



June 21, 2005

VIA FACSIMILE: (512) 463-2092
AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Attorney General Greg Abbott
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Dear Attorney General Abbott:

On June 9, 2005, Election Systems & Software, Inc. ("ES&S") received a letter from the Bexar County Criminal District Attorney (the "DA") notifying ES&S that she had received a request under the Texas Public Information Act (the "Act") from Ms. Melissa Castro and Mr. Rolando Rios to inspect or copy some of Bexar County's files with respect to the May 7, 2005 City of San Antonio City Council Election for District 7. Specifically, the request asks for the following information:

- The election results for each precinct and each race with the results separated by early voting, Election Day voting, absentee voting, and provisional voting. In each case and for each precinct, they requested records showing the number of votes for each candidate, the number of undervotes, and the number of overvotes.
- The training materials given to poll workers explaining the applicable procedure.
- Copies of the poll tapes from each machine used in early voting in District 7. If they were not printed at the end of early voting, they request copies of the early-voting poll tapes to be printed and provided.
- The May 7 election audit log for the central tabulator.
- Copies of all records related to the ballot programming for the May 7 election, including but not limited to: purchase orders, contracts, invoices from ES&S memos, and emails.
- Copies of all problem reports such as problem logs and trouble tickets, related to the May 7 election.

On the same day, ES&S also received a copy of a letter from the DA to the Texas Attorney General requesting an opinion as to whether or not Texas law requires Bexar County to release the documents. The DA requested an opinion from the Texas Attorney General's Office that Bexar County not be required to disclose the information requested pursuant to Section 552.103(a) of the Government Code which provides that 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 state or a political subdivision, as a consequence of the person's office or employment, is or may be a party" is not subject to disclosure. The DA also advised ES&S that it could submit a briefing to this address for the purpose of

demonstrating that information requested was exempt from public disclosure under the Act. Please consider this letter ES&S' briefing with respect to this matter.

ES&S agrees with the DA's office that all the information requested should be excepted from disclosure pursuant to Section 552.103(a) of the Government Code. Additionally, ES&S considers specific items outlined in Ms. Castro and Mr. Rios' request, as well as information provided by Bexar County, to constitute "trade secrets" and "commercial or financial information" that are exempt from public disclosure under the Act. These items are discussed below.

Trade Secret Exception

Pricing

The *Cost Considerations and DRE Voting Equipment Voter Activated* Sections of ES&S' proposal submitted to Bexar on or around July 13, 2001, Solicitation No: 2001-74 ("Proposal") as well as all invoices should be protected from disclosure under § 552.110(a) of the Act. These Sections provide that "a trade secret obtained from a person and privileged or confidential by statute or judicial decision" may be excepted from required public disclosure.

The Texas Supreme Court has adopted its definition of "trade secret" from the Restatement of Torts, §757 (1939) (the "Restatement"), which provides that a "trade secret" is "any . . . 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." The Restatement further states that a trade secret may "relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or their concessions in a price list." The Restatement lists six factors to be considered in determining whether particular information constitutes a "trade secret." In addition to falling within the given definition provided in the Restatement, the Pricing meets these six factors as follows:

- 1) EXTENT TO WHICH THE INFORMATION IS KNOWN OUTSIDE OF THE COMPANY'S BUSINESS. Some competitors may be able to make a rough estimate of the price ES&S proposed to Bexar County in the Proposal for ES&S' proprietary election system. In addition, third-party software and hardware is often priced in ES&S' bids at cost (which is readily available even to those outside of ES&S' industry). However, the Pricing provided to Bexar County and requested by Ms. Castro and Mr. Rios does **not** reflect this simplistic pricing estimate. The Pricing reflects ES&S' proprietary and confidential trade secrets because it a) outlines the products and services ES&S recommends for Bexar County, b) reflects discounts that ES&S is able to provide, c) includes the various pricing options ES&S is able to offer, and d) incorporates the level of services ES&S presented to Bexar County.

This information would be vital to those competing against ES&S in upcoming bids for counties within and outside of Texas. A perceptive competitor would be able to glean valuable information as to ES&S' thought processes and

methodologies in price structuring that would be detrimental to ES&S' ability to remain competitive. ES&S has a company policy, which is strictly enforced, of refusing to furnish **any** pricing information (let alone unbundled pricing details of this nature) to anyone outside of the company or the particular customer being offered the pricing. Existing customers, potential customers, subcontractors, industry analysts, etc. are not privy to such details of ES&S' business. During the bidding process, total price information may become available, but details are never disclosed unless absolutely required.

- 2) EXTENT TO WHICH THE INFORMATION IS KNOWN BY EMPLOYEES AND OTHERS INVOLVED IN THE COMPANY'S BUSINESS. The Sales Executive for the region prepares the pricing which is approved by the "Management Team" (members of management from the Sales and Finance departments). Therefore, ES&S' Proposal Center (which is responsible for preparing and submitting proposals in response to RFPs), Sales, and Finance are the only departments with access to ES&S' pricing methodology, and even their access is restricted to only the bids for which they have responsibility. When hired, these employees sign a non-disclosure agreement with the company. The Pricing reflects the departments' efforts to take ES&S' standard pricing model and inject numerous assumptions, pricing variables, software options, customization, service levels and other proprietary and confidential market and pricing strategies. Considering that pricing is one of the most competitive elements of a bid, nothing could be more sensitive than ES&S' proprietary and confidential pricing strategies, margins, costs, discounting methods and other accounting assumptions which could be deduced from access to the Pricing. *See generally Stewart & Stevenson Servs., Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89 (Tex. Ct. App. 1994) (affirming a jury finding that a bidding process can be a trade secret).
- 3) EXTENT OF MEASURES TAKEN BY THE COMPANY TO GUARD THE SECRECY OF THE INFORMATION. ES&S does not have a standard pricing list that is distributed to the public. Since ES&S is a privately held company, pricing, margins, costs and other accounting information is rarely disclosed to those outside of the company. Those to whom it is disclosed are charged with a duty to maintain the confidentiality of this information. The computer files used to generate the Pricing are segregated in a password-protected directory, with access granted to only those who would have a need-to-know in order to provide products and services to Bexar County.
- 4) THE VALUE OF THE INFORMATION TO THE COMPANY AND TO ITS COMPETITORS. The Pricing is extremely valuable to ES&S and its competitors. The Pricing summarizes ES&S' product implementation strategy and efficiencies. It represents ES&S' competitive strengths and helps differentiate ES&S from its competitors. The Pricing represents ES&S' unique bid to gain a partnership with the potential client. It reflects ES&S' employee base across the United States, its research and development investment, and its stability within the industry.

- 5) THE AMOUNT OF EFFORT OR MONEY EXPENDED BY THE COMPANY IN DEVELOPING THIS INFORMATION. ES&S' professionals spent approximately 24-30 hours preparing the Pricing specifically for Bexar County. However, it is important to remember that their ability to do so is based on the know-how and industry expertise gained through 30-plus years in the election industry and the efforts of dedicated Sales Executives and other employees over those years.
- 6) THE EASE OR DIFFICULTY WITH WHICH THE INFORMATION COULD BE PROPERLY ACQUIRED OR DUPLICATED BY OTHERS. The grand total of an awarded bid is usually available to the public. However, the breakdown of the price and the unbundled details and assumptions used to develop the price are never disclosed to competitors. ES&S zealously guards this information from disclosure under state laws such as the Act.

References

The list of customer references provided in ES&S' Proposal specifically the References Verification Report – Voter Tabulation, Texas References and References Verification Report – Voter Registration of the *Company Profile* Section of the Proposal (collectively herein called the "References") are also protected from disclosure under §552.110(a). The Restatement 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.**" *Hyde v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958) (emphasis added). In addition, the References satisfy all six factors used by the Texas courts to define a trade secret.

- 1) EXTENT TO WHICH THE INFORMATION IS KNOWN OUTSIDE OF THE COMPANY'S BUSINESS. Bexar County was provided with extensive details regarding ES&S' customers, including without limitation the name of the election authority, contact names of employees within the election authority, and details regarding the type of system supplied to the election authority. This level of detailed information is never distributed outside the company unless specifically requested as part of an RFP, and in those instances, ES&S notifies the potential customer as to the confidential and proprietary nature of the information. A competitor with this much information would enjoy a unique opportunity to target selected customers of ES&S and make a well-informed proposal to replace ES&S as the provider of such election products and services.
- 2) EXTENT TO WHICH THE INFORMATION IS KNOWN BY EMPLOYEES AND OTHERS INVOLVED IN THE COMPANY'S BUSINESS. Access to the database containing all of ES&S' customer information, and used to compile the References, is restricted by the user profiles defined by ES&S' Information Technology department. Only those employees granted the appropriate level of access may review, generate, and/or modify the References. Generally, these are employees with a need-to-know in the Proposal Center, Sales and Customer Service departments who

have signed a non-disclosure agreement that requires them to keep the References confidential and not to use the References for any unauthorized purpose.

- 3) EXTENT OF MEASURES TAKEN BY THE COMPANY TO GUARD THE SECRECY OF THE INFORMATION. As noted above, ES&S does not usually provide such detailed customer information during the bidding process because of the sensitive nature of the information contained in the References. When required to supply such customer information during the bidding process, as required by Bexar County, ES&S takes every effort to limit further dissemination of the information, including challenging its further disclosure under applicable "sunshine" laws. ES&S never provides this level of information unless required during the bidding process because of the competitive advantage it would provide to ES&S' competitors.
- 4) THE VALUE OF THE INFORMATION TO THE COMPANY AND TO ITS COMPETITORS. The References represent years of sales and customer support efforts by ES&S and are invaluable to both ES&S and its competitors. A competitor armed with this information could create a focused marketing plan aimed specifically at one or more segments of ES&S' customer base.
- 5) THE AMOUNT OF EFFORT OR MONEY EXPENDED BY THE COMPANY IN DEVELOPING THIS INFORMATION. As noted above, the References represent years of sales and customer support efforts. In addition to the initial costs, the database requires constant maintenance by qualified professionals in order for the content to remain current and accurate.
- 6) THE EASE OR DIFFICULTY WITH WHICH THE INFORMATION COULD BE PROPERLY ACQUIRED OR DUPLICATED BY OTHERS. There are approximately 3,156 election authorities in the United States. ES&S also provides election-related products and services in numerous foreign countries in the Western Hemisphere, each of which has its own election authorities. Determining which election authority with whom ES&S does business, and then questioning each such election authority to obtain the information contained in the References would be very difficult (if not impossible), costly, time-consuming and impractical.

Your Office and the Texas courts have established precedents for the protection of such customer lists from disclosure. See *e.g.*, Open Records Decision No. 255 (1980); Open Records Decision No. 89 (1975); *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593 (Tex. Ct. App.- Amarillo 1995, no writ.); *American Precision Vibrator Co. v. National Air Vibrator Co.*, 764 S.W.2d 274 (Tex. App. - Houston 1988, no writ.). See also *Expo Chemical Co. v. Brooks*, 572 S.W.2d 8 (Tex. Civ. App. – Houston 1978, *rev'd on other grounds*) (the court noted that pieces of data which made the list were undoubtedly known to some members of the public, but the court still held that the list, when taken together with cross-referenced customer history information, constituted a trade secret).

Technical Overview, Detailed Proposal and Hardware Programming Manager User Guide

Various pages of the ES&S' Proposal as well as the Hardware Programming Manager User Guide embodies proprietary and confidential portions of ES&S' plan for implementing an election system for Bexar County. The various proprietary and confidential portions including the User Guide, although each individually qualifying as a "trade secret", shall be collectively referred to herein as Implementation Documents.

The Implementation Documents should be protected from public disclosure under the "trade secret" exception provided under the Act. As noted above, the Restatement broadly defines a "trade secret" to include any "formula, pattern, device or compilation of information" that gives one a competitive advantage from not being known. Trade secrets include "a process or device for continuous use in the operation of the business", but may also "relate to the sale of goods or to other operations in the business." ES&S' Implementation Documents fit within this definition of "trade secrets". In addition, the Implementation Documents meet the six Restatement factors one considers when determining that an item is a "trade secret":

- 1) EXTENT TO WHICH THE INFORMATION IS KNOWN OUTSIDE OF THE COMPANY'S BUSINESS. The Implementation Documents are a culmination of ES&S' 30-plus years of election experience and efforts. The details found in Implementation Documents are not known by those outside of ES&S without a duty to maintain its confidentiality, since such details are not provided during general sales calls.
- 2) EXTENT TO WHICH THE INFORMATION IS KNOWN BY EMPLOYEES AND OTHERS INVOLVED IN THE COMPANY'S BUSINESS. The Implementation Documents were developed by employees with individual expertise across the entire election process. However, this knowledge is decentralized. For example, only a minimal number of employees in Customer Support and Project Management conduct customer training. Only this handful of employees would have the expertise to design the Training Overview for Bexar County. Other than those employees assigned to implement the project, employees do not learn this level of detail regarding the system and its entire implementation life-cycle. Those employees with access to the various portions of Implementation Documents are subject to non-disclosure agreements, which require them to keep the information contained therein confidential and not to use it for any unauthorized purpose.
- 3) EXTENT OF MEASURES TAKEN BY THE COMPANY TO GUARD THE SECRECY OF THE INFORMATION. ES&S does not usually present such a detailed blueprint, like the Implementation Documents prepared for and provided to Bexar County, to a potential customer until the customer accepts ES&S' bid and enters into a contractual duty to prevent disclosure of such confidential and proprietary trade secrets to third parties. However, for the Proposal to qualify for consideration by Bexar County, ES&S was required by the County to prepare and provide the Implementation Documents as part of the Proposal. ES&S is aggressively taking every avenue to prevent further disclosure of Implementation Documents (as evidenced by this brief).

Since training is provided only to customers (which have a contractual duty to maintain the confidentiality of ES&S' proprietary training material) and not the public or ES&S' competitors, Implementation Documents do not lose its confidential nature when disclosed during a training session.

- 4) THE VALUE OF THE INFORMATION TO THE COMPANY AND TO ITS COMPETITORS. Because of the level of expertise and proprietary knowledge input into the Implementation Documents, its value is inestimable. It represents ES&S' core strength since effective and efficient deployment of the election system is critical. It is a blueprint for others in the industry who have less experience or expertise in implementing an election system of this magnitude and have no other resources to cheaply and quickly obtain such vast expertise. Because of the trade secrets incorporated, the Implementation Documents would provide a substantial advantage to ES&S' competitors in upcoming bids.
- 5) THE AMOUNT OF EFFORT OR MONEY EXPENDED BY THE COMPANY IN DEVELOPING THIS INFORMATION. In addition to the industry experience accumulated over the decades, ES&S has conducted over 400 deployments. Most of its competitors have deployed only 30-35 systems and are still struggling to learn how to execute successfully.
- 6) THE EASE OR DIFFICULTY WITH WHICH THE INFORMATION COULD BE PROPERLY ACQUIRED OR DUPLICATED BY OTHERS. Developing a technical and detailed plan for a county with the number of registered voters and complex functionality required by Bexar County necessitates personal experience that can only be gained from years in the election industry, trial and error and interaction with counties the size of Bexar County. Even other veterans in the election industry have not been privy to such a detailed description of ES&S' implementation strategies, which provide ES&S with its competitive uniqueness and which are incorporated into Implementation Documents.

Case law also recognizes that a business process or methodology as outlined in ES&S' Implementation Documents may be protected as a "trade secret". See *General Elec. Capital Corp. v. DirecTV*, 184 F.R.D. 32 (D. Conn. 1998) (an accounting firm's internal audit manuals, which document its process for performing its services, have been given trade secret status). Accord *In re Mid American Waste Sys. Inc. Sec. Litig.*, Civ. 97-4888 (ALJ), 1997 WL 1045729 (D.N.J. 1997); *Gohler v. Wood*, 162 F.R.D. 691 (D. Utah 1995); *Tonnemacher v. Sasak*, 155 F.R.D. 193 (D. Ariz. 1994); *In re Worlds of Wonder Secs. Lit.*, 147 F.R.D. 214 (N.D. Cal. 1992); *Master Palletizer Sys. v. T.S. Ragsdale Co.*, 123 F.R.D. 351 (D. Colo. 1988). See also *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995) (ruling corporate strategy could be a trade secret); *Smith v. TCI Communications, Inc.*, 981 P.2d 690 (Colo. Ct. App. 1999) (holding that a trade secret claim can be supported by assertions that the one has invested substantial time, money, energy, and other resources in developing unique and detailed business plans for a cable television channel).

The Implementation Documents are a "trade secret" even though ES&S disclosed the information to Bexar County. In *Taco Cabana Int'l v. Two Pesos, Inc.*, 932 F.2d 1113 (5th Cir.

1991) (applying Texas law), *aff'd*, 112 S.Ct. 2753 (1992), the court held that limited disclosure of information through controlled channels does not destroy the trade secret nature of information, if steps are taken to control the dissemination and use of the information. The parties seeking trade secret status in *Two Pesos* voluntarily disclosed information to prospective clients and business associates. The court determined that trade secret status was not affected in this context of disclosure because it was carefully limited to "the imperatives of a beneficial transaction." *Id.* at 1124. Like the plaintiff in *Two Pesos*, ES&S provided Technical/Detailed Sections, which embodies numerous trade secrets, to Bexar County in order to facilitate a future business relationship. Without disclosing such information, ES&S would not have been eligible to compete in the bidding process, the only way to win Bexar County's business. As noted throughout the brief, ES&S has taken numerous steps to prevent further dissemination of its trade secrets, including challenging the requests for disclosure of its proprietary and confidential information under the Act.

Ballot Programming Source Code

The information submitted detailing the computer programming code used to program the ballot and embedded in the voting system hardware should be protected from disclosure under the Act. This item is not subject to disclosure pursuant to ORD 581 which provides that "where information has no significance other than its use as a tool for the maintenance, manipulation or protection of public property, it is not the kind of information made public...." The computer programming code pertains to the embedded hardware code for the voting system and therefore is not required to be disclosed. The ballot programming code should also be granted protection from disclosure as a trade secret.

Commercial or Financial Information

In addition to the protection granted for trade secrets, ES&S also asserts that its Cost Considerations, DRE Voting Equipment Poll Worker Activated, References, Implementation Documents and Financial Summary Sections of the Proposal (collectively referred to herein as "Proprietary Information") should be protected under the exception provided by §552.110(b) of the Act for "commercial or financial information." The Proprietary Information is commercial and/or financial information for which disclosure would cause substantial competitive harm to ES&S. Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom ES&S' valuable Proprietary Information is released under the Act. If those competitors are charged only minimal retrieval costs for the Proprietary Information, rather than the considerable costs of private reproduction that ES&S incurred (*i.e.*, money, time, employee knowledge and company experience), they will be getting an unfair bargain. Such bargains will have competitive consequences not contemplated as part of the Act's principal aim of promoting openness in government.

Conclusion

ES&S has presented a prima facie case outlining that the Pricing, References, Implementation Documents, Ballot Programming Code and Financial Summaries are 1) composed of trade secrets as defined under Texas common law, and 2) commercial or financial information for which disclosure would cause ES&S substantial competitive harm. ES&S therefore respectfully requests that pursuant to the exceptions provided under § 552.110(a) and (b) of the Act, the following requested information not be disclosed:

<u>Bexar County, Texas – Request for Proposal for the Implementation of a New Voting System and Voter Registration System July 13, 2001</u>	
References and Financial Summary:	Provided in Section 7 of the Proposal (Included in Materials Submitted by Bexar County)
Technical Overview and Detailed Proposal:	Sections 4 and 5 of the Proposal (Included in Materials Submitted by Bexar County)
Cost Considerations	Section 6 of the Proposal (Included in Materials Submitted by Bexar County)
Other Documents	
Hardware Programming Manager User's Guide (Pgs. 1-100)	Included in Materials Submitted by Bexar County
Ballot Programming Code – Code contained in Hardcopy Form	Included in Materials Submitted by Bexar County (32 pages)

Please contact the undersigned if you have any additional questions.

Respectfully submitted,



Timothy J. Hallett