



**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

May 31, 2017

Ms. Julie Masek  
Assistant General Counsel  
Texas A&M University System  
301 Tarrow Street, 6th Floor  
College Station, Texas 77840-7896

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

OR2017-11880

Dear Ms. Masek:

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# 658056 (R000390-022417).

The Texas A&M University System (the "system") received a request for all proposals submitted, the resulting contract, and the scoring and evaluation documents for a specified request for proposal. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Blue Cross Blue Shield of Texas ("Blue Cross"); CaremarkPCS Health, L.L.C. ("Caremark"); Catamaran; Express Scripts, Inc. ("Express Scripts"); Script Care, Ltd. ("Script Care"); and WellDyne RX, Inc. ("WellDyne"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue 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 arguments from BlueCross, Caremark, Express Scripts, Script Care, and WellDyne. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the requested proposals and evaluative documents were the subject of a previous request for information, in response to which this office issued Open Records Letter

No. 2015-08084 (2015). In that ruling, we held, in part, (1) to the extent the customer information at issue is not publicly available on Express Scripts' website, the system must withhold the customer information at issue under section 552.110(a) of the Government Code; (2) the system must withhold Blue Cross's and Caremark's information we marked under section 552.110(b) of the Government Code; (3) the system must withhold the insurance policy numbers under section 552.136 of the Government Code; and (4) the system must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.

In response to Open Records Letter No. 2015-08084, Express Scripts and Caremark filed lawsuits against our office. We note the Express Scripts lawsuit is still pending. *See Express Scripts v. Ken Paxton, Attorney Gen. of Tex.*, No. D-1-GN-1-001748 (201st Dist. Ct., Travis County, Tex.). Accordingly, with regard to Express Scripts' information at issue in this lawsuit, we will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public.<sup>1</sup> Additionally, in response to Caremark's lawsuit, you inform us Open Records Letter No. 2015-08084 was subsequently modified by the trial court by an Agreed Final Judgment in *CaremarkPCS Health, L.L.C. v. Ken Paxton, Attorney General of Texas*, Cause No. D-1-GN-15-001781 (98th Dist. Ct., Travis County, Tex.). Accordingly, with regard to Caremark's information, the system must rely on the Agreed Final Judgment and withhold or release the identical information in accordance with the Agreed Final Judgment.<sup>2</sup>

Further, in Open Records Letter No. 2015-08084, Catamaran did not submit any arguments in response to the request for information and we held, in part, Catamaran's information must be released. We note the law, facts, and circumstances have not changed in regards to Catamaran's information and the system must continue to rely on Open Records Letter No. 2015-08084 as a previous determination and withhold or release Catamaran's information in accordance with that ruling. *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 that information is or is not excepted from disclosure).

BlueCross, Script Care, and WellDyne now seek to withhold some of their information which was previously ordered released under sections 552.104 and 552.110 of the Government Code. Additionally, BlueCross also claims section 552.101 of the Government Code for some of its information. Although the law has changed with regard to a third

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<sup>1</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of the information at issue.

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

party's right to assert section 552.104(a), *see Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), section 552.007 of the Government Code provides that, 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 confidential by law). We note section 552.104 of the Government Code does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, the system may not now withhold any of the previously released information under section 552.104 of the Government Code on behalf of Blue Cross, Script Care, or WellDyne. Because information subject to sections 552.101 and 552.110 of the Government Code is deemed confidential by law, we will address the claims under sections 552.101 and 552.110 for any previously released information. Furthermore, except with regard to the information subject to the third parties' claims under sections 552.101 and 552.110, there is no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, for any other portions of 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 No. 2015-08084 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* ORD 673. With respect to the submitted information that was not at issue in the previous ruling, we will consider the submitted arguments.

Next, we note some of the submitted information consists of information that is subject to section 2261.253 of the Government Code. Section 2261.253(a) provides, in relevant part, as follows:

(a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

(1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]

(b) A state agency monthly may post contracts described by Subsection (a) that are valued less than \$15,000.

Gov't Code § 2261.253(a)(1), (b). The contract at issue is valued at more than \$15,000, is between the system, which is a state agency, and a private vendor for the purchase of

services, and the contract is not expired or completed. Although Express Scripts seeks to withhold portions of the contract under sections 552.104 and 552.110 of the Government Code, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the system may not withhold any portion of Express Scripts' contract under section 552.104 of the Government Code or section 552.110 of the Government Code. Consequently, the system must release Express Scripts' contract in its entirety pursuant to section 2261.253 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. Section 552.101 encompasses the doctrines of common-law and constitutional privacy. Common-law privacy 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. However, we note 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 designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). Upon review, we find BlueCross has failed to establish the information it seeks to withhold under common-law privacy is highly intimate or embarrassing and not of legitimate public interest and thus, none of this information may be withheld under section 552.101 of the Government Code on that basis.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find BlueCross has failed to demonstrate the information at issue falls within the zones of privacy or otherwise implicates an individual's privacy interests for the purposes of

constitutional privacy. Accordingly, the system may not withhold the information at issue under section 552.101 in conjunction with constitutional privacy.

BlueCross, Script Care, and WellDyne claim 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>3</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret

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<sup>3</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).

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* Open Records Decision No. 552 at 5 (1990). 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).

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* Open Records Decision No. 661 at 5 (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).

As mentioned above, BlueCross’s, Script Care’s, and WellDyne’s information was subject to Open Records Letter No. 2015-08084. Since the issuance of the previous ruling on April 24, 2015, BlueCross, Script Care, and WellDyne have not disputed this office’s conclusion regarding the release of the information. In this regard, we find BlueCross, Script Care, and WellDyne have not taken any measures to protect their information in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause BlueCross, Script Care, or WellDyne substantial harm. *See* Gov’t Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude the system may not withhold BlueCross’s, Script Care’s, or WellDyne’s information that was at issue in Open Records Letter No. 2015-08084 under section 552.110 of the Government Code.

In summary, with regard to Express Script’s information that is the subject of a pending lawsuit, we will allow the trial court to resolve the issue of whether that information must be released to the public. With regard to Caremark’s information, the system must rely on the Agreed Final Judgment that was issued as a result of Open Records Letter No. 2015-08084 and withhold or release the identical information in accordance with the Agreed Final Judgment. With regard to Catamaran’s, BlueCross’s, Script Care’s, and WellDyne’s information, the system must continue to rely on Open Records Letter No. 2015-08084 as a previous determination and withhold or release the identical information in accordance with that ruling. The system must release Express Scripts’ contract at issue pursuant to section 2261.253 of the Government Code.

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,

A handwritten signature in black ink that reads "D. Michelle Case". The signature is written in a cursive style with a long, sweeping underline.

D. Michelle Case  
Assistant Attorney General  
Open Records Division

DMC/eb

Ref: ID# 658056

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

6 Third Parties  
(w/o enclosures)

Velva L. Price  
District Clerk  
Travis County  
D-1-GN-17-002616  
Daniel Smith

CAUSE NO. D-1-GN-17-002616

EXPRESS SCRIPTS, INC.,	§	IN THE DISTRICT COURT OF
<i>Plaintiff,</i>	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
KEN PAXTON, ATTORNEY GENERAL	§	
OF TEXAS,	§	
<i>Defendant.</i>	§	353rd JUDICIAL DISTRICT

**AGREED ORDER OF DISMISSAL**

This is a cause of action under the Public Information Act (PIA), Texas Government Code chapter 552. Plaintiff Express Scripts, Inc. and Defendant Ken Paxton, Attorney General of Texas, agree to dismiss this suit pursuant to PIA section 552.327 on the ground that the requestor has voluntarily withdrawn her request for information in writing. *See* Tex. Gov't Code § 552.327. A court may dismiss a PIA suit under section 552.327 when all parties agree to dismissal, and the Attorney General determines and represents to the Court that the requestor has voluntarily withdrawn the request for information in writing or has abandoned the request. *Id.* The Attorney General represents to the Court that the requestor, Hannah Hennen, has voluntarily withdrawn her request for information in writing. Accordingly, information belonging to Express Scripts, Inc. that was subject to disclosure in Letter Ruling OR2017-11880 issued by the Attorney General need not be released in response to Letter Ruling OR2017-11880. The Court is of the opinion that entry of an agreed dismissal order is appropriate.


It is therefore ORDERED, ADJUDGED, and DECLARED that this cause is DISMISSED in all respects:

All costs of the court and attorney fees are taxed against the parties incurring the same:

All relief not expressly granted is denied; and

This order disposes of all claims between the parties and is final.

Signed this 7<sup>th</sup> day of April, 20~~19~~<sup>20</sup>



JUDGE PRESIDING

Tim Sulak

AGREED:



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