



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

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May 26, 2015

Mr. Dan Junell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

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

OR2015-10191

Dear Mr. Junell:

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# 564691.

The Teacher Retirement System of Texas (the "system") received a request for copies of specified contracts sent by the system to the Office of the Attorney General (the "OAG") during a specified time period and any correspondence generated as a result. You state you will redact information subject to section 552.117(a)(1) of the Government Code as permitted by section 552.024(c) of the Government Code.¹ You further state you will redact information pursuant to section 552.136(c) of the Government Code and pursuant to section 552.137 of the Government Code in accordance with Open Records Decision

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). If a governmental body redacts such information, it must notify the requestor in accordance with subsections 552.024(c-1) and (c-2). *See id.* § 552.024(c-1)-(c-2).

No. 684 (2009).² You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code.³ You also state release of the remaining information may implicate the interests of Aetna, Blue Cross Blue Shield of Texas (“BCBS”), CaremarkPCS Health, L.L.C. (“Caremark”), and Express Scripts, Inc. (“ESI”). Accordingly, you notified these third parties of the request for information and of their rights to submit arguments stating why their information should not be released. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from Aetna, BCBS, Caremark, and ESI. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state some of the submitted information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2008-15991 (2008), 2010-06557 (2010), 2010-08904 (2010), 2010-11154 (2010), 2011-17179 (2011), 2013-06185 (2013), 2013-19019 (2013), 2015-03624 (2015), and 2015-03649 (2015). In response to Open Records Letter Nos. 2013-06185 and 2013-19019, ESI has filed lawsuits against our office. *See Medco Health Solutions, Inc. V. Greg Abbott, Attorney Gen. of Tex.*, No. D-1-GN-13-003877 (98th Dist. Ct., Travis County, Tex.); *Medco Health Solutions, Inc. & Express Scripts, Inc. v. Greg Abbott, Attorney Gen. of Tex.*, No. D-1-GN-13-001399 (98th Dist. Ct., Travis County, Tex.). In response to Open Records Letter No. 2015-03624, Caremark has filed a lawsuit against our office. *See CaremarkPCS Health, L.L.C. v. Ken Paxton, Attorney Gen. of Tex.*, No. D-1-GN-15-000871 (98th Dist. Ct., Travis County, Tex.). In response to Open Records Letter No. 2015-03649, Aetna has filed a lawsuit against our office. *See Aetna Life Ins. Co. v. Ken Paxton, Attorney Gen. of Tex.*, No. D-1-GN-15-000876 (353rd Dist. Ct., Travis County, Tex.). Accordingly, with regard to the information at issue in these lawsuits, we will allow the trial courts to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public.⁴

²Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov’t Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

³Although you also raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege in this instance is section 552.107 of the Government Code. *See* Open Records Decision Nos. 676 at 1-2 (2002).

⁴As we are able to make this determination, we need not address the submitted arguments against disclosure of this information.

There is no indication the law, facts, and circumstances on which Open Records Letter Nos. 2008-15991 and 2010-06557 were based have changed. Additionally, with respect to the information of ESI, there is no indication the law, facts, and circumstances on which Open Records Letter Nos. 2010-11154 and 2011-17179 were based have changed. Further, with regard to any information in the current request that is identical to information previously ruled upon by this office and is not at issue in the aforementioned lawsuits, there is no indication the law, facts, and circumstances on which Open Records Letter Nos. 2015-03624 and 2015-03649 were based have changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the system must continue to rely on Open Records Letter Nos. 2008-15991 and 2010-06557, and, with respect to the information of ESI, Open Records Letter Nos. 2010-11154 and 2011-17179 as previous determinations and withhold or release the identical information in accordance with those rulings. Furthermore, with regard to any information in the current request that is identical to information previously ruled upon by this office and is not at issue in the aforementioned lawsuits, we conclude the system must continue to rely on Open Records Letter Nos. 2015-03624 and 2015-03649 as previous determinations and withhold or release the identical information in accordance with those rulings.⁵ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). Upon review, however, we find the law, facts, and circumstances on which Open Records Letter Nos. 2010-08904 and 2011-17179 were based have changed. Further, with respect to the information of Caremark, we find the law, facts, and circumstances on which Open Records Letter No. 2011-11154 was based have changed. Accordingly, the system may not rely on Open Records Letter Nos. 2010-08904, 2011-17179, and, with respect to the information of Caremark, 2011-11154. *See id.* Therefore, we will consider the submitted arguments against disclosure of this information. We will also consider the public availability of the remaining submitted information to the extent the information at issue is not subject to litigation and was not previously ruled upon.

Next, we note you seek to withhold some of the submitted information under sections 552.107 and 552.111 of the Government Code. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made

⁵As we are able to make these determinations, we need not address the submitted arguments against disclosure of this information.

confidential by law). Accordingly, pursuant to section 552.007, to the extent the information we previously ruled you must release in Open Records Letter Nos. 2015-03624 or 2015-03649 is identical to the submitted information and not subject to the aforementioned pending litigation, the system may not now withhold such information unless its release is expressly prohibited by law or the information is confidential under law. Because sections 552.107 and 552.111 do not prohibit the release of information or make information confidential, the system may not now withhold any previously released information under these exceptions. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) and Texas Rule of Evidence 503 may be waived), 663 at 5 (1999) (governmental body may waive section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally). However, we will address your arguments under these exceptions for the information that was not released in accordance with Open Records Letter Nos. 2015-03624 or 2015-03649 and is not the subject of pending litigation.

Next, we note 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) of the Government Code 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). Although we received comments from BCBS, BCBS did not raise any exceptions to disclosure or assert it had a protected proprietary interest in the submitted information. Therefore, we have no basis to conclude BCBS has a protected proprietary interest in the remaining 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, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the system may not withhold the remaining information on the basis of any proprietary interest BCBS may have in the information.

Caremark contends some of its information at issue is confidential because it is subject to "confidential financial terms it has negotiated with its clients." However, information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 ("[T]he obligations of a governmental body under [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 information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement specifying otherwise.

Section 552.110 of the Government Code 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.⁶ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that 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

⁶The 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).

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 that 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, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

In advancing its arguments, we understand Caremark to rely, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only the interests of Caremark in the information at issue.

Caremark asserts portions of its remaining information, including pricing information, constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Caremark has established a *prima facie* case that its customer information constitutes trade secret information. Accordingly, to the extent Caremark’s customer information is not publicly available on the company’s website, the system must withhold Caremark’s customer information, which we have marked, under section 552.110(a) of the Government Code.⁷ However, we find Caremark has failed to establish a *prima facie* case that any portion of its

⁷As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

remaining information at issue meets the definition of a trade secret. We further find Caremark has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORD 402. We note 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 Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3. Consequently, the system may not withhold any of Caremark’s remaining information at issue under section 552.110(a) of the Government Code.

Caremark asserts portions of its remaining information consist of commercial or financial information, the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Caremark has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the system must withhold this information, which we have marked, under section 552.110(b) of the Government Code.⁸ However, we find Caremark has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of its remaining information at issue would cause the company substantial competitive harm. *See* ORD 319 at 3. Further, we note the contract at issue was awarded to Caremark. 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 from disclosure 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). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). We therefore conclude the system may not withhold any of the remaining information under section 552.110(b) of the Government Code.

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:

⁸As 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 information under section 552.101 of the Government Code on those bases.

Additionally, Caremark argues portions of its 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 remaining information under section 552.101 of the Government Code in conjunction with section 134A.002(6) of Texas Civil Practice and Remedies Code.

The system claims the information in Exhibit 4 is protected from release under section 552.107(1) of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The system asserts the information in Exhibit 4 comprises confidential communications between the system's employees, system attorneys, attorneys for the OAG, and OAG legal support staff. The system states these communications were made for the purpose of facilitating the rendition of professional legal services to the system and the system has not waived the attorney-client privilege in disclosing certain information to the OAG. Based on the system's representations and our review, we find the system has demonstrated the applicability of the attorney-client privilege to portions of the submitted information. Thus, the system may generally withhold the information in Exhibit 4 under section 552.107(1) of the Government Code. We note, however, some of these e-mail strings include e-mails and attachments received from and sent to parties with whom the system has not demonstrated it shares a privileged relationship. Furthermore, if the e-mails and attachments received from and sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails and attachments, which we have marked, are maintained by the system separate and apart from the otherwise privileged e-mail strings in which they appear, then the system may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code. In that event, we will address the system's arguments under section 552.111 of the Government Code for such information. Further, we find the system has failed to demonstrate the remaining portions of Exhibit 4, which we have marked, document confidential communications between privileged parties. Accordingly, the system may not withhold this information under section 552.107 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland*, 22 S.W.3d 351 (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel

matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

The system asserts the remaining information in Exhibit 4 consists of interagency policymaking communications between the system and the OAG. The system also indicates the information at issue includes draft documents that reflect the deliberations of the system and the OAG. The system contends it shares a privity of interest with the OAG. However, we note the information at issue consists of communications to or from other third parties pertaining to contractual negotiations. Accordingly, we find the system has failed to establish it shares a privity of interest or common deliberative process with these third parties with respect to these communications. Accordingly, the system may not withhold any of the remaining information in Exhibit 4 under section 552.111 of the Government Code.

We note portions of the remaining information contain information protected by common-law privacy. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. We note that common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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, we will allow the trial courts to resolve the issue of whether the information that is the subject of pending litigation must be released to the public. The system must continue to rely on Open Records Letter Nos. 2008-15991 and 2010-06557 and the portions of Open Records Letter Nos. 2010-11154 and 2011-17179 pertaining to ESI as previous determinations and withhold or release the identical information in accordance with those rulings. With regard to any information in the current request that is identical to information previously ruled upon by this office and is not at issue in the aforementioned lawsuits, we conclude the system must continue to rely on Open Records Letter Nos. 2015-03624 and 2015-03649 as previous determinations and withhold or release the identical information in accordance with those rulings. To the extent Caremark's customer information is not publicly available on the company's website, the system must withhold Caremark's customer

information, which we have marked, 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. With the exception of the information we have marked for release, the system may generally withhold the information in Exhibit 4 under section 552.107(1) of the Government Code; however, the system may not withhold the non-privileged e-mails and attachments we have marked if they are maintained separate and apart from the otherwise privileged e-mail strings in which they appear. The system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The system must release the remaining information; however, any information protected by copyright may only be released 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, 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,



Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 564691

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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CAUSE NO. D-1-GN-15-002235

MEDCO HEALTH SOLUTIONS, INC.	§	IN THE DISTRICT COURT OF
AND EXPRESS SCRIPTS, INC.,	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
KEN PAXTON,	§	
ATTORNEY GENERAL OF TEXAS, ,	§	
<i>Defendant.</i>	§	345th JUDICIAL DISTRICT

FINAL
AGREED ORDER OF DISMISSAL

This is an open records lawsuit, in which Medco Health Solutions, Inc. and Express Scripts, Inc. (Medco) seeks a declaratory judgment, pursuant to the Public Information Act (PIA), TEX. GOV'T CODE § 552.325, that certain information collected, maintained, or assembled by the Teacher Retirement System (TRS) is protected from disclosure under the PIA.

Background

In March 2015, a request was made under the Public Information Act (PIA) for all health care related contracts the Teacher Retirement System of Texas (TRS) sent to the Attorney General's office from 2005-2014. TRS asked for an Attorney General decision on whether portions of this information could be withheld.

In Letter Ruling OR2015-10191, the Open Records Division of the Attorney General (ORD) required TRS to release some information Medco claims is proprietary.

After this lawsuit was filed, Medco 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

Medco's request and agrees to the settlement. The Attorney General has reviewed Medco's request and agrees to the settlement. All matters in controversy between Plaintiff, Medco, and Defendant, the Attorney General have been resolved, and the parties agree to the entry and filing of an Agreed Order of Dismissal.

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 the requestor, Mr. Brian Rosenthal, on April 16, 2020, informing him of the setting of this matter on the Court's submission docket on or after this date. The requestor was informed of the parties' agreement that the information would be withheld. The requestor was also informed of his right to intervene in the suit to contest this determination. Verification of the mailing of this letter is attached to this motion as Exhibit "A". 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.

Terms

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

1. Medco 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 Medco's 2012 contract with TRS can be redacted in accordance with the markings agreed to by the parties, which markings are reflected on the copies of the information that Medco originally transmitted to the Attorney General in 2016. The Attorney General will provide a copy of the agreed markings to TRS, with a letter instructing TRS that Letter Ruling OR2015-10191 should not be relied upon as a prior determination.

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

3. All relief not expressly granted is denied; and

4. This Agreed Order of Dismissal finally disposes of all claims that are the subject of this lawsuit between Medco and the Attorney General and is a final judgment.

SIGNED the 7th day of July, 2020.


PRESIDING JUDGE

AGREED:

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