STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

Steven P. Means
Executive Assistant

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Mary E. Burke
Assistant Attorney General
burkeme@doj.state.wi.us
608/266-0323
FAX 608/267-2223

May 16, 2011

Ms. Juliana M. Ruenzel
City Attorney
City of Manitowoc
City Hall
900 Quay Street
Manitowoc, WI 54220

Dear Ms. Ruenzel:

I am responding to your March 18, 2011, letter to Attorney General J.B. Van Hollen regarding a public records request received by the City of Manitowoc (the "City") for the contents of removable memory devices for the City's voting systems for the September 14, 2010, and November 2, 2010, elections.

Enclosed with your letter were copies of the following documents:

- The public records request dated March 14, 2011, sent by John Washburn ("Mr. Washburn") to numerous Wisconsin municipal clerks, including the Manitowoc City Clerk (the "Washburn request");

- An email dated March 9, 2011, from Government Accountability Board ("GAB") Staff Counsel Shane Falk ("Mr. Falk") to certain county and municipal clerks (the "Falk email");

- An email dated March 15, 2011, from Lee Storbeck ("Mr. Storbeck"), President of Command Central, LLC ("Command Central") to various recipients (the "Storbeck email"); and

- An email dated March 18, 2011, from GAB Elections Specialist Ross Hein ("Mr. Hein") to county and municipal clerks (the "Hein email").

Your letter explains that Command Central is the City's vendor for voting machines and the "prom packs" (a type of removable memory device) that contain the information requested by Mr. Washburn. The Storbeck email opines that Mr. Washburn is not entitled to the

information sought by the Washburn request. The Storbeck email offers two reasons for that opinion:

> The first issue is that the request must be made during a time period prescribed by Wisconsin statute, which may not be the case here. In fact, most of the memory devices affected here have already been reprogrammed for the April 5, 2011 election. Your Governmental [sic] Accountability Board should be getting something out on that issue shortly.
>
> The second issue is that the vendor that manufactured the affected voting machines has very strict policies governing the transfer of proprietary information to outside parties regardless of an "open records" request. This definitely includes the programming information resident on those memory devices. Dominion Voting Systems, the company that acquired Sequoia Voting Systems will provide Command Central with an updated legal position on this, which we, in turn, will provide to you, the County Clerks.

You subsequently forwarded to me an April 1, 2011, letter to Mr. Storbeck from Edwin B. Smith, III ("Mr. Smith"), Vice President of Compliance and Certification at Dominion Voting Systems ("Dominion"). Mr. Smith's letter stated, in relevant part:

> Dominion . . . does not object to the disclosure of the raw data contained within the electronic files on . . . [the Edge II, Optech Eagle and Insight memory card devices]. The information contained on the memory devices may either be downloaded onto electronic media or printed in hard copy. . . .
>
> Note that Dominion Voting Systems does not relinquish any copyright, patent, or trademark asserted over this or any other material in any release arising from any public records request. Dominion Voting Systems neither relinquishes nor waives any remedy, at tort or at equity for any reverse engineering, patent mining, or other use of the released information if such use infringes Dominion Voting Systems intellectual property.

Mr. Smith's letter does not explain what Dominion deems to be "raw data" that may be disclosed or how that raw data may be formatted or produced for disclosure; does not identify what specific information on the memory devices is alleged to be protected by copyright, patent, or trademark; does not provide supporting legal citations; and does not identify any facts supporting applicability of those protections to specific information contained on the memory devices.

The Falk email outlined the general framework applicable to analyze and respond to a public records request for the contents of removable memory devices for voting systems:

> The recent request for the contents of the removable memory devices for the voting systems used in the past Spring Primary will require further investigation in consultation with the voting equipment manufacturer and/or programmer, as well as your attorney. Your attorney can advise you on how to proceed with respect to preservation of any records subject to an open record request immediately prior to a statutorily approved disposal date. In order to make sure that all requested records that statutorily must be disclosed are in fact available to public inspection, clerks should request the position of the voting equipment manufacturer and/or programmer to prevent violations of trade secret, copyright, trademark, proprietary and general confidentiality rights of the manufacturer and/or programmer.
>
> Most importantly, clerks should seek consultation with their respective municipal or corporation counsel regarding trade secret and open record provisions, as these issues may relate to specific open records requests.

As suggested in the Falk email, your city clerk consulted you upon receipt of the Washburn request—thus prompting your inquiry to Attorney General Van Hollen.

The Hein email subsequently elaborated on the advice offered in the Falk email, specifically in reference to public records requests for contents of removable memory devices for the voting systems used in the September 2010 primary and November 2010 general election. Mr. Hein began by noting that Wis. Stat. § 7.23(1)(g) sets forth the data transfer requirements applicable to detachable recording units and compartments used with tabulating equipment for an electronic voting system. Mr. Hein further noted that the GAB's approved retention policy dated June 9, 2010,[1] provides some direction on satisfying those statutory requirements for the many voting systems approved for use in Wisconsin.

The Hein email again advised clerks preparing responses to these public records requests to request the position of the voting equipment manufacturer and/or programmer "to prevent violations of trade secret, copyright, trademark, proprietary and general confidentiality rights of the manufacturer and/or programmer." Mr. Hein noted that individualized advice was required because the applicable public records analysis is specific to each public records request and its subject matter. Acknowledging the diverse voting systems currently approved for use in Wisconsin, Mr. Hein also explained that "certain manufacturers/programmers have open source

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[1]Available on line at *http://gab.wi.gov/node/1126.*

coding which does not hinder any disclosure in response to an open records request, so please be cautious if you do not consult your counsel but instead rely solely on information from another clerk. Your specific situation may be entirely different than another clerk's situation."

The Hein email also suggested that clerks receiving these public records requests contact the Wisconsin Towns Association, Wisconsin League of Municipalities, Wisconsin Counties Association, Wisconsin Municipal Clerks Association, and Wisconsin County Clerks Association. Mr. Hein noted the potential benefit of consultation by attorneys for various jurisdictions regarding legal issues presented, particularly for jurisdictions utilizing the same vendors.

Your letter requests guidance as to whether or not information responsive to the Washburn request may be released "without violating any proprietary rights of the manufacturer of these voting systems."

At the outset, I note that your inquiry does not involve the separate issue of whether clerks are complying with the election materials retention requirements of Wis. Stat. § 7.23. The right of access provided by the Wisconsin public records law applies to records that exist at the time a public records request is received. 73 Op. Att'y Gen. 37, 44 (1984).

On the central public records issues about which you do inquire, I concur in the general advice offered in the Falk email and the Hein email. The Department of Justice (the "Department") does not possess the necessary factual information about each of the various voting systems now used in Wisconsin that would be necessary to offer particularized advice about what may or may not be released—in response to a public records request—from the removable memory devices used in each of those systems.

Pursuant to the Attorney General's Wis. Stat. § 19.39 authority to provide advice about applicability of the Wisconsin public records law, however, the general legal analysis applicable to requests like Mr. Washburn's is outlined below. Each municipality or county receiving a public records request similar to the Washburn request will need to apply this analysis to the specific facts about the removable memory devices used in its election equipment. That analysis will require specific information from the manufacturer and/or programmer of the election equipment used in that municipality or county.

Generalized assertions from those vendors that information on the memory devices cannot be released because it is protected from disclosure by copyright, trademark, patent, or otherwise are not helpful. Although the public records law recognizes several bases for redacting proprietary information that may be applicable to some contents of the various election equipment memory devices, those bases must be identified with sufficient specificity in response to a particular request.

More cooperation from the vendors therefore is necessary to respond to these public records requests. It is not realistic or reasonable to expect county and municipal clerks to be able to assert complex intellectual property law arguments to justify withholding certain information on the memory devices from public records responses, as requested by the vendors, if the vendors have not provided the clerks with the necessary legal and factual information to support those assertions on their behalf.

On this letter, therefore, I am copying vendor representatives of the election equipment approved for use in Wisconsin. For purposes of efficiency and consistency, I also am copying representatives of Wisconsin's various municipal and county associations and clerks' associations.

To facilitate efficient resolution of these memory device content requests consistently with requirements and limitations of the Wisconsin public records law, including protection of the vendors' proprietary information where applicable, the Department strongly suggests that each vendor immediately provide the following information to each of their municipal customers, the municipal and county associations copied on this letter, and the GAB:

- A detailed explanation specifically identifying any proprietary programming or information on the removable memory devices used in their equipment in which the vendors assert interests precluding disclosure in response to public records requests, with explanations specific to each model of that vendor's equipment now in service in Wisconsin;

- The applicable legal bases, cognizable under the Wisconsin public records law analysis set forth below, upon which the vendor bases its claims that the identified information is proprietary and not subject to disclosure in response to a public records request—including legal citations and facts sufficient to demonstrate applicability of the asserted legal bases, and identification of relevant sections of licensing agreements or other governing agreements between the vendor and its Wisconsin customers;

- What constitutes "raw data" or other information on each memory device regarding which the vendor does not assert any proprietary interest, such that the data or information may be disclosed in response to public records requests without violating the vendor's proprietary interests; and

- How to actually extract or copy the non-proprietary information from each specific memory device, and the costs of any such extracting or copying.

To the extent that any follow up communications might be needed with vendors to obtain or clarify this information, the Department strongly suggests that the municipal and county associations copied on this letter collaborate to obtain that information or those clarifications for their members.

Failure by a vendor to provide a clerk with sufficient factual and legal information to support the vendor's claims that proprietary information should not be released may result in necessary joinder of that vendor in subsequent litigation over sufficiency of the clerk's response to a related public records request or other legal challenges to the vendor's asserted proprietary interests. *Cf.* Wis. Stat. §§ 19.37(1) and 803.03(1). *See also Assessment Technologies of WI, LLC v. WIREdata*, 350 F.3d 640 (7th Cir. 2003). I note that § 34 of the City's licensing agreement with Sequoia Voting Systems, Inc. ("Sequoia"), in which Sequoia's interests subsequently were assigned to Dominion, memorializes the vendor's agreement that: (1) the licensing agreement will be governed by and construed in accordance with the laws of Wisconsin; and (2) the parties agree "to submit to the exclusive jurisdiction of the courts of the State of Wisconsin and the federal district courts situated in Wisconsin with respect to any matter arising from or relating to this Agreement."

The Wisconsin public records law provides that "[e]xcept as otherwise provided by law, any requester has a right to inspect any record." Wis. Stat. § 19.35(1)(a). Any record specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under Wis. Stat. § 19.35(1), except that any portion of the record containing public information is open to public inspection. Wis. Stat. § 19.36(1).

If a record contains both information that is subject to disclosure and information that is not subject to disclosure, information not subject to disclosure must be deleted before release of the record. Wis. Stat. § 19.36(6).

Whether to disclose records or portions of records not specifically addressed by statutory provisions or case law requires application of a balancing test, in which the public interest in disclosure is weighed against any public interests in non-disclosure. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. The balancing test is a fact-intensive inquiry that must be performed on a case by case basis. *Kroeplin v. Wisconsin Dep't of Nat. Res.*, 2006 WI App 227, ¶ 37, 297 Wis. 2d 254, 725 N.W.2d 286.

<u>Copyrighted and patented information</u>. Materials to which access is limited by copyright or patent are not records subject to disclosure under the Wisconsin public records law. Wis. Stat. § 19.32(2). If a vendor is asserting that certain content on a memory device is protected by copyright or patent, the vendor should: (1) identify that content as precisely as possible, by file

name or in similar detail; (2) provide supporting legal citations; and (3) identify facts, documents, or other evidence supporting its assertion of copyright or patent protection for that specific content.

Trade secret information. Access to any record or portion of a record containing information qualifying as a trade secret, as defined in Wis. Stat. § 134.90(1)(c), may be withheld from release in response to a public records request. Wis. Stat. § 19.36(5).

> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply:
>
> 1. The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> 2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.

Wis. Stat. § 134.90(1)(c).

Consequently, establishing a trade secret pursuant to Wis. Stat. § 134.90(1)(c) requires demonstrating: (1) existence of information such as a formula, pattern, compilation, program, device, method, technique, or process; (2) that has independent economic value, available from only one source; and (3) that is the subject of reasonable efforts to maintain its secrecy. *ECT International v. Zwerlein*, 228 Wis. 2d 343, 349, 597 N.W.2d 479 (Ct. App. 1999). A party asserting existence of a trade secret need not spell out details that would destroy what the party is seeking to protect, but must include with some specificity the nature of the trade secret. A generalized assertion that there is a trade secret is insufficient. *Id.* at 349. If a vendor is asserting that specified content on a memory device is trade secret, the vendor should specifically identify that content and identify the specific facts, documents, and legal citations demonstrating existence of the three *Zwerlein* attributes demonstrating that the specified content meets the Wis. Stat. § 134.90(1)(c) definition of a trade secret. Vendors and their legal counsel should review *Zwerlein* for guidance as to the amount of information needed to establish these ultimate facts.

Computer programs. Similarly, a computer program—as defined in Wis. Stat. § 16.971(4)(c)—is not subject to disclosure in response to a public records request. Wis. Stat. § 19.36(4). "Computer programs" are "the processes for the treatment and verbalization of data." Wis. Stat. § 16.971(4)(c). "Open source" software that might not be protected from disclosure under the copyright, patent, or trade secret provisions discussed above might qualify for redaction under Wis. Stat. § 19.36(4). The material used as input for a computer program or

the material produced as a product of the computer program is subject to disclosure, however, except as otherwise provided in Wis. Stat. §§ 19.35 and 19.36.

Other legal bases. It is possible that a vendor also may be able to identify other specific provisions of law that would preclude disclosure of particular information contained on a memory device that would exempt that information from disclosure in response to a public records request. *Cf.* Wis. Stat. § 19.36(1). If so, it is incumbent on the vendor to provide its Wisconsin customers with an explanation identifying particular information, the specific provisions of law that may be asserted to preclude disclosure of that information, and any necessary factual or background information necessary to establish that the identified provisions of law apply to that particular information.

To summarize, the vendors are the entities possessing the information necessary to answer these questions:

1. What specific content of a particular memory device is protected from disclosure in response to a public records request because it is proprietary intellectual property protected by copyright or patent; it is a trade secret pursuant to Wis. Stat. § 134.90(1)(c); it constitutes a computer program as defined in Wis. Stat. § 16.971(4)(c); or its confidentiality is protected by some other identifiable provision of law?

2. What are the specific legal and factual bases for asserting applicability of those proprietary intellectual property interests?

3. What specific content of a particular memory device may be disclosed in response to a public records request because it constitutes raw data or is not the vendor's proprietary intellectual property, as described in No. 1 above?

4. How exactly does a municipality extract or copy the content of a particular memory device that may be disclosed in response to a public records request, as described in No. 3 above, and what are the associated costs?

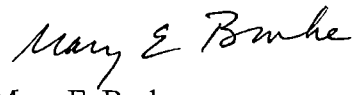
Armed with that information, with the assistance of their counsel and IT departments, the clerks will be able to actually assess which contents of specific memory devices are exempt by operation of the specific laws discussed above from disclosure in response to public records requests. After making those threshold determinations, the clerks then will be able to consider whether any other data or information on the memory devices should be redacted pursuant to the public records balancing test for reasons that might include—based on the totality of circumstances presented—the public interest in protecting the security of voting systems in

Wisconsin and insuring access to a sufficient number and variety of competitive voting system manufacturers in Wisconsin.

For further information, vendors unfamiliar with requirements of the Wisconsin public records law may find it helpful to review the Department's *Wisconsin Public Records Law Compliance Outline* (the "*Outline*"). The *Outline* may be viewed, printed, or downloaded free of charge at *http://www.doj.state.wi.us/dls/OMPR/2010OMCG-PRO/2010_Pub_Rec_Outline.pdf.*

This letter is intended to provide general information pursuant to Wis. Stat. § 19.39. It is not a formal opinion of the Attorney General issued pursuant to Wis. Stat. § 165.015.

Sincerely,



Mary E. Burke
Assistant Attorney General

MEB:cla

c: Shane Falk
Government Accountability Board

Janet Geisler
Wisconsin County Clerks Association

Timothy J. Hallett
Election Systems & Software

Ross Hein
Government Accountability Board

Diane Hermann-Brown
Wisconsin Municipal Clerks Association

Stanford Morganstein
Populex Corporation

Mark O'Connell
Wisconsin Counties Association

Steve Pearson
Election Systems & Software

Claire Silverman
League of Municipalities

Edwin B. Smith, III
Dominion Voting Systems, Inc.

Richard Stadelman
Wisconsin Towns Association

Lee Storbeck
Command Central, LLC

Larry Zins
Command Central, LLC

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