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December 7, 1989

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Re: Petition for Public Records Disclosure Order; Oregon Health Sciences University Records

Dear Mr. Baldwin:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition (submitted on behalf of Richard J. Reedal of Home Parenteral Care, Inc.), which we received on December 1, 1989, asks the Attorney General to direct the Oregon Health Sciences University (OHSU) to disclose the fee schedules and/or price lists provided to OHSU by VitalCare of Oregon and Caremark, Inc. in their unsuccessful bids on OHSU's Request for Proposal #17 (RFP #17). For the reasons that follow, we deny your petition.

1. Background

We understand that Mr. Reedal's initial request for disclosure of records grew out of OHSU's RFP #17, which sought proposals from qualified and experienced home care providers for home parenteral care, including supplies, equipment maintenance and patient follow-up. RFP #17 requested current prices charged for selected patient care, but specifically provided that the chosen vendor would not be required to adhere to the price lists. Eight vendors responded to RFP #17, including Mr. Reedal's company, Home Parenteral Care, Inc. OHSU gave all respondents the opportunity to identify proprietary or trade secret information submitted with a proposal. Specifically, OSHU's RFP #17 provided in relevant part:

> "Proprietary or trade secret information: If any of the information requested in this section is considered to be proprietary or a trade secret belonging to the respondent, that information should be filed with the proposal form in a separate envelope, appropriately marked."

Five of the eight respondents, including the successful one, did not identify any of their proposal information as proprietary or trade secrets. On the other hand, Institutional Pharmacy Consultants, Caremark, and VitalCare asked that some or all of the material submitted with their proposals be kept confidential. When Mr. Reedal asked on or around October 18, 1989, to inspect the proposals, OHSU made all of the proposals available to him except the materials that the three companies identified as trade secrets. OHSU conferred with representatives of those companies to ascertain their continued interest in maintaining confidentiality and their reasons therefor. After receiving those responses, OHSU made all of the Institutional Pharmacy Consultants proposal available to Mr. Reedal, because that company withdrew its request for confidentiality. Caremark narrowed its request for confidentiality. Nevertheless, both Caremark and VitalCare continued to request that their fee schedules and price lists remain confidential. See letter to Richard Reedal, dated March 13, 1989, from Anya Averill, Contracts Manager, OHSU.

2. The Materials at Issue

Caremark submitted with its proposal four examples of services to be provided, taken from the RFP. Each example described the condition and care of a patient, and set forth the cost of therapy per day. Only the cost information has been deleted from the materials supplied to your client.

VitalCare submitted its proposal in a different format. Its prices were broken down into major components (e.g., medication, nursing care, supplies), and formulated to state the total cost of care over a specified period (e.g., 14 days) rather than the charge per day. In two instances, VitalCare also submitted alternative treatment plans and costs. When it did so, the proposal included a statement of the relative advantages and disadvantages of the described alternatives. None of this material has been released to Mr. Reedal.

3. Exemption for Trade Secrets

ORS 192.501(2) exempts "trade secrets" from disclosure "unless the public interest requires disclosure in the particular instance." The statute defines "trade secrets" as follows:

> "'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."

Oregon's version of the Uniform Trade Secrets Act, ORS 646.461(4), also is relevant to our analysis; if information falls within that statute, it is prohibited from disclosure, and that prohibition is incorporated into the Public Records Law by ORS 192.502(8). ORS 646.461(4) defines "trade secret" as follows:

> "'Trade Secret' means information, including a drawing, cost data, customer list, formula, pattern, compilation, program, devise, 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." (Emphasis added.)

The Oregon law specifically includes "cost data" as a trade secret, while the uniform act does not. See Unif. Trade Secrets Act § 1(4), 14 ULA 542 (1980). Thus, the Oregon legislature has stated that a price list can be a trade secret if the other statutory requirements are satisfied.

The first type of information in question here is the pricing data submitted by VitalCare and Caremark. We previously have concluded that price lists may qualify as exempt trade secret information. See Public Records Order, December 30, 1987, O'Neill. In that order, we concluded that the pricing data contained in a contract between OHSU and Blue Cross/Blue Shield of Oregon (BCBSO) constituted trade secret information exempt from disclosure. We reasoned that public disclosure of that information could undermine both OHSU's and BCBSO's competitive positions. Id. at 3-4. We also found that in recognition of the sensitivity of the pricing information, both OHSU and BCBSO took steps to maintain the confidentiality of

the information. Finally, we determined that disclosure of the trade secret information would disserve the public interest in (1) promoting programs, such as the preferred provider arrangement at issue there, designed to reduce health care insurance costs, (2) promoting a program that encourages persons to use OHSU's medical facilities, and (3) providing valuable clinical training to OHSU medical students. The harm to these programs from disclosure outweighed any public interest to be served by disclosure. Accordingly, we denied the petition to compel disclosure.

The reasoning in our prior order applies with equal force here. First, the pricing information has commercial value derived from not being generally known to persons who could obtain economic value from its disclosure. Knowledge of this information would allow a competitor to undercut Caremark's or VitalCare's rates, thus giving the competitor an advantage in the marketplace. Cf. Gulf & Western Industries, Inc. v. U.S., 615 F2d 527 (DC Cir 1979) (pricing information exempt under federal Freedom of Information Act as trade secret; court notes that disclosure would allow competitors to estimate and undercut contractor's future bids, thus undermining its competitive position). Moreover, both companies have informed us that they provide the pricing information only to certain persons within those organizations on a need-to-know basis. ORS 192.501(2). Thus, this information is protected by "efforts that are reasonable under the circumstances to maintain its secrecy." ORS 646.461(4)(b). We conclude, therefore, that the pricing information constitutes trade secrets under both the Public Records Law and ORS 646.461(4).

We also conclude that VitalCare's alternative treatment plans, and its statements of the relative advantages and disadvantages of the described alternatives, are trade secrets. As VitalCare's general manager explained to OHSU's contracts manager, that discussion reveals VitalCare's clinical and operational policies and procedures. Disclosure of that information to VitalCare's competitors could place VitalCare at a competitive disadvantage in the future. Thus, that information has commercial value. Again, we understand that VitalCare discloses this information to its personnel only on a need-to-know basis. This information, therefore, constitutes trade secrets.

Nor does the public interest require disclosure in the particular instance. You have not provided any specific arguments on this point. Consequently, we focus on the general

public interest in disclosure of public records to allow members of the public to monitor the government's conduct of the public's business: here, OHSU's decision-making process on an RFP. Disclosure here would not significantly serve that public interest. First, under RFP #17, no points were awarded for the price list, and OHSU specifically informed respondents that the successful vendor would not be required to adhere to the price lists. Thus, access to the price lists would not aid the public in monitoring OHSU's adherence to its RFP process. Second, disclosure of VitalCare's alternative treatment proposals, which were not even directly responsive to the RFP, could not aid the public in reviewing OHSU's administration of its RFP process.

In addition, disclosure would harm the public's interest in OHSU's ability to attract bidders to provide services such as the home parenteral care involved here. If OHSU were unable to guarantee the confidentiality of trade secret information such as the price lists here, its ability to attract bids likely would be substantially curtailed, and the public's costs for providing the care increased. In our view, this detriment to the public interest outweighs any benefit that would result from disclosure.

4. Conclusion

For these reasons, we respectfully deny your petition.

Sincerely,

PAMELA L. ABERNETHY
Special Counsel to the
Attorney General

PLA:RDW:JEM:cm
cc: (w/incoming letter)
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