



**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.



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 27, 2015

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

Ms. Claudene Marshall  
Assistant General Counsel  
The Texas A&M University System  
301 Tarrow Street, 6<sup>th</sup> Floor  
College Station, Texas 77840-7896

OR2015-08084

Dear Ms. Marshall:

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# 561329 (Ref. Nos. SO-15-015 & SO-15-021).

The Texas A&M University System (the "system") received two requests from different requestors for information relating to a specified request for proposals. Although the system takes no position as to whether the submitted information is excepted under the Act, it states release of the submitted information may implicate the proprietary interests of Blue Cross Blue Shield of Texas ("BCBS"); Catamaran; CaremarkPCS, L.L.C. ("Caremark"); Express Scripts, Inc. ("Express Scripts"); OptumRx, Inc. ("OptumRx"); Script Care, Ltd.; and WellDyne Rx. Accordingly, the system states, and provides documentation showing, it notified the third parties of the requests for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (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 comments from BCBS, Caremark, Express Scripts, and OptumRx. We have considered the submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from BCBS, Caremark, Express Scripts, and OptumRx explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the system may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

BCBS, Caremark, Express Scripts, and OptumRx each contend some of their information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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>1</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983). We 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 also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

BCBS, Caremark, Express Scripts, and OptumRx argue some of their information consists of trade secret information. Upon review, we find Express Scripts and OptumRx have established a *prima facie* case their customer information constitutes trade secret information for purposes of section 552.110(a). Accordingly, to the extent the customer information at issue is not publicly available on Express Scripts' or OptumRx's website, the system must withhold the customer information at issue under section 552.110(a).<sup>2</sup> However, we find BCBS, Caremark, Express Scripts, and OptumRx have failed to establish a *prima facie* case any portion of their remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for their remaining

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<sup>1</sup>The Restatement of Torts lists the following six factors 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 other 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).

<sup>2</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

information. *See* ORD 402. Therefore, none of the remaining information may be withheld under section 552.110(a).

BCBS, Caremark, Express Scripts, and OptumRx further argue some of their information consists of commercial information, the release of which would cause each company substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find BCBS, Caremark, and OptumRx have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause each company substantial competitive injury. Accordingly, the system must withhold this information, which we have marked, under section 552.110(b).<sup>3</sup> However, we find BCBS, Caremark, Express Scripts, and OptumRx have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their remaining information would cause the companies substantial competitive harm. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Further, we note Express Scripts was the winning bidder in this instance. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* 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). Accordingly, the system may not withhold any of the remaining information under section 552.110(b).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This section encompasses information protected by other statutes. Caremark argues portions of its remaining information fit the definition of a trade secret found in section 1839(3) of title 18 of the United States Code, and indicates this information is therefore confidential under sections 1831 and 1832 of title 18 of the United States Code. *See* 18 U.S.C. §§ 1831, 1832, 1839(3). Section 1839(3) provides in relevant part:

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<sup>3</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

(3) the term “trade secret” means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes . . . if -

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public[.]

*Id.* § 1839(3). Section 1831 provides criminal penalties for the unauthorized disclosure of trade secrets to foreign governments, instrumentalities, or agents. *Id.* § 1831. Section 1832 provides criminal penalties for the unauthorized appropriation of trade secrets related to products produced for or placed in interstate or foreign commerce. *Id.* § 1832. We find Caremark has not demonstrated the information at issue is a trade secret under section 1839(3). Accordingly, we need not determine whether section 1831 or section 1832 applies, and the system may not withhold any of the remaining responsive information under section 552.101 of the Government Code on those bases.

Additionally, Caremark and OptumRx argue portions of their remaining information fit the definition of a trade secret found in section 134A.002(6) of the Civil Practice and Remedies Code of the Texas Uniform Trade Secrets Act (the “TUTSA”) as added by the Eighty-third Texas Legislature. Section 134A.002(6) provides:

(6) “Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that:

(A) 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; and

(B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Civ. Prac. & Rem. Code § 134A.002(6). We note the legislative history of TUTSA indicates it was enacted to provide a framework for litigating trade secret issues and provide injunctive relief or damages in uniformity with other states. Senate Research Center, Bill Analysis, S.B. 953, 83rd Leg., R.S. (2013) (enrolled version). Section 134A.002(6)’s definition of trade secret expressly applies to chapter 134A only, not the Act, and does not expressly make

any information confidential. *See* Civ. Prac. & Rem. Code § 134A.002(6); *see also id.* § 134A.007(d) (TUTSA does not affect disclosure of public information by governmental body under the Act). *See* Open Records Decision Nos. 658 at 4, 478 at 2, 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the system may not withhold Caremark's or OptumRx's remaining information under section 552.101 of the Government Code in conjunction with section 134A.002(6) of Texas Civil Practice and Remedies Code.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], 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.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Upon review, we find the system must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

We note some of the remaining information 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 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.

In summary, to the extent the customer information at issue is not publicly available on Express Scripts' or OptumRx's website, the system must withhold the customer information at issue under section 552.110(a) of the Government Code. The system must withhold the information we have marked under section 552.110(b) of the Government Code. The system must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The system must release the remaining information; however, any information subject to copyright may be released only 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,



David L. Wheelus  
Assistant Attorney General  
Open Records Division

DLW/sdk

Ref: ID# 561329

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)

Mr. Colby Heiner  
Catamaran  
3718 E. Morrison Ranch Parkway  
Gilbert, Arizona 85296  
(w/o enclosures)

Ms. Jenna Saint Louis  
Script Care, Ltd.  
6380 Folsom Drive  
Beaumont, Texas 77706  
(w/o enclosures)

Mr. D. Keith George  
Assistant General Counsel  
Blue Cross Blue Shield of Texas  
P.O. Box 655730  
Dallas, Texas 75265-5730  
(w/o enclosures)

Mr. Jack E. Skaggs  
Counsel to OptumRx  
Jackson Walker  
100 Congress Avenue, Suite 1100  
Austin, Texas 78701  
(w/o enclosures)

Ms. Melissa J. Copeland  
Counsel to Express Scripts  
Schmidt & Copeland  
P.O. Box 11547  
Columbia, South Carolina 29201  
(w/o enclosures)

Mr. Robert H. Griffith  
Counsel to CaremarkPCS  
Foley & Lardner  
321 North Clark Street, Suite 2800  
Chicago, Illinois 60654-5313  
(w/o enclosures)

Ms. Debbie Stevens  
WellDyne Rx  
7472 South Tuscon Way  
Centennial, Colorado 80112  
(w/o enclosures)

JAN 28 2019

At 1:44 P.M.  
Velva L. Price, District Clerk

Cause No. D-1-GN-15-001784

EXPRESS SCRIPTS, INC.,  
*Plaintiff,*

v.

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

§ IN THE DISTRICT COURT  
§  
§  
§  
§ 201st JUDICIAL DISTRICT  
§  
§  
§ TRAVIS COUNTY, TEXAS

**AGREED FINAL JUDGMENT**

This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which Express Scripts, Inc. (Express), sought to withhold certain information which is in the possession of the Texas A&M University. All matters in controversy between Plaintiff, Express, and Defendant, Ken Paxton, Attorney General of Texas (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 a certified letter to each of the requestors, Ms. Rose Santos and Ms. Maria Costagliola, on January 4, 2019, informing them of the setting of this matter on the uncontested docket on this date. The requestors were informed of the parties' agreement that Texas A&M will be instructed to withhold the designated portions of the information at issue. The requestors were also informed of their right to intervene in the suit to contest the withholding of this information. Verification of the sending of this letter is attached to this motion as Exhibit "B".

Neither requestor has 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.

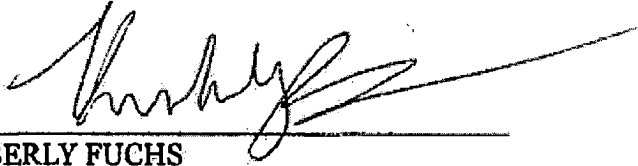
**IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:**

1. Express 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 responsive information contained in Express's proposal to Texas A&M, including pricing 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 information that Express transmitted to the Attorney General via email on December 20, 2018. The Attorney General will provide a copy of the agreed markings to Texas A&M, with instructions that Letter Ruling OR2015-08084 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 and the Attorney General and is a final judgment.

SIGNED the 20 day of January, 2019.

  
PRESIDING JUDGE

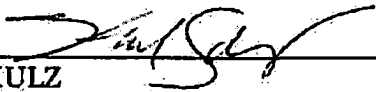
AGREED:



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**KIMBERLY FUCHS**  
Texas Bar No. 24044140  
Assistant Attorney General  
Administrative Law Division  
P. O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
Telephone: (512) 475-4195  
Facsimile: (512) 320-0167  
Kimberly.Fuchs@texasattorneygeneral.gov

**ATTORNEY FOR DEFENDANT, KEN PAXTON**



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**KARL SCHULZ**  
State Bar No. 24057339  
**COZEN O'CONNOR**  
1221 McKinney Street, Suite 2900  
Houston, Texas 77010  
Telephone: (832) 214-3933  
Facsimile: (713) 512-5334  
kschulz@cozen.com

**ATTORNEY FOR PLAINTIFF EXPRESS SCRIPTS, INC.**

A

Cause No. D-1-GN-15-001784

EXPRESS SCRIPTS, INC.,  
*Plaintiff,*

v.

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

§ IN THE DISTRICT COURT  
§  
§  
§  
§ 201st JUDICIAL DISTRICT  
§  
§  
§ TRAVIS COUNTY, TEXAS

**SETTLEMENT AGREEMENT**

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

**Background**

In 2015, Texas A&M University (Texas A&M) received two requests for information for proposals related to pharmacy benefit management services under the Public Information Act (PIA). Texas A&M asked for an Attorney General ruling on whether portions of this information could be withheld.

In Letter Ruling OR2015-08084, the Open Records Division of the Attorney General (ORD) required Texas A&M to release some information Express claims is proprietary.

After this lawsuit was filed, Express 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's 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:

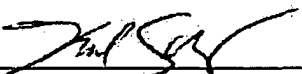
1. Express and the Attorney General have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue are excepted from disclosure pursuant to Texas Government Code section 552.104. Pursuant to Texas Government Code section 552.104, the Attorney General agrees that certain portions of the responsive information contained in Express's proposal to Texas A&M, including pricing 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 information that Express transmitted to the Attorney General via email on December 20, 2018. The Attorney General will provide a copy of the agreed markings to Texas A&M, with instructions that Letter Ruling OR2015-08084 should not be relied upon as a prior determination.
2. Express 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 requestors, as required by Tex. Gov't Code § 552.325(c), of the proposed settlement and of their right to intervene to contest Express's right to have Texas A&M withhold the information.

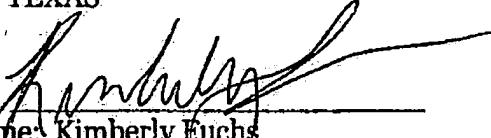
4. A final judgment entered in this lawsuit after a requestor intervenes prevails over this Agreement to the extent of any conflict.
5. Each party to this Agreement will bear their own costs, including attorney fees relating to this litigation.
6. The terms of this Agreement are contractual and not mere 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 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 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 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 Schulz  
firm: COZEN O'CONNOR

By:   
name: Kimberly Fuchs  
title: Assistant Attorney General,  
Administrative Law Division

Date: Jan. 3, 2019

Date: 1/3/19