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August 8, 2007

Karen Kirsch
1930 NW Irving Street #605
Portland, OR 97209

RE: Petition for Public Records Disclosure Order
Amended Order superseding Public Records Order, July 12, 2007 (Kirsch)

Dear Ms. Kirsch:

This Amended Order supersedes the Order issued on July 12, 2007.

In the earlier Order, we stated that "Competitors would gain insight into how Regence may set their rates *and thereby circumvent competition in the industry that helps to keep rates lower.*" (Emphasis added). Subsequently, we became aware of concerns that the italicized portion of the statement might be misconstrued as relevant to how the Director of DCBS would decide similar issues under HB 3103, which goes into effect on January 1, 2008 and requires consideration of harm to competition. Because the issue of harm to competition was not before us in this matter, the earlier Order should not be viewed as having any impact on the potential application of HB 3103. To avoid any such implication, we issue this Amended Order.

This letter is the Attorney General's Amended and Superseding Order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on June 29, 2007, asks the Attorney General to direct the Insurance Division (Division) to make available the entire rate filing submitted to the Division by Regence Blue Cross Blue Shield (Regence), including the portions of the filing "relating to claim trends, retention and target loss ratio". For the reasons that follow, we deny your petition.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. If a public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while

preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

On June 11, 2007, your husband, Larry Kirsch, acting on your behalf, requested that he be provided an opportunity to inspect and copy the rate filing documents submitted by Regence in support of their proposed rate increase for individual health plans. In responding to your request for records, David Ball, a Division Actuary, offered to disclose the requested rate filing information with the exception of some material in the filing relating to claims trends, retention, target loss ratio, accidental death benefit rates, and dental rider rates. *See* Email, dated June 26, 2007, from David Ball, Actuary, to Larry Kirsch. While the Division granted, in part, your request for records by inviting you to review the rate filing with a small portion of the material redacted, the Division denied your request to the extent that you wish to receive the information regarding Regence's claim trends, retention, and target loss ratio. Therefore, we determine whether the Division may withhold the denied records from disclosure.

1. Background

The Insurance code requires that an insurer offering individual health plans must submit requests to increase rates to the Insurance Division along with a rate filing. ORS 743.767. On April 23, 2007, Regence submitted its proposed rates and supporting rate filing information for individual plans. The Division subsequently approved the rate increases.

Regence asserts that certain information contained in the rate filing it submitted to the Division is a trade secret and thus is exempt from disclosure under the Public Records Law. The specific portions of the rate filing at issue here are the information concerning claim trends, retention, target loss ratio, and accidental death benefit rates.

2. Discussion

The confidential nature of trade secrets is addressed both within and apart from the Public Records Law. Trade secrets are conditionally exempt from disclosure under ORS 192.501(2):

> "Trade secrets" as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it[.]

ORS 192.501(2).

Oregon's Uniform Trade Secrets Act (UTSA), ORS 646.461(4), is also relevant to our analysis. If information falls within that statute, its "misappropriation" by disclosure is prohibited,

ORS 646.463, and the records would be exempt from disclosure under the Public Records Law by ORS 192.502(9).[1] ORS 646.461(4) defines trade secret as follows:

> "Trade secret" means information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to the public or to 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.

Further guidance in defining trade secret has been provided by the courts. In *Citizens' Utility Board v. Public Utility Commission,* 128 Or App 650, 877 P2d 116 (1994), the court, in its discussion of trade secrets, states that "[c]ourts traditionally examine six factors in determining whether information constitutes a trade secret: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to safeguard the secrecy of the information; (4) the value of the information to the business or its competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *Id.* at 658-59. These factors overlap somewhat with the definition of "trade secret" contained in the Public Records Law, and we consider those factors to be included in the six factors described above for purposes of this analysis.

a. Trend, retention and target loss ratio

Regence's projections of trend, claims cost and administrative expenses (part of retention), and target loss ratios are based on its actuaries' review of past performance as well as projected future claims, costs, and enrollment trends. Regence claims that this is proprietary information that is compiled by highly skilled Regence actuaries who have acquired the knowledge necessary to make such projections by developing an intimate understanding of Regence's business. Regence expends large amounts of money and effort in training and supporting the actuaries to enable them to accurately develop the actuarial formulas, statistics, and assumptions included in the rate filings. These actuarial figures are a core component of rate setting and are the result of specialized knowledge known only to Regence's actuaries. The records are known and provided only to certain individuals within Regence. Regence takes extensive measures to protect this information from being released to its competitors and the public.

The projections contain information that has economic value for Regence and disclosing that information to other insurance carriers would provide them with an economic advantage in that they would be able to use the information in formulating their own rates without having to expend the costs of compiling and analyzing the data. Competitors would gain insight into how Regence may set their rates. Additionally, this information could be used by competitors to understand and better

[1] ORS 192.502(9) exempts from disclosure "public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law."

predict how Regence might price its products in the future. Thus, the information relating to trend retention, and target loss ratio in the rate filings is a trade secret pursuant to the UTSA.

b. Accidental death benefit rates

The rate filing includes Regence's development of rates for its accidental death benefit, which includes target loss ratio and the predicated death rates on which the accidental death benefit premiums are based. Regence claims that this information is also highly proprietary. Its value and accuracy depends on the skill and knowledge of the Regence actuaries. These actuarial figures are computed from actuarial formulas developed and known only to Regence. As with the information relating to trend, retention, and target loss ratios, the information on which assumptions about projected death rates is based is known only to a few select employees. These actuarial figures are a core component of rate setting and because they are the result of specialized knowledge known only to Regence's actuaries, it is information that Regence's competitors could easily use to obtain a business advantage. Therefore, the accidental death rate assumptions are a trade secret pursuant to the UTSA.

3. Public interest in disclosure of records

By enacting the UTSA, by providing the trade secret exemption under the Public Records Law, and by granting immunity to public officials who disclose only when such disclosure is made pursuant to a public records order or advice of an attorney, the attorney general believes that the legislature has, in effect, called for heightened scrutiny of contentions that the public interest requires the disclosure of records asserted to be trade secrets. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2005) at 32. We believe that without a showing of significant public interest in disclosure of Regence's trade secret trend, retention, and target loss ratio and accidental death benefit rates information as contained in its rate filings, this information should remain confidential under the UTSA and exempt from disclosure under the Public Records Law.

While the term "public interest in disclosure" is not defined in the Public Records Law, the Court of Appeals has said that "the Public Records Law expresses the legislature's view that members of the public are entitled to information that will facilitate their understanding of how the public business is conducted." *Guard Publishing v. Lane County School Dist.*, 96 Or App 463, 468-69, 774 P2d 499 (1989). The term "public" means that "the focus is on the effect of the disclosure in general, not disclosure to a particular person at a particular time. *Morrison v. School Dist.*, 53 Or App 148, 156, 631 P2d 784 (1981).

In your petition, you cite a Division publication titled *Health Insurance in Oregon*, January 2007, in support of your argument for disclosure of the entire rate filing. In this report, the Division made recommendations related to affordability and cost effectiveness of commercial health insurance. DEPARTMENT OF CONSUMER AND BUSINESS SERVICES, HEALTH INSURANCE IN OREGON § 7, at 73-74 (2007), *available at* http://www.cbs.state.or.us/ins/health_report/health_report_intro.html (last viewed July 11, 2007). One of the recommendations is that the review process should be more transparent. *Id.* at 74. Because the Division noted in its recommendation that other states have adopted a policy that health

insurance rate filings and supporting documents are open to public inspection, you contend that the Division should likewise make Regence's entire rate filing available as a public record. However, the Division was advocating for a change in law, not expressing a position about the records that are the subject of your petition. In this case, the Division's recommended disclosure of the majority of the information in the rate filing with the exception of the portions that we conclude are trade secrets complies with the Division's recommendation for public disclosure.[2]

Furthermore, the fact that other jurisdictions may provide full disclosure of rate filings to the public does not bind Oregon or necessarily show a significant public interest in disclosure of the exempted information in this instance. Whether rating data for individual health plans may or may not be disclosed is reviewed pursuant to the Public Records Law and the UTSA, as discussed above. We find the evidence in your petition does not demonstrate a significant public interest in disclosure of the information exempted by the Division from the rate filing.

4. Conclusion

We conclude that the specific information in the rate filing concerning claim trends, retention, target loss ratio, and accidental death benefit rates meets the factors that define a trade secret and disclosure by the Division would be a "misappropriation" under the UTSA. Furthermore, we do not find that there is a significant public interest that would require disclosure of this information. Therefore, the information is exempt from disclosure pursuant to ORS 192.502(9) and ORS 192.501(2).

For the reasons stated above, we deny your petition to the extent that it is for disclosure of information designated as claim trends, retention, target loss ratio, and accidental death benefit rates. All other information in the rate filings and supporting documentation is available for your review as provided in the Division's June 26, 2007 email responding to your public records request.

Sincerely,

Peter D. Shepherd

PETER D. SHEPHERD
Deputy Attorney General

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c: David N. Ball, Oregon Insurance Division Life and Health Actuary

[2] The Division provided 38 pages in response to your initial public records request. Of those 38 pages, small portions of nine pages were exempted.