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February 26, 2024

VIA OVERNIGHT MAIL

The Honorable Ken Paxton
Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Dear Attorney General Paxton:

INTRODUCTION

Election Systems & Software, LLC ("ES&S") respectfully submits this brief pursuant to Government Code § 552.305, and in response to a recent request for specified equipment manuals sent to the Custodian of Public Records for Swisher County, Texas, on or about February 13, 2024 (the "Request") (see enclosed copy). ES&S received notice of the Request from Swisher County by letter dated February 26, 2024 (see enclosed copy). The Request seeks, in part, "ES&S Manuals Used to Administer Elections" in Swisher County as well as other counties throughout Texas (the "Manuals"). A similar request was made by the same individual last year, Mr. Christopher Gleason (the "Requestor"), and in that instance your office determined that the Manuals could only be inspected in-person at the custodian's office and that the custodian could not, and should not, provide copies. This year's Request is similar except this time the requestor cites the fair use exception to copyright as a purported basis to obtain copies of the Manuals contrary to your prior determination.

This brief addresses why the Manuals sought by the Request should only be made available using an in-person inspection at the custodian of records' office and that no copying, photographing or reproduction of the Manuals is permitted because the requestor has failed to provide any basis to apply the fair use exception, and further because fair use does not, and could not, apply here. Furthermore, any Manuals provided for inspection must be redacted to remove information that relates to critical Texas voting system infrastructure.

ES&S' position as summarized above is entirely consistent with the recent January 3, 2024, decision issued by your office, wherein you determined that "the requestor has a right of access to the submitted information pursuant to section 123.008 of the Election Code", but with the important and necessary qualification that "the county attorney's office must release the submitted information; however, any information subject to copyright law may only be released in accordance with copyright law." (ORD2024-000106 at 2-3) (hereafter, the "January 3rd Decision"). Copying of a copyrighted work is one of the exclusive rights reserved to the owner of the copyrighted material. 17 U.S.C. section 106 (1). Copies or reproductions

of any kind made by anyone other than the copyright owner is a direct violation of the Federal Copyright Act. *Id.*; 17 U.S.C. § 501(a). *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 533 (5th Cir. 1994)("Copying a copy of copyrighted materials is a cognizable contravention of the Copyright Code."). Therefore, any inspection of the Manuals, such as those sought in the Request, can only be done lawfully where the custodian prohibits, and takes necessary and reasonable steps to prevent, copying, photographing or reproduction of any kind. Accordingly, any inspection must prohibit things like cell phones, recording and other electronic devices, cameras, and notes from the inspection room.

In the January 3rd Decision, your office analyzed Texas law and came to essentially the same conclusion as summarized above, allowing access to the Manuals but stating that copying would not be allowed in order to comply with federal copyright law. In response to the January 3rd Decision, the Requestor has now cited the fair use exception to copyright as the purported basis to renew his public records requests and demand copies of the Manuals, going beyond the right of inspection you previously determined.

You previously allowed ES&S to submit briefs to you on the prior issue, and in those letters ES&S explained that the Manuals contain confidential and proprietary information about the voting systems used in Texas, and they are subject to federal copyright protection as works prepared by ES&S. (January 19, 2024, Letter to Attorney General for State of Texas from ES&S Vice President & General Counsel Eric Anderson). In a transparent attempt to avoid these legal protections and to seek more than the law allows, the Requestor now claims that the Request "clearly fall[s] under 'Fair Use Doctrine.'" As shall be explained herein, the fair use exception found in 17 U.S.C.A. § 107 is a *limited* exception to copyright and is determined on a case-by-case basis after consideration of four non-exclusive statutory factors, for which the party claiming fair use bears the burden of proof. Here, the Requestor has provided no evidence that any of the fair use circumstances apply, nor has he provided an analysis of the four factors. As you will see below, all four factors, as well as additional factors that may be considered, all weigh against any application of fair use in the current circumstances. (*See, e.g., Lyons P'ship v. Giannoulas,* 14 F. Supp. 2d 947, 954 (N.D. Tex. 1998)("Fair use is an affirmative defense; therefore, defendants carry the burden of proof."). Fair use cannot apply here, and therefore the respective custodians should only provide inspection of the requested materials in a manner consistent with your office's prior determination: namely, do not provide copies of the Manual and do not permit inspection in any manner that would allow copies, photographs or other reproductions to be made.

Additionally, ES&S invites reconsideration of the premise that sections 552.110, 552.1101, and 552.139 of the Government Code (specific exceptions to the public records statutes) are merely general provisions rather than specific ones. You may recall that in the January 3rd Decision, you reasoned that because these exceptions to the public records statutes were general in nature, and because Section 123.008(a) of the Election Code was specific, the latter section governed without reference to the former. This brief discusses how both sets of statutes are specific, and accordingly Texas law requires that they be harmonized so as to give effect to both in these circumstances. As we believe you will see, reading these sections together is both possible and practical. The result is that the Manuals (or portions of them) may be accessed by public inspection in the custodians office (but not copied) if the Manuals (or portions of them) do not qualify for any of the specific exceptions to disclosure under the Public Information Act. If the Manuals do qualify under the specific exceptions to disclosure under the Public Information Act, then those portions which relate to confidential,

proprietary, and/or sensitive information on critical voting systems infrastructure should be redacted while the remaining portions would remain available for in-person inspection.

In any event, we wish to highlight that the designation of voting systems as critical infrastructure, while relevant to the fair use discussion, is also independent of it. Texas Government Code § 418.181 provides a blanket exception to disclosure of any technical information that could reveal a vulnerability to critical infrastructure that could be used in an act of terrorism, such as the interruption of an election. Notably, this exception allows for no carve outs or exceptions, for obvious reasons.

FACTUAL BACKGROUND

ES&S is an American-owned and operated company that is dedicated to providing election products and services of exceptional quality and value to maintain voter confidence and enhance the voting experience. ES&S' mission is to provide valuable, trusted, and proven election systems and services to our nation's election administrators, including more than 130 counties in Texas with which ES&S partners to provide organized, efficient, stable, and secure elections.

The Requestor has seemingly issued hundreds of requests that are similar, if not identical, to the Request attached to this brief as **Exhibit A**. As listed in **Exhibit A**, the Requestor is seeking various operator manuals and administrator guides along with other related documents and items. For ease of reference, these requested items will continue to be referred to as the "Manuals." These Manuals are not only subject to copyright protection, but also contain confidential, proprietary, and sensitive information relating to critical Texas voting infrastructure.

The January 3rd Decision addressed the request for "specified equipment manuals, audit logs, and communications" and determined that "the requestor has a right to access to this information pursuant to section 123.008 of the Election Code" (which states in relevant part that the general custodian of records subject to this provision shall make those materials available for public inspection in the custodian's office on the request of any person[1]) but with the important and necessary qualification that "a government body must allow inspection of copyrighted materials unless an exception applies to the information" and that "information subject to copyright law may only be released in accordance with copyright law." (January 3rd Decision at 1-3).

We understand the Requestor made no in-person inspections pursuant to last year's requests despite the fact that your January 3rd Decision allowed such inspections. Instead, the Requestor now seeks to circumvent your decision by claiming, without evidence or proof, that the fair use exception applies and that he should be allowed to obtain copies of the Manuals. At the outset, we note that the Requestor's argument completely disregards the controlling language in Section 123.008(a) of the Election Code which clearly provides only that "public inspection in the custodian's office" is permitted. The statute provides no right to copies. In support of his fair use argument, the Requestor states merely in part:

Our lawful requests for the ES&S Manuals Used to Administer Elections in

[1] Election Code § 123.008(a).

your county clearly fall under "Fair Use Doctrine".

1. Our use is clearly non-commercial and for nonprofit educational purposes. [*Notably, the Requestor provides no description or evidence of what his intended or actual use may be.*]

2. The nature of the copyright work is for the understanding of the administration of local, state and federal elections via the use of ES&S Electronic Voting Systems and the understanding of the "Auditable Election Records" that you are required under Texas and Federal code to provide to the Public as the greatest public interest is in the public's knowledge that their elections are open, free, fair and TRANSPARENT. The voter knowing that their ballots are being accurately cast and their votes are being accurately counted. [*Notably, the description grossly understates the content of the Manuals, as they inform on how to access and program the voting systems, including access to the administrator menus; it also fails to explain how copies are needed when access to the Manuals as expressed in the January 3rd Decision already afford the public with the ability to know what he claims is his goal.*]

3. There is no negative effect upon the potential market or value for the copyrighted work as there is no commercialization of the sale of these copyrighted works. In fact, there is a far greater risk that is in the Public Interest and that would be compromised elections being administered where the public has no confidence that the will of the voter is being considered and that the voters ballots are being accurately cast and counted. [*Notably, this assertion is made without knowledge of the contents of the Manuals or the foresight to see the impact on the market if some of the content of the Manuals is used by someone with nefarious intent to interrupt voting systems in Texas.*]

(**Exhibit A**). As this brief discusses below, the Requester has failed to meet his burden of proof in establishing that fair use applies, and an analysis of the four statutorily required factors reveals that fair use does not apply in these circumstances.

THE JANUARY 3RD DECISION AND CURRENT REQUESTS

The January 3rd Decision has two key determinations that are most relevant to the present discussion. The relevant parts are, to wit:

(1) "**A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted**. Open Records Decision No. 180 at 3 (1977). A government body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* (Internal citations omitted). 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 copyright law and the risk of a copyright infringement suit. Accordingly, **the county attorney's office must release the submitted information; however, any information**

subject to copyright law may only be released in accordance with copyright law." (January 3rd Decision at pages 2-3) (emphasis added).

(2) "Upon review, we find the requestor has a right of access to the submitted information pursuant to section 123.008 of the Election Code. Although ES&S raises sections 552.110, 552.1101, and 552.139 of the Government Code for the submitted information, a statutory right of access prevails over the Act's general exceptions to public disclosure…Where information falls within both a general and a specific statutory provision, the specific provision prevails over the general statute." (*Id.* at page 2).

The Requestor now seeks to undermine your decision by demanding that the custodian of public records for Swisher County (and other counties in Texas) "**provide**" the materials requested. (See **Exhibit A**) (emphasis added). Such requested materials include the Manuals, which in turn contain confidential information related to critical Texas voting infrastructure. The Requestor relies on fair use as provided in 17 U.S.C.A. § 107 (*See* **Exhibit A**), but Requestor fails to provide any evidence to meet his burden of proof for fair use, and analysis of the statutory factors show that fair use is inapplicable.

To be clear, the Manuals and other requested items are subject to copyright protections. U.S. copyright law provides copyright owners with the exclusive right to, among other things, (1) reproduce the work in copies or phonorecords, (2) prepare derivative works based upon the work, (3) distribute copies or phonorecords to the public by sale or other transfer or ownership; and to display the work publicly.[2] To allow the Requestor to make or be provided copies of the requested materials is a clear violation of the Federal Copyright Act and is therefore expressly prohibited based on your January 3rd Decision.[3] Instead, compliance with your January 3rd Decision and Section 1232.008(a) requires (and is limited to) in-person inspection of the Manuals with no opportunity to copy or reproduce them).

To the second determination, ES&S invites your office to consider whether the public records exception statutes are also specific provisions as opposed to general provisions. As explained below, sections 552.110, 552.1101, and 552.139 of the Government Code are not general statutes; rather, they are specific exceptions to the general public records statutes. They were enacted after section 123.008 of the Election Code, which is relevant to the analysis below under Texas law. Harmonization between these sets of statutes is not only possible, but appropriate. Namely, section 123.008 allows an interested member of the public to inspect items such as operator's manuals for election systems, but only if such manuals (or specific portions of the manuals) do not fall under the specific exceptions in Subchapter C of the Public Information Act.

In short, ES&S asks your office to (1) permit in-person only inspections of the Manuals; (2) deny inspection of any confidential and proprietary information which falls under an exception expressly provided for under Subchapter C of the Public Information Act; and (3) with respect to any Manuals or portions of any Manuals that you determine may be

[2] 17 U.S.C. § 106; *see also*: https://www.copyright.gov/what-is-copyright/# (Last accessed, February 21, 2024).
[3] Indeed, seeking copies goes beyond the express language of Section 123.008(a) because the statute only provides for inspection at the custodian of records' office.

inspected, require that such inspections must be conducted so as to prevent the copying, photographing, display, or other reproduction of the Manuals under any circumstances. By way of illustration but not limitation, no recording devices, cell phones, cameras, notes, or other such items should be permitted during the public inspection at the custodian of records office.

LEGAL ANALYSIS

Copying ES&S' Manuals Violates the Federal Copyright Act and Your January 3rd Decision

Federal law, Texas law, your office's policies on public records, and your prior decisions on the Requests all support the notion that copying or other reproduction of Manuals should not be allowed.

The Federal Copyright Act provides "anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author…is an infringer of the copyright or right of the author." (17 U.S.C.A. § 501(a)). Section 106 expressly lists reproducing the work in copies or phonorecords as being among the exclusive rights of the owner of the copyright. (17 U.S.C.A. § 106(1)). As referenced above, the Federal Copyright Act provides other exclusive rights to owners/authors such as (i) the right to prepare derivative works, (ii) to right to distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, and (iii) the right to perform *or* display the work publicly.[4] Put simply, "a copyright infringement is established by showing (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." (*Lyons Partnership*, 14 F.Supp.2d 947, at 954). Therefore, the mere act of copying a copywritten work, without a valid and applicable exception, is *per se* a violation of the copyright owner's exclusive rights.

The 2022 Public Information Act Handbook published by your office provides that "if the requested records are copyrighted, the governmental body must comply with federal copyright law." (2022 Public Information Handbook – Office of the Attorney General, at 27). Consistent with that policy, your January 3rd Decision provides "the county attorney's office must release the submitted information; however, any information subject to copyright law may only be released in accordance with copyright law." (January 3rd Decision, at 3). Indeed, the Requestor has implicitly admitted that the Manuals are subject to copyright protection. By claiming the fair use exception, the Requestor acknowledges that he seeks "a limited privilege in those other than the copyright owner." (*See Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986)).

Manuals have been found to be subject to copyright laws. (*See, e.g., B2B CFO Partners, LLC v. Kaufman*, 787 F.Supp.2d 1002 (D. Ariz. 2011). The Manuals at issue here are no different. The Requestor demands to be "provided" with manuals and other items for the DS2000, DS450, DS850, ExpressTouch, ExpressVote, and ExpressVote XL, all of which are products of ES&S. (See **Exhibit A**). The Manuals for these voting systems contain detailed information on the structure, logic, operation, and functionalities of the equipment. Specific

[4] 17 U.S.C.A. § 101 *et seq*; *see also* https://www.copyright.gov/what-is-copyright/# Last accessed: February 21, 2024.

confidential information relating to these items include, but is not limited to, administrator access information (which allows election administrators the ability to access certain menus and make changes to settings, including *security settings*, contained within the equipment). The Manuals also include the passwords needed to access such menus and provide detailed information on the settings and options contained within those menus. Some of the Manuals also detail how to access, manage and change the election qualification code, administrator passcodes, override passcodes, and election passcodes.

If such information were made widely available, there is a material, substantial risk that nefarious actors could anonymously and openly exploit such information, which poses a serious threat to critical Texas voting system infrastructure.

I. Fair Use Does Not Apply Here because the Requestor Has Not Met His Burden of Proof

Turning to the assertion of fair use, the Requestor bears the burden of proving that his attempt to be "provided" copies of the Manuals falls within the limited exceptions for fair use. The Requestor has not and cannot meet that burden, and therefore should not be permitted to make or be furnished copies of any kind.

Section 107 of the Federal Copyright Act states:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Here, the Requestor claims that "our lawful requests for the ES&S Manuals Used to Administer Elections in your county clearly falls under the 'Fair Use Doctrine.'" (**Exhibit A**). The Requestor demands that he be "provided" the items requested, but he never describes what he plans to do with the Manuals or how any intended use qualifies as fair use. The Requestor only makes the conclusory allegation that "our use is clearly non-commercial and

for nonprofit educational purposes," but does not explain what the "use" would be or how it might qualify as either non-commercial or as nonprofit educational use. (*Id.*). Yet it is his burden to prove application of fair use.

The Requestor's second point is difficult to decipher, but what is clear is that it provides nothing in the way of proof that fair use applies to his non-specified intended use:

> The nature of the copyright work is for the understanding of the administration of local, state, and federal elections via the use of ES&S Electronic Voting Systems and the understanding of the "Auditable Election Records" that you are required under Texas and Federal code to provide to the Public as the greatest public interest is in the public's knowledge that their elections are open, free, fair and TRANSPARENT. The voter knowing that their ballots are being accurately cast and their votes are being accurately counted [sic].[5]

Again, the Requestor misstates the facts in that he does not adequately describe the nature of the Manuals. They are operator manuals, which means they include detailed instructions on how to access administrative functions and program the voting systems. Notably, the Requestor's description of his reasoning for reviewing the Manuals—public knowledge and confidence in the accuracy of elections—is already accomplished pursuant to Section 123.008(a) of the Election Code by providing access to the Manuals for inspection; therefore, his stated reasons do not require taking the additional risks attendant to providing copies of the Manuals to the Requestor, which is an action beyond the plain language of Section 123.008(a).

Additionally, the Requestor blindly asserts that "there is no negative effect upon the potential market or value for the copyright work as there is no commercialization of the sale of these copyrighted works." (*Id.*). The Requestor then goes on to cite various legal statutes, the Constitution, and other cases for general propositions of law. The Requestor concludes by stating that "the ongoing non-disclosure of these public records related to local, state, and federal elections is a violation of both Texas Code and Federal Code." (*Id.*). With respect to this last point, the Requestor ignores the fact that the January 3 Decision already recognized the right to inspect the records at the custodian's office.

While the Requestor fails to identify his intended use—a fact that is fatal to his attempt to invoke fair use—there is circumstantial evidence to believe that he intends to post the manuals online. For example, the Requestor published the entirety of the January 3rd Decision online. This intent may be why he asserts the public should know how elections are open, free, fair and transparent as well as understand that their ballots are cast and counted accurately. Once again, however, he makes broad, sweeping statements that are not connected to the facts. Of course, the public should understand how election systems function and have transparency and confidence that elections are counted correctly. Yet, the Manuals instruct on *how* to operate the voting systems, but

[5] Notably, the Requestor's reference to "provide to the Public" is further indicia that he intends, among other things, to distribute and display the work, which are rights held exclusively by the copyright owner. 17 U.S.C. § 106.

they alone cannot show the accuracy of any election results. Such verification requires audit testing that includes prepared test ballots. And yet again, the ultimate purpose Requestor cites is already served by the access provided under Section 123.008(a) and as already recognized by the January 3rd Decision.

Indeed, the Requestor's true intent may be more accurately gleaned from his other online activities. He operates or is otherwise heavily associated with an online forum entitled "Immutable Truth – Election Integrity."[6] An article from this forum entitled Florida, Maryland, and US Election Assistance Commission Officials are Guilty of Election Fraud and Are Actively Conspiring to Cover it Up. Part 1[7] publishes the entirety of the January 3rd Decision, suggesting that ES&S and other county attorneys need to "brush up on United States Copyright law and look into what is considered 'FAIR USE.'"[8] (Emphasis in original). According to the "X" (formerly Twitter) account "Christopher Gleason," which links to the aforementioned forum, Mr. Gleason has appeared on "Loomer Unleashed" on or about November 28th to speak with Laura Loomer. Mr. Gleason was described as an "Election Data expert and election fraud whistleblower" where he interviewed to discuss "the possible murder, and the cover up of Peter Antonacci's death inside @RonDeSantis'a [sic] office!"[9] (Emphasis in original).

The Requestor only provides threadbare conclusory statements such as "our use is clearly non-commercial and for nonprofit educational purposes" without stating what the use would be and how it would be for any non-commercial or nonprofit educational purpose. Burdens of proof are met by providing facts not conclusory statements and haphazard generalized citations from various sources. The burden rests with the Requestor to establish facts and circumstances within the ambit of fair use and then how those facts apply to each of the four statutory factors set forth in 17 U.S.C. § 107 to prove that the fair use should be allowed. Yet the Requestor has failed to do so. Copyright protections do not yield simply by using the phrase "fair use;" merely claiming the exception applies is very different from actually satisfying the burden of proof that rests with the party invoking fair use. (*See, e.g., Sega Enterprises Ltd. V. MAPHIA*, 948 F.Supp. 923, 933 (N.D. Cal. 1996) ("Because fair use is an affirmative defense, [alleged infringer] carries the burden of demonstrating it.").

The other legal citations provided by the Requestor in the Request do not warrant an analysis, as the Requestor provides no facts against which such citations can apply. Furthermore, it is difficult to address the citations, as few intelligible citations are provided. The Requestor cites 17 U.S.C.A. § 301, noting that the Federal Copyright Act preempts certain common law or state statutory schemes. (**Exhibit A**). The Requestor cites Article VI of the United States Constitution, 17 U.S.C.A. § 107, and *Jartech, Inc. v. Clancy*, 666 F.2d 403, 407 (9th Cir. 1982), among other citations. *Jartech* is a case that discusses whether obscenity is a defense to copyright infringement claims, and indeed does discuss whether certain evidence provided at trial warranted a finding of fair use:

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[6] https://immutabletruthelections.substack.com/p/florida-maryland-and-us-election (Last accessed February 21, 2024).
[7] *Id.*
[8] *Id.*
[9] https://twitter.com/LauraLoomer/status/1729609875196375155/photo/1 (Last accessed February 21, 2024).

"because there was *evidence* that the Council's use was neither commercially exploitative of the copyright, nor commercially exploitative of the copyright holder's market, the jury's verdict is certainly supported by *substantial evidence*." (666 F.3d at 407) (emphasis added). Requestor, however, has provided no evidence at all as to how fair use would apply here. These purported authorities set forth general propositions of law but do not support an analysis of a particular set of facts when, as here, the Requestor has provided no particular set of facts that would suggest fair use is relevant and should be analyzed.

The limited exception of fair use does not exist in a vacuum. The Requestor has provided neither information nor any facts that would afford a determination of whether his purported use of the Manuals would qualify under the fair use exception and should therefore be analyzed under the statutory factors. Because he has provided no indication of his intended use and because he has provided no facts relevant to a fair use analysis, it is impossible for him to apply fair use to undermine your January 3rd Decision and go beyond the plain language of Section 123.008(a) to obtain copies of the Manuals.

Because the Requestor has not met his burden, the limited fair use exception cannot apply. However, the Requestor not only has failed to meet his burden--he *cannot* meet the burden because here all four factors weigh against applying the fair use exception.

II. Fair Use Does Not Apply Here Because All Four Statutory Factors Weigh Against the Application of Fair Use

In relevant part, 17 U.S.C.A. § 107 provides:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:
>
> **(1)** the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> **(2)** the nature of the copyrighted work;
>
> **(3)** the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> **(4)** the effect of the use upon the potential market for or value of the copyrighted work.

"The four factors are not exclusive." (*Bell v. Eagle Mountain Saginas Independent School District*, 27 F.4th 313, 321 (5th Cir. 2022); *citing Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, 114 S. Ct. 1164, 1171, 127 L. Ed. 2d 500 (1994)). "All are to be explored, and the results weighed together, in light of the purposes of copyright." (*Id.*). Merely claiming fair use application is not enough for the exception to apply. The proponent of the fair use exception bears the burden of proof in establishing the exception applies. (*Lyons*, 14 F. Supp. 2d at 954). While all four factors are to be considered, "courts typically give particular attention to factors one and four (the purpose and market effect of the use)." (*Bell*, 27 F.4th at 321). Finally, "the fair use doctrine 'is entirely equitable.'" (*Iowa State Univ. Rsch. Found.,*

Inc. v. Am. Broad. Companies, Inc., 621 F.2d 57, 62 (2nd Cir. 1980; *quoting Time Inc. v. Bernard Geis Associates*, 293 F.Supp. 130, 144 (S.D.N.Y. 1968)).

In contrast the Requestor's conclusory statements on just two of the factors, relevant facts reveal that fair use simply is not available in these circumstances because all four factors weigh strongly against finding any application of fair use by the Requestor.

1. First Factor – The Purpose and Character of the Purported Use

The first factor weighs against applying the Fair use exception.

"The first statutory factor to consider, which addresses the manner in which the copied work is used, is 'the heart of the fair use inquiry.' (*Cariou v. Prince*, 714 F.3d 694, 705 (2nd Cir. 2013); *quoting Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006)). "If the secondary use *adds* value to the original—if [the original work] is used as raw material, *transformed* in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society." (*Id.* (internal citations omitted)(emphasis added)). "For a use to be fair, it must be productive and must employ the quoted matter in a different manner or for a different purpose from the original." (*Id.* (internal citations omitted)). "In other words, transformative uses tend to favor a fair use finding because a transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright's overall objective of contributing to public knowledge." (*Authors Guild v. Google, Inc*., 804 F.3d 202, 214 (2d Cir. 2015)).

Here, the Requestor merely states "our use is clearly non-commercial and for nonprofit educational purposes." (See **Exhibit A**). The Requestor implies that the purpose of copying the Manuals and other requested items (and presumably making the copies widely available) is for "the understanding of the administration of local, state, and federal elections via the use of ES&S Electronic Voting Systems and the understanding of the 'Auditable Election Records' that you are required under Texas and Federal code to provide to the Public as the greatest public interest is in the public's knowledge that their elections are open, free, fair, and TRANSPARENT. The voter knowing that their ballots are being accurately cast and their votes are being accurately counted." (See **Exhibit A**). However, section 123.008 of the Election Code already addresses this goal. The section provides "the custodian shall also make available for **public inspection in the custodian's office any materials described by Subsection (a)**." (See Election Code § 123.008(b) (emphasis added).

Because the Election Code already addresses that goal raised by the Requestor, there is nothing new or transformative proposed or at issue in these circumstances.; no value would be added to any Manual or other requested item. By being "provided" the requested items, the Requestor will not create "new information, new aesthetics, new insights and understandings" or anything else that is "the very type of activity that the fair use doctrine intends to protect for the enrichment of society." (*Cario*, 714 F.3d at 707). Furthermore, it is not clear how a copy of the Manuals (a user's manual) would assure a member of the public that the elections are "open, free, fair, and TRANSPARENT." To the extent that an operator's manual could do so, an interested person may freely inspect the Manuals pursuant to the Election Code to achieve that goal. The Requestor's potential use of "copies" is entirely

superfluous to that end. There is no transformative use evidenced here. The Manuals will experience no transformation from what they originally were meant to do: inform individuals on how to program and operate particular voting systems.

The first prong of the fair use exception analysis routinely involves determining "whether such use is of a commercial nature or is for nonprofit educational purposes." (*Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., Inc.*, 900 F.Supp.1287, 1299-1300 (C.D. Cal. 1995)). The fact that use of a copyrighted work is educational and not-for-profit does not insulate it from a finding of infringement. (*Campbell*, 510 U.S. 569, 584 (1994) ("Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness")). Further, courts have long held that the application of fair use is "a means of balancing the exclusive right of a copyright holder with the public's interest in dissemination on information affecting areas of universal concern, such as art, science, history, or industry." (*Meeropol v. Nizer*, 560 F.2d 1061, 1067 (2nd Cir. 1977)).

As your office has already confirmed in the January 3rd Decision, the public's interest is served by making inspection of the Manuals available at the custodian's office pursuant to Section 123.008(a). The Requestor does not purport to transform the Manuals in any other way, and he has failed to provide any evidence of non-commercial use or use in a non-profit educational setting. He is not an educator or affiliated with any institution of higher learning. Instead, he advertises and self-proclaims to be an "expert" on "election data" and "election fraud." This raises at least two points in this analysis. First, his use of the Manuals would appear to be to further his own reputation in the industry, which is a commercial use given that the public already enjoys a right to inspect the Manuals at the custodian's office. Second, nothing in an operator's manual will give insight to any particular election data or election fraud because a study into such unfounded accusations would require election-specific data not found in an operator's manual.

For at least these reasons, the first factor weighs heavily against the application of fair use in these circumstances.

2. Second Factor – The Nature of the Copyrighted Work

The second factor also weighs against applying the Fair use exception.

The second fair use factor is the nature of the copyrighted work. "The second factor has rarely played a significant role in the determination of a fair use dispute." (*Authors Guild*, at 220). "The inquiry here concerns whether plaintiff's work is primarily creative as opposed to informational; the defense of fair use has been given a greater reach when the work copied is informational in nature." (*Hustler Mag., Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526, 1536 (C.D. Cal. 1985)). However, the mere fact that the original is a factual work should not imply that others may freely copy it. (*Authors Guild*, at 220). "While the 'transformative purpose' inquiry discussed above is conventionally treated as a part of first factor analysis, it inevitably involves the second factor as well. One cannot assess whether the copying work has an objective that differs from the original without considering both works, and their respective objectives." (*Id.*). Here, the Requestor has stated no purpose other than to apparently inform the public about elections, which is a matter already provided for by Texas election laws.

In *Author's Guild*, the Second Circuit considered whether an internet search engine, which made digital copies of books submitted by major libraries able to be searched by the public who could see snippets of the text infringed upon the authors' copyrights. (*Id.* at 202-07). In considering this second factor, the *Authors Guild* court opined that "while each of the three Plaintiffs' books in this case is factual, we do not consider that as a boost to Google's claim of fair use. If one (or all) of the plaintiff works were fiction, we do not think that would change in any way our appraisal." (*Id.* at 220). Rather, the *Authors Guild* court held that "the secondary work uses the original in a 'transformative' manner…the second factor favors fair use not because Plaintiffs' works are factual, but because the secondary use transformatively provides valuable information, rather than replicating protected expression in a manner that provides a meaningful substitute for the original." (*Id.*).

Here, the Requestor has given no explanation or evidence as to how his use would transform the Manuals or other materials in any way, other than suggesting that he would distribute the Manuals and other items for public viewing. Therefore, little to no weight should be granted to the factual nature of the Manuals and other materials. This is to say nothing of the fact that ES&S has spent countless hours and substantial resources in developing the Manuals and other materials. To permit the Requestor to merely replicate protected expression under the guise of fair use would run afoul of long-established precedent. "The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance." (*Iowa State Univ. Rsch. Found., Inc.* 621 F.2d at 61 (2d Cir. 1980)). Regardless of the Requestor's claims, currently any member of the public may view the Manuals and other requested materials, thereby addressing the public concern cited by the Requestor.

Furthermore, the Requestor apparently provides no argument as to why this second factor weighs in favor of applying the fair use exception to his Request, once again failing to meet his burden of proof. The non-transformative use suggested by the Requestor does not warrant an application of the fair use exception under this factor.

3. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

The third factor in considering the fair use exception also weighs against applying the exception in these circumstances.

Courts consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" when analyzing the third factor. (See 17 U.S.C.A. § 107(3)). **Wholesale copying of a work tends to disfavor a finding of fair use**. (*Hachette Book Group, Inc. v. Internet Archive*, 664 F.Supp.3d 370, 387 (S.D.N.Y. 2023) (emphasis added)). "Substantively, the third factor considers whether the quantity and value of the materials used, are reasonable in relation to the purpose of the copying." (*Whiddon v. Buzzfeed, Inc.*, 638 F.Supp.3d 342, 354 (S.D.N.Y. 2022) (internal citations omitted)). "A secondary work may copy the original in its totality where a full copy is reasonably appropriate to the secondary work's transformative purpose." (*Id.*). Courts consider whether the amount copied is either a quantitatively or qualitatively significant part of the original. (*Bell*, at 323-24). "Even a relatively small amount of copying can weigh against fair use if it captures the heart of the

work." (*Id.*; *citing Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 at 565 (1985)).

Here, the Requestor apparently seeks to be "provided" the Manuals so that he presumably may provide or distribute the Manuals in their entirety. The Requestor seeks to do this without attempting to transform the copyrighted work in the slightest. When the heart of the work would be copied, particularly without any transformation, there can be no way the third factor weighs in favor of applying the fair use exception.

4. The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

The fourth factor for the fair use exception analysis also weighs against finding that the exception applies.

The fourth factor requires courts to consider "the effect of the use upon the potential market for or value of the copyrighted work." (17 U.S.C.A. § 107(4)). Courts "consider actual market harm but, more broadly, whether widespread use of the work in the same infringing fashion would result in a substantially adverse impact on the potential market for the original work and any derivatives." (*Bell*, 27 F.4th at 324. (internal citations omitted)). "**This last factor is undoubtedly the single most important element of fair use**." (*Harper & Row*, 471 U.S. at 566 (emphasis added)). Again, it is the Requestor who bears the burden of proof in establishing that the requested copying would not adversely affect the market value of ES&S' products and materials. (*Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 583 (6th Cir. 2007)). Courts have found that when the copyright owner shows substantial harm to the value of its copyright that would result from the copying, the fourth factor weighs strongly against finding that the fair use can apply. (*American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 926 (2nd Cir. 1994)).

Here, despite his burden to do so, the Requestor has provided no evidence or reasoning that his unspecified use of the Manuals would have no adverse impact in the market. Instead, he simply makes the threadbare allegation that there would be no harm in the market. He fails to explain (and prove) why his assertion should be taken as true. This is yet another instance in which the Requestor fails to meet his burden to show facts—not unsubstantiated conclusions—to support the application of fair use. Indeed, facts and logic warrant a contrary determination in these circumstances.

As ES&S has explained in prior letters to your office, the Manuals and other technical documentation contain confidential and proprietary information detailing nearly every aspect of the voting system. (October 3, 2022 Letter to Attorney General Ken Paxton from Katie D. Figgins, Associate General Counsel) (hereafter, the October 3rd Letter). We also describe here, in this letter, that the manuals provide passwords and instructions for accessing administrative menus and functions. Widespread dissemination of such information not only threatens the integrity of the voting system—and therefore the market—it also threatens the security of elections. That, in turn, impacts the market for ES&S' products and services. Indeed, there is an obvious difference between a nefarious actor having unlimited anonymous access to the confidential and sensitive information in the Manuals rather than in-person access to the Manuals (with appropriate redactions as discussed below) without the opportunity to copy or reproduce them.

While the Requestor claims he is concerned with "the public's knowledge that their elections are open, free, fair, and TRANSPARENT," releasing this information would actually serve the opposite effect. Section 418.181 of the Government Code provides that "those documents or portions of documents in the possession of a government entity are confidential if they identify the technical details of a particular vulnerability of critical infrastructure to an act of terrorism." The Attorney General has previously determined that ES&S' confidential and proprietary information, such as the Manuals at issue here, are critical infrastructure. (ORD No. 2021-34130) (where, upon receiving a request for "voting machine operator's manuals", your office held that "you argue, and we agree, the submitted information relates to critical infrastructure for purposes of section 418.181 of the Government code", which defines critical infrastructure to include all public and private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation). The Requestor, as well as any other interested citizen, may inspect the Manuals at the custodian's office (with appropriate redactions as discussed below). Therefore, providing the Requestor with copies of the Manuals will not serve his stated purpose to any greater degree; but it will increase the risk that Texas elections are subject to disruption or interference by nefarious and anonymous actors who might gain access to the confidential information contained in the Manuals. Public interest is satisfied by in-person inspection provided for by Texas statute.

To be clear, ES&S shares the same sense of patriotism and transparency that Requestor espouses in the Request, and with those who legitimately want transparency in government action. ES&S also necessarily recognizes that clear and present danger exists and that some risks are too great: If Requestor receives copies of the Manuals under the guise of fair use, no copyright infringement lawsuit could remedy the potential damage to critical infrastructure that could occur at the hands of nefarious actors armed with the confidential information in the Manuals.

Given that this factor is the most important, and given the enormous risk that wholesale copying of the Manuals pose to critical infrastructure, this factor weighs heavily and decidedly against the application of fair use in these circumstances.

Reconsidering a Harmonization of Specific Statutes

In the January 3rd Decision, your office considered the assertion made by the county attorney's office and ES&S that "the submitted information is confidential under section 418.181 of the Government Code" and "under section 418.182 of the Government Code." Your office opined that "where information falls within both a general and a specific statutory provision, the specific provision prevails over the general statute. Gov't Code § 311.026 (where general statutory provision conflicts with specific provision, specific provision prevails as exception to general provision unless the general provision is the later enactment and the manifest intent is that the general provision prevails)." (January 3rd Decision at 2). This is a correct statement of Texas law, but ES&S invites you to consider the underlying premise in application of such law, that is, that the circumstances involve one general and one specific statute. Instead, ES&S respectfully asks you to consider that both statutes are specific in nature, and therefore Texas law requires that they be harmonized, and effect be given to both statutes. Such a result is both possible and practical here.

Your office correctly stated the well-established proposition of Texas law found in *Cuellar v. State*, 521 S.W.2d 277 (Ct. App. Tx. 1975), and more recently articulated in *Dailing v. State*: "if two statutes apply to an issue, courts should construe the statutes, if possible, to give effect to each statute…if the statutes irreconcilably conflict and one statute is a general provision and the other is more specific, the specific statute prevails as an exception to the general provision, unless (1) the Legislature enacted the general provision later than the specific; and (2) the Legislature manifestly intended that the general provision prevail." (546 S.W.3d 438, 434 (Ct. App. Tx. 2018)). Ultimately, your office determined that "the right of access provided by section 123.008 of the Election Code is more specific than, and prevails over, the confidentiality provided by sections 418.181 and 418.182 of the Government Code." (January 3rd Decision at 2).

Given the importance of both sets of statutes at issue, it is worth consideration as to how *both* sets of statutes are *specific* to the issues at hand and how they can and should be harmonized so as to give effect to both. These statutes are **not** contradictory such that harmonization is impossible.

Your office noted that "although ES&S raises sections 552.110, 552.1101, and 552.139 of the Government Code for the submitted information, a statutory right of access prevails over the Act's general exceptions to public disclosure." (*Id.*)(emphasis added). However, we assert that those provisions (§§ 552.110, 552.1101, and 552.139) are not general provisions at all; rather, they are specific, narrowly defined *exceptions,* necessarily tailored by the Legislature to a limited set of documents, to the *general* and liberal right of public access to records under the Public Information Act. The January 3rd Decision cites those provisions as "general exceptions to public disclosure", but not as "general provisions". Given their contents, it is more accurate to classify the exceptions under the Public Information Act to be **specific** statutory exceptions to the Public Information Act, rather than general exceptions. Indeed, the Public Information Act provides that disclosure is strongly favored. That there are express exceptions to disclosure indicates the Legislature's intent for those exceptions to be specific provisions, rather than parts of the general provisions. Further, ES&S proposes that these provisions and the provisions cited by your office from the Election Code can and should be *harmonized* rather than one disregarded for the purposes of the other. (*See In re Miller*, 6431 S.W.3d 924, 928 (Ct. App. Tx. 2022) ("when deciding whether overlapping provisions of two different statutes can concurrently operate, we will construe the different provisions in a way that harmonizes rather than conflicts.").

Sections 552.110, 552.1101, and 552.139 of the Public Information Act are specific provisions that provide narrow exceptions to public access to government records. § 552.001 provides the general purpose of the Public Information Act to be an expression of general policy:

> The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. The provisions of this chapter shall be liberally construed to implement this policy.

In light of this, it is of paramount importance to note that Sections 552.110, 552.1101, and 552.139 are all express "exceptions" to this broad policy. Given the broad nature of the general policy, such exceptions are *narrowly tailored* to define *specific* records that should not be produced under the general right of access.

Indeed, all three of those sections fall under Subchapter C, which is entitled "Information Excepted from Required Disclosure." Each of those sections begin their title with the word "Exception"[10]. The intent of the Legislature is clear: the Public Information Act is generally meant to effect the policy of the State of Texas and ensure that "at all times complete information about the affairs of government and the officials acts of public officials and employees" are available to the people. But there are necessarily exceptions—limited in nature—to such policy, despite recognition that the Public Information act is otherwise "liberally construed to implement this policy."[11] That numerous exceptions have been added to this statute is indicative that each exception is specific to a narrow category of documents rather than general statutes.

Given that Sections 552.110, 552.1101, and 552.139 of the Public Information Act and Section 123.008 of the Election Code are all specific statutes, the propositions of law articulated in *Cuellar* and *Dailing* apply differently to these circumstances, and the doctrine of *pari materia* also applies.

The doctrine of *pari materia* is well articulated in *Cheney v. State*:

> It is a settled rule of statutory interpretation that statutes that deal with the same general subject, have the same general purpose, or relate to the same person or thing or class of persons or things, are considered as being in *pari materia* though they contain no reference to one another, and though they were passed at different times or at different sessions of the legislature.
>
> In order to arrive at a proper construction of a statute, and determine the exact legislative intent, all acts and parts of acts in *pari materia* will, therefore, be taken, read, and construed together, each enactment in reference to the other, as though they were parts of one and the same law. Any conflict between their provisions will be harmonized, if possible, and effect will be given to all the provisions of each act if they can be made to stand together and have concurrent efficacy.

(755 S.W.2d 123, 126 (Tex. Crim. App. 1988) (internal citations omitted)).

A harmonization between Sections 552.110, 552.1101, and 552.139 of the Public Information Act and Section 123.008 of the Election Code exists. Namely, that the custodian

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[10] § 552.110 – "Exception: Confidentiality of Trade Secrets; Confidentiality of Certain Commercial or Financial Information"
§ 552.1101 – "Exception: Confidentiality of Proprietary Information"
§ 552.139 – "Exception: Confidentiality of Government Information Related to Security or Infrastructure Issues for Computers."

[11] Gov't Code § 552.001(a).

shall make items such as manuals available for public inspection in the custodian's office[12] so long as those manuals do not fall under any of the specific exceptions provided for in the Public Information Act Subchapter C.

Not every manual qualifies, for example, as a trade secret under Texas law. (*See e.g., GE Betz Inc. v. Moffitt-Johnson*, 301 F. Supp.3d 668, 691 (S.D. Tex. 2014) (where the court held that "the Trailer Manual does not contain any specific information about the implementation of GE's ideas, methodologies, or techniques so as to potentially qualify for trade secret protection")). Given that Sections 552.110, 552.1101, and 552.139 of the Public Information Act were all published *after* Section 123.008 of the Election Code, the Legislature can be assumed to have considered the existence of Section 123.008 of the Election Code when drafting the exceptions to public disclosure found in Sections 552.110, 552.1101, and 552.139 of the Public Information Act.[13] Therefore, items such as manuals and other "operator manuals or other instructions or documents relating to the use of the system or equipment" provided for in Section 123.008 of the Election Code may be made available for public inspection *so long as* those manuals and other instructions (or any portion of them) do not fall under the exceptions provided for in Subchapter C of the Public Information Act. If such manuals do qualify under one of the specific exceptions, then the manuals should be provided in redacted form, so that interested people may inspect the parts of the manuals that relate to their right of access without disclosing those the portions of the manuals which warrant protection under a specific exception to public disclosure under Subchapter C of the Public Information Act (such as passwords and administrative access to critical voting system infrastructure).

Finally, even if your office continues to believe that at first blush Sections 552.110, 552.1101, and 552.139 of the Public Information Act are general and not specific statutes, the appropriate test requires a two prong analysis: (1) determining which statute was first enacted and (2) determine if the Legislature manifestly intended for the general to prevail over the specific. As explained in the preceding paragraph, Sections 552.110, 552.1101, and 552.139 of the Public Information Act were enacted *after* Section 123.008 of the Election Code. That the Legislature enacted these exceptions to the Public Information Act, and recognizing that Section 123.008 of the Election Code already existed, is a manifestation of its intent to protect these specific categories of information from public disclosure. (*See Acker v. Texas Water Com'n*, 790 S.W.2d 299, 301 (1990) ("A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it").

Accordingly, ES&S asks that you apply both sets of statutes, making the Manuals and other information available in the custodian's office but giving ES&S the opportunity to designate which portions are confidential and should be withheld from public disclosure, such as passwords and information on how to access administrative/programming functions on the voting systems.

[12] *See* Election Code § 123.008.
[13] Election Code § 123.008 was enacted in 1987, while Government Code Sections 552.110, 552.1101, and 552.139 were enacted in 1993, 2019, and 2001, respectively.

CONCLUSION

Requestor is seeking to undermine your office's prior determination and cites fair use as a basis to obtain copies of confidential information about critical Texas voting infrastructure. Yet, Requestor has not met the burden of showing facts that would make fair use applicable, and an analysis of the statutory factors for applying the fair use exception to copyright infringement shows that the Requestor could never meet that burden here.

ES&S believes the appropriate analysis is first to harmonize the Public Information Act specific provisions with the Election Code specific provisions cited herein, and make available in the custodian's office those Manuals or portions of Manuals that do not qualify for any specific exception provided for in the Public Information Act's Subchapter C. Then, with respect to the Manuals or portions of Manuals to be made available for inspection, or with respect to all Manuals should your office continues in its view that those provisions of the Public Information Act are general rather than specific in nature, ES&S requests that access for inspection shall be set up by the custodians so as to prevent any copying of the Manuals or portions thereof. By way of example and not limitation, the custodian should provide for inspection only in a manner that does not allow any recording device, cell phone, camera, other electronic devices capable of recording, copying, or transmitting or accessing the Internet or World Wide Web, or any paper or materials by which someone could take notes or transcribe. Put simply, the Election Code Section 123.008 provides only that the custodian "make available for public inspection" these Manuals and does not provide for copying of any sort. As explained herein, the act of copying is one of the exclusive rights belonging exclusively to the copyright owner, and unauthorized copying is a direct violation of the Federal Copyright Act. If, therefore, the custodian allows for inspection in a manner that permits copying, then the custodian will have violated the January 3rd Decision.

Requestor cannot use "fair use" to subvert copyright protections for the Manuals or confidentiality protections for critical infrastructure. The Requester has not met his burden to show facts and circumstances to invoke fair use. Furthermore, an analysis of the applicable factors to consider reveal that fair use could not and does not apply here.

Voting systems are natural targets for nefarious actors. This is why the U.S. government and the state of Texas (as well as many other states) have specifically designated voting systems as critical infrastructure. Given that the application of fair use is equitable in nature and involves a weighing of the competing interests involved, protecting critical infrastructure must and certainly does outweigh the Requestor's attempts to obtain copies of the Manuals. This is particularly true when the Manuals are already available for public inspection under Texas law (with appropriate redactions for the protection of critical infrastructure).

Please contact us if you have any questions or wish to discuss these matters further. We are available at your convenience to designate which portions of the requested manuals and other information would qualify for an exception to public disclosure. We are also available to propose protocols to prevent copying of any records, as we have had experience in proposing protocols accepted in other states when having to address confidentiality issues in a variety of circumstances.

Respectfully submitted,

Eric Anderson
Vice President & General Counsel

Enclosures

cc: Christopher Gleason, Requestor (via email: records@thejusticesociety.com)
Amy M. McAtee, Assistant County Attorney (via email: a.mcatee@swisher-tx.org)

Exhibit D

Richelle Culifer

From: Records Requests <records@thejusticesociety.com>
Sent: Tuesday, February 13, 2024 10:44 AM
To: Richelle Culifer
Subject: RE: Swisher County ES&S User Guides and Manuals Disclosure and Release Under United States Copyright Fair Use

RE: Swisher County ES&S User Guides and Manuals Disclosure and Release Under United States Copyright Fair Use

Dear Custodian of Public Records for Swisher County

Kindly provide the following Public Records related to the administration of elections for Swisher County using ES&S Electronic Voting Systems:

07_System Operations Procedures		
DS200_2'30'0'0_SOP	DS200 Operator's Guide, Firmware Version 2.30.0.0.	1.1
DS450_3'4'0'0_SOP	DS450 Operator's Guide, Firmware Version 3.4.0.0	1.2
DS850_3'4'0'0_SOP	DS850 Operator's Guide, Firmware Version 3.4.0.0	1.2
ELS_2'0'0'0_SOP	EVS Event Log Service User's Guide, Software Version 2.0.0.0	1.0
ETOUCH_1'0'3'0_SOP	ExpressTouch Operator's Guide, Firmware Version 1.0	1.2
EVOTE_4'0'0'0_SOP_HW1'0	ExpressVote Operator's Guide, Hardware Version 1.0, Firmware Version 4.0.0.0	1.2
EVOTE_4'0'0'0_SOP_HW2'1	ExpressVote Operator's Guide, Hardware Version 2.1, Firmware Version 4.0.0.0	1.2
EVOTEXL_1'0'3'0_SOP	ExpressVote XL Operator's Guide, Firmware Version 1.0	1.4
EWARE_6'0'1'0_SOP_01Admin	Electionware Vol. I: Administrator Guide, Software Version 6.0.1.0	1.0
EWARE_6'0'1'0_SOP_02Define	Electionware Vol. II: Define User Guide, Software Version 6.0.1.0	1.0
EWARE_6'0'1'0_SOP_03Design	Electionware Vol. III: Design User Guide, Software Version 6.0.1.0	1.0
EWARE_6'0'1'0_SOP_04Deliver	Electionware Vol. IV: Deliver User Guide, Software Version 6.0.1.0	1.0
EWARE_6'0'1'0_SOP_05Results	Electionware Vol. V: Results User Guide, Software Version 6.0.1.0	1.0
EWARE_6'0'1'0_SOP_06Appendices	Electionware Vol. VI: Appendices, Software Version 6.0.1.0	1.0

Our lawful requests for the ES&S Manuals Used to Administer Elections in your county clearly fall under "Fair Use Doctrine".

1. Our use is clearly non-commercial and for nonprofit educational purposes.

2. The nature of the copyright work is for the understanding of the administration of local, state and federal elections via the use of ES&S Electronic Voting Systems and the understanding of the "Auditable Election Records" that you are required under Texas and Federal code to provide to the Public as the greatest public interest is in the public's

knowledge that their elections are open, free, fair and TRANSPARENT. The voter knowing that their ballots are being accurately cast and their votes are being accurately counted.

3. There is no negative effect upon the potential market or value for the copyrighted work as there is no commercialization of the sale of these copyrighted works. In fact there is a far greater risk that is in the Public Interest and that would be compromised elections being administered where the public has no confidence that the will of the voter is being considered and that the voters ballots are being accurately cast and counted.

"On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." Cf. 28 U.S.C. s. 1338(a) (the district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases).

Where a federal statute such as the copyright law expressly preempts a field and operates to bar specified acts or conduct, the Supremacy Clause of the United States Constitution provides that the federal law will prevail and exclusively control such matters.(See Art. VI, cl. 2, U.S. Const. And see 17 U.S.C. s. 301)

Consequently, the state is prohibited from enacting or enforcing any state law or regulation which conflicts or interferes with, curtails, or impairs, the operation of the federal law. However, even if a record is copyrighted, federal law permits copying under certain conditions. For example, notwithstanding the exclusive rights of the copyright owner, "**the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."**

Any claim being made regarding copyright law is misinformed and unfounded, not considering "Fair Use"

See 17 U.S.C. s. 107, which states that in determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

https://www.justice.gov/oip/blog/foia-update-oip-guidance-copyrighted-materials-and-foia

"FAIR USE"

The overriding consideration in determining that a particular use is a "fair use" under the Copyright Act, and thus not a copyright infringement, is the public interest in unrestricted access to the information. *See* A. Latman & R. Gorman, *Copyright for the Eighties* 473 (1981); *see also Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 309 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). **Given that the FOIA is designed to serve the public interest in access to information maintained by the government, *see, e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978), disclosure of nonexempt copyrighted documents under the FOIA should be considered a "fair use."**

In fact, reproduction of a copyrighted document by a government entity for a purpose that is not "commercially exploitive of the copyright holder's market," such as copying a work to use as evidence in a judicial proceeding, has been held to constitute a "fair use." *Jartech, Inc. v. Clancy*, 666 F.2d 403, 407 (9th Cir.), *cert. denied*, 103 S. Ct. 58 (1982).

Indeed, the leading commentator on copyright law has found it **"inconceivable that any court would hold such reproduction to constitute infringement." 3 M. Nimmer, *Nimmer on Copyright* § 13.05[D][2] (1983).** In the FOIA context, because reproduction is mandated by law and serves to inform the public of the operation of government, it should similarly be unlikely that a court would find the disclosure of nonexempt information to constitute an infringement.

There is no infringement of federal copyright law in your lawful disclosure of these public records under the "Fair Use Doctrin"

The United States Supreme Court in Seminole Tribe of Florida v. Florida,[-- U.S.--, 116 S.Ct. 1114, 1185 fn. 16 (1996). In response to Justice Stevens dissent that the opinion results in no remedy for state violations of those federal statutes, the Court noted that an individual may obtain injunctive relief under Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), in order to remedy a state officer's ongoing violation of federal law.

The Eleventh Amendment bars suits not only against the state itself, but also against a subdivision of the state if the state remains "the real, substantial party in interest." Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 1355-56, 39 L.Ed.2d 662 (1974). Whether a particular official is the legal equivalent of the state for Eleventh Amendment purposes is generally a question of that state's law. See Garcia v. City of Chicago, Ill., 24 F.3d 966, (7th Cir. 1994), certiorari denied, 115 S.Ct. 1313, 131 L.Ed.2d 194 (1995).) concluded that Congress lacks authority in exercising its Article I powers to abrogate a state's sovereign immunity under Eleventh Amendment, stating: "[I]t has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of those statutory schemes . . . .

Although the copyright and bankruptcy laws have existed practically since our nation's inception, and the antitrust laws have been in force for over a century, there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States." In addition, the fact that the material may be copyrighted does not preclude the material from constituting a public record.

-- U.S.--, 116 S.Ct. 1114, 1185 fn. 16 (1996). In response to Justice Stevens dissent that the opinion results in no remedy for state violations of those federal statutes, the Court noted that an individual may obtain injunctive relief under Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), in order to remedy a state officer's ongoing violation of federal law.

The ongoing non-disclosure of these public records related to local, state and federal elections is a violation of both Texas Code and Federal Code.

We thank you for your co-operation and compliance with the law in a timely fashion as required under Texas law.

Warmest regards,

Christopher Gleason
For The Justice Society

Office of
SWISHER COUNTY ATTORNEY
J. MICHAEL CRISWELL

February 26, 2024

Tyler Masterson
Elections Systems & Software
11128 John Galt Blvd.
Omaha, NE 68137

Via email to tyler.masterson@essvote.com

Dear Mr. Masterson:

We have received a formal request to inspect or copy some of our files. A copy of the request for information is enclosed. The requested files include records we received from you or from your company. The Office of the Attorney General is reviewing this matter, and they will issue a decision on whether Texas law requires us to release your records.

Generally, the Public Information Act (the "Act") requires the release of requested information, but there are exceptions. As described below, you have the right to object to the release of your records by submitting written arguments to the attorney general that one or more exceptions apply to your records. You are not required to submit arguments to the attorney general, but if you decide not to submit arguments, the Office of the Attorney General will presume that you have no interest in withholding your records from disclosure. In other words, if you fail to take timely action, the attorney general will more than likely rule that your records must be released to the public. If you decide to submit arguments, **you must do so not later than the tenth business day after the date you receive this notice.**

If you submit arguments to the attorney general, you must:

a. identify the legal exceptions that apply,
b. identify the specific parts of each document that are covered by each exception, and
c. explain why each exception applies.

Gov't Code § 552.305(d).

A claim that an exception applies without further explanation will not suffice. Attorney General Opinion H-436 (1974). You may contact this office to review the information at issue in order to make your arguments. We will provide the attorney general with a copy of the request for information and a copy of the requested information, along with other material required by the Act. The attorney general is generally required to issue a decision within 45 business days.

Ph: (806) 995-3505
Fax: (806) 995-1525
Email: a.mcatee@swisher-tx.org

119 S. Maxwell
3rd Floor
Tulia, Texas 79088

Please send your written comments to the Office of the Attorney General at the following address:

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

If you wish to submit your written comments electronically, you may only do so via the Office of the Attorney General's eFiling System. An administrative convenience charge will be assessed for use of the eFiling System. No other method of electronic submission is available. Please visit the attorney general's website at http://www.texasattorneygeneral.gov for more information.

In addition, you are required to provide the requestor with a copy of your communication to the Office of the Attorney General. Gov't Code § 552.305(e). You may redact the requestor's copy of your communication to the extent it contains the substance of the requested information. Gov't Code § 552.305(e). You may provide a copy of your communication to the governmental body who received the request and sent the notice.

Commonly Raised Exceptions

In order for a governmental body to withhold requested information, specific tests or factors for the applicability of a claimed exception must be met. Failure to meet these tests may result in the release of requested information. We have listed the most commonly claimed exceptions in the Government Code concerning proprietary information and the leading cases or decisions discussing them. This listing is not intended to limit any exceptions or statutes you may raise.

Section 552.101: Information Made Confidential by Law

Open Records Decision No. 652 (1997).

Section 552.110: Confidentiality of Trade Secrets and Commercial or Financial Information

Trade Secrets

Commercial or Financial Information:

Birnbaum v. Alliance of Am. Insurers, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. filed) (construing previous version of section 552.110), *abrogated by In re Bass*, 113 S.W.3d 735 (Tex. 2003).

Open Records Decision No. 639 (1996).

Open Records Decision No. 661 (1999).

Section 552.1101: Confidentiality of Proprietary Information

Section 552.113: Confidentiality of Geological or Geophysical Information

Open Records Decision No. 627 (1994).

Section 552.131: Confidentiality of Certain Economic Development Negotiation Information

If you have questions about this notice or release of information under the Act, please refer to the *Public Information Handbook* published by the Office of the Attorney General, or contact the attorney general's Open Government Hotline at (512) 478-OPEN (6736) or toll-free at (877) 673-6839 (877-OPEN TEX). To access the *Public Information Handbook* or Attorney General Opinions, including those listed above, please visit the attorney general's website at http://www.texasattorneygeneral.gov.

Respectfully,

Amy M. McAtee
Assistant County Attorney
Swisher County, Texas

Enclosure: Copy of request for information

cc: Christopher Gleason, Requestor
via email to records@thejusticesociety.com
(w/o enclosures)

Open Records Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(w/o enclosures)