



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.  
The ruling and judgment can be viewed in PDF  
format below.



January 21, 2015

Mr. Mark E. Brewton  
Corporate Counsel  
San Antonio Water System  
P.O. Box 2449  
San Antonio, Texas 78298-2449

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

OR2015-01119

Dear Mr. Brewton:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 550663 (ORR# 3755).

The San Antonio Water System ("SAWS") received a request for specified proposals pertaining to Contract Solicitation R-14-004-MF.<sup>1</sup> SAWS does not take a position as to whether the submitted information is excepted from disclosure under the Act. However, SAWS states, and provides documentation showing, it notified Aetna, Blue Cross and Blue Shield of Texas ("Blue Cross"), Express Scripts, Inc. ("Express"), and United HealthCare Services, Inc. ("United") of SAWS's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 at 3 (1990)* (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received correspondence from all the interested third parties, which object to the release of some of the information at issue. We have reviewed the submitted arguments and information.

Initially, we note information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept

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<sup>1</sup>SAWS sought and received clarification of the information requested. *See Gov't Code § 552.222* (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the requested information falls within an exception to disclosure, SAWS must release it, notwithstanding any expectations or agreement specifying otherwise.

Express has submitted information to this office it asserts is excepted from release under section 552.110 of the Government Code. However, SAWS did not submit this information for our review. This ruling does not address information beyond what SAWS has submitted to us for review. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information SAWS submitted as responsive to the request for information. *See id.*

United asserts some of the submitted information is not responsive to the request for information. A governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). SAWS has reviewed its records and determined the documents it has submitted are responsive to the request. Thus, we find SAWS has made a good-faith effort to relate the request to information within its possession or control. Accordingly, we will determine whether SAWS must release the submitted information under the Act.

Blue Cross argues some of its information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure information that, if released, would give an advantage to a competitor or bidder. Gov’t Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). SAWS did not assert section 552.104. Therefore, SAWS may not withhold any of the information at issue pursuant to that section. *See* ORD 592 (governmental body may waive statutory predecessor to section 552.104).

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Gov’t Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret

from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* ORD 552 at 2. Section 757 provides a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . It may . . . relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>2</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983). We also note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see Hyde Corp.*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3.

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result

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<sup>2</sup>The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret: (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). However, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514.

Upon review, we find Aetna has established the release of its customer information would cause it substantial competitive injury. Nevertheless, to the extent Aetna has published any of the customer information at issue on its website, this information is not confidential under section 552.110. Accordingly, SAWS must withhold Aetna's customer information under section 552.110(b), provided Aetna has not published the information on its website. We also find Aetna and Blue Cross have established the release of some of the remaining information, which we have marked under section 552.110(b), would cause them substantial competitive injury. Thus, SAWS must withhold the information we have marked under section 552.110(b). However, we find Aetna, Blue Cross, Express, and United have failed to establish release of any of the remaining information at issue, including any customer information published on Aetna's website, would cause these third parties substantial competitive injury. *See* Gov't Code § 552.110(b). We also conclude these third parties have not shown any of the remaining information, including any customer information published on Aetna's website, meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See id.* § 552.110(a); ORD 402 at 2-3. Therefore, SAWS may not withhold any of the remaining information under section 552.110.

The submitted information contains insurance policy numbers. Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential."<sup>3</sup> Gov't Code § 552.136(b). This office has determined an insurance policy number is an access device number for purposes of section 552.136. Open Records Decision No. 684 at 9 (2009). Thus, SAWS must withhold the insurance policy numbers in the submitted information under section 552.136 of the Government Code.

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records

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<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

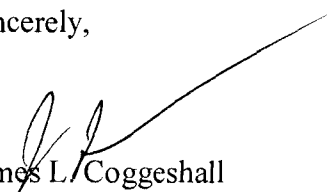
that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

To conclude, SAWS must withhold Aetna's customer information under section 552.110(b) of the Government Code, provided Aetna has not published the information on its website. SAWS must also withhold the information we have marked under section 552.110(b) of the Government Code. SAWS must withhold the insurance policy numbers in the submitted information under section 552.136 of the Government Code. SAWS must release the remaining information, but may only release any copyrighted information in accordance with copyright law.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/cbz

Ref: ID# 550663

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Elizabeth Hadley  
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Mr. John S. Aissis  
Senior Associate General Counsel  
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Government Sector and Labor  
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4300 Centreway Place  
Arlington, Texas 76018  
(w/o enclosures)

JUL 30 2019

At 2:33 P.M.  
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-15-000427

EXPRESS SCRIPTS, INC.,  
*Plaintiff,*

v.

KEN PAXTON,  
ATTORNEY GENERAL OF TEXAS,  
*Defendant.*

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IN THE DISTRICT COURT OF

419th JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

**AGREED FINAL JUDGMENT**

On this date, Plaintiff Express Scripts, Inc. (Express Scripts) and Ken Paxton, Attorney General of Texas (the Attorney General), appeared by and through their respective attorneys and announced to the Court that all matters of fact and things in controversy between them had been fully and finally resolved.

This is an action brought by Plaintiff Express Scripts to challenge Letter Ruling OR2015-01119. The San Antonio Water System (SAWS) received a request for information pursuant to the Public Information Act (PIA), Tex. Gov't Code ch. 552, for all documents submitted in response to a request for bids. These documents contain information designated by Express Scripts as confidential, proprietary, trade secret, and commercial and financial information exempt from disclosure under the PIA. SAWS requested a ruling from the Open Records Division of the Office of the Attorney General (ORD). ORD subsequently issued the Ruling, ordering the release the some of the information. SAWS holds the information that has been ordered to be disclosed.

All matters in controversy between Plaintiff, Express Scripts, and Defendant, Attorney General, have been resolved by settlement, a copy of which is attached hereto as Exhibit "A", and the parties agree to the entry and filing of an Agreed Final Judgment.



Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent certified letters to the requestor, Mr. Victor Pluto, on July 9, 2019, informing him of the setting of this matter on the uncontested docket on this date. The requestor was informed of the parties' agreement that SAWS will be instructed to withhold the designated portions of the information at issue. The requestor was also informed of his right to intervene in the suit to contest the withholding of this information. Verification of the delivery of this letter is attached to this motion as Exhibit "B". The requestor has not filed a motion to intervene.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

**IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:**

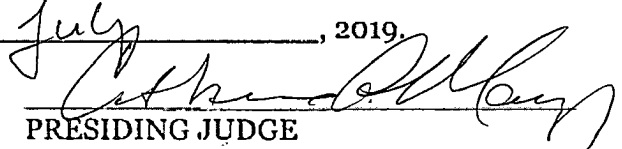
1. Express Scripts and the Attorney General have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue are excepted from disclosure pursuant to Texas Government Code section 552.104. Pursuant to Texas Government Code section 552.104, the Attorney General agrees that certain portions of the information, specifically pricing information and client reference and subcontractor information can be redacted in accordance with the markings agreed to by the parties, which markings are reflected on the copies of the above-described documents that Express Scripts transmitted to the Attorney General. The Attorney General will provide a copy of the agreed markings to SAWS, with instructions to SAWS that Letter Ruling OR2015-01119 should not be relied upon as a prior determination.

2. All court cost and attorney fees are taxed against the parties incurring the same;

3. All relief not expressly granted is denied; and

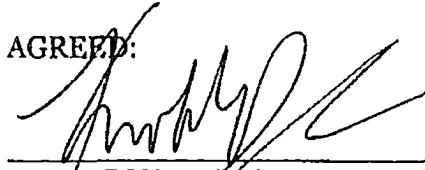
4. This Agreed Final Judgment finally disposes of all claims that are the subject of this lawsuit between Express Scripts and the Attorney General and is a final judgment.

SIGNED the 30 day of July, 2019.


  
PRESIDING JUDGE

Catherine A. Maury

AGREED:

  
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Assistant Attorney General  
Administrative Law Division  
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ATTORNEY FOR DEFENDANT, KEN PAXTON

  
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ATTORNEYS FOR PLAINTIFF, EXPRESS SCRIPTS

**A**

CAUSE NO. D-1-GN-15-000427

EXPRESS SCRIPTS, INC.,  
*Plaintiff,*

v.

KEN PAXTON,  
ATTORNEY GENERAL OF TEXAS,  
*Defendant.*

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IN THE DISTRICT COURT OF

419th JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

**SETTLEMENT AGREEMENT**

This Settlement Agreement (Agreement) is made by and between Plaintiff Express Scripts, Inc. ("Express Scripts") and Ken Paxton, Attorney General of Texas (the Attorney General). This Agreement is made on the terms set forth below.

**Background**

In October 2014, a request was made under the Public Information Act (PIA) for all documents submitted in response to a request for bids put out by the San Antonio Water System (SAWS). SAWS asked for an Attorney General decision on whether portions of this information could be withheld.

In Letter Ruling OR2015-01119, the Open Records Division of the Attorney General (ORD) required SAWS to release some of the information Express Scripts claims is proprietary.

After this lawsuit was filed, Express Scripts submitted information and briefing to the Attorney General establishing that some of the information at issue is excepted from disclosure under Texas Government Code section 552.104 in conjunction with *Boeing Company v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The Attorney General has reviewed Express Scripts' request and agrees to the settlement.

Texas Government Code section 552.325(c) allows the Attorney General to enter into settlement under which the information at issue in this lawsuit may be withheld. The parties wish to resolve this matter without further litigation.

### **Terms**

For good and sufficient consideration, the receipt of which is acknowledged, the parties to this Agreement agree and stipulate that:

1. Express Scripts and the Attorney General have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue are excepted from disclosure pursuant to Texas Government Code section 552.104. Pursuant to Texas Government Code section 552.104, the Attorney General agrees that certain portions of the information, specifically pricing information and client reference and subcontractor information can be redacted in accordance with the markings agreed to by the parties, which markings are reflected on the copies of the above-described documents that Express Scripts transmitted to the Attorney General. The Attorney General will provide a copy of the agreed markings to SAWS, with instructions to SAWS that Letter Ruling OR2015-01119 should not be relied upon as a prior determination.

2. Express Scripts and the Attorney General agree to the entry of an agreed final judgment, the form of which has been approved by each party's attorney. The agreed final judgment will be presented to the court for approval, on the uncontested docket, with at least 15 days prior notice to the requestor.

3. The Attorney General agrees that he will also notify the requestor, as required by Tex. Gov't Code § 552.325(c), of the proposed settlement and of their right to intervene to contest Express Scripts' right to have SAWS withhold the information.

4. A final judgment entered in this lawsuit after a requestor intervenes prevails over this Agreement to the extent of any conflict.

5. Each party to this Agreement will bear their own costs, including attorney fees relating to this litigation.

6. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement.


7. Express Scripts warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that Express Scripts has against the Attorney General arising out of the matters described in this Agreement.

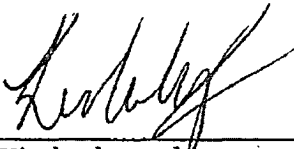
8. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against Express Scripts arising out of the matters described in this Agreement.

9. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.


**EXPRESS SCRIPTS, INC.**

**KEN PAXTON, ATTORNEY GENERAL  
OF TEXAS**

By:   
name: Karl A. Schulz  
firm: Cozen O'Connor  
Date: July 8, 2019

By:   
name: Kimberly Fuchs  
title: Assistant Attorney General,  
Administrative Law Division  
Date: 7-8-19

**B**

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY														
<ul style="list-style-type: none"> <li>■ Complete items 1, 2, and 3.</li> <li>■ Print your name and address on the reverse so that we can return the card to you.</li> <li>■ Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	<p>A. Signature <input type="checkbox"/> Agent  <input checked="" type="checkbox"/> <i>William J. Ploby</i> <input type="checkbox"/> Address</p> <p>B. Received by (Printed Name) <input type="checkbox"/> C. Date of Delivery</p>														
<p>1. Article Addressed to:</p> <p style="margin-left: 40px;">Mr. Victor Pluto  Humana-Group Medicare  6300 South Syracuse Way, Suite 555  Centennial, CO 80111  [Express3]: [Req Ltr 1 settlement]</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes  If YES, enter delivery address below: <input type="checkbox"/> No</p>														
<div style="text-align: center;">   9590 9402 2720 6351 8533 01 </div>	<p>3. Service Type</p> <table border="0"> <tr> <td><input type="checkbox"/> Adult Signature</td> <td><input type="checkbox"/> Priority Mail Express®</td> </tr> <tr> <td><input checked="" type="checkbox"/> Adult Signature Restricted Delivery</td> <td><input type="checkbox"/> Registered Mail™</td> </tr> <tr> <td><input type="checkbox"/> Certified Mail®</td> <td><input type="checkbox"/> Registered Mail Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Certified Mail Restricted Delivery</td> <td><input type="checkbox"/> Return Receipt for Merchandise</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery</td> <td><input type="checkbox"/> Signature Confirmation<sup>1</sup></td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery Restricted Delivery</td> <td><input type="checkbox"/> Signature Confirmation Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery Restricted Delivery</td> <td></td> </tr> </table>	<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®	<input checked="" type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™	<input type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery	<input type="checkbox"/> Certified Mail Restricted Delivery	<input type="checkbox"/> Return Receipt for Merchandise	<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation <sup>1</sup>	<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery	<input type="checkbox"/> Collect on Delivery Restricted Delivery	
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USPS TRACKING#



First-Class Mail  
Postage & Fees Paid  
USPS  
Permit No. G-10

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United States  
Postal Service

• Sender: Please print your name, address, and ZIP+4® in this box\*

[Express3]: [Req Ltr 1 settlement]

Kimberly Fuchs, Open Records Litigation  
Office of Attorney General, ALD - 018  
P O BOX 12548 CAPITOL STATION  
AUSTIN TX 78711-2548

