted the requested information to the county clerk with the expectation that certain portions would remain confidential. Information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. See Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the submitted information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Easy Access argues that portions of its information are excepted from disclosure under section 552.110 of the Government Code. This section protects: (1) trade secrets, and (2)

---

<sup>3</sup>The county clerk indicates that the contract document itself has been released. The county clerk has provided us with the contract for informational purposes only.

<sup>4</sup>The county clerk states that it has also released Attachments A, H, and I to the requestor.

commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b).

Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 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, 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.), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 552 at 2 (1990), 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 Nos. 319 (1982), 306 (1982), 255 (1980), 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).

Section 552.110(b) protects “[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[.]” Gov’t Code § 552.110(b). This exception to disclosure 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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Assn v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having reviewed the submitted brief, we conclude that Easy Access has failed to establish a *prima facie* case for the trade secret exception under section 552.110(a). Additionally, we find that Easy Access has made only conclusory allegations that release of the information at issue would cause it substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations for purposes of section 552.110(b). *See* Open Records Decision Nos. 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) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor); *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if 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”). Further, we note that the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices

in government contract awards. *See* Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). Thus, none of the information at issue may be withheld pursuant to section 552.110.

Lastly, we note that some of the submitted information appears to be protected by copyright. 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).

In summary, the county clerk must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released. In doing so, however, the information must be released in accordance with applicable copyright laws for any information protected by copyright.

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).

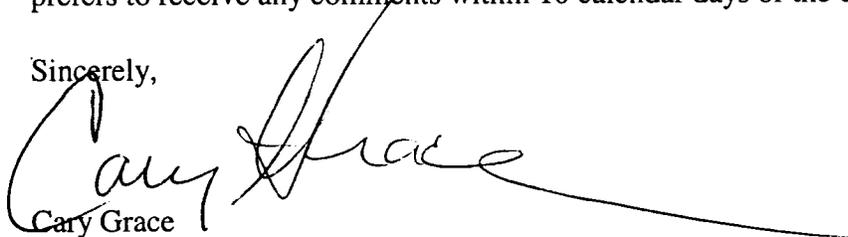
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/jev

Ref: ID# 220404

Enc. Submitted documents

c: Mr. David Van Os  
David Van Os & Associates P.C.  
1530 North Alamo Street  
San Antonio, Texas 78215  
(w/o enclosures)

Mr. William C. Hamer, CEO  
Easy Access, Inc.  
4200-A North Bicentennial Drive  
McAllen, Texas 78504  
(w/o enclosures)

Mr. Scott Flom, Vice President  
EVoting Operations  
Hart InterCivic  
P.O. Box 80649  
Austin, Texas 78708  
(w/o enclosures)