DEPARTMENT OF JUSTICE

December 30, 1987

Patrick O'Neill
The Oregonian
1320 SW Broadway
Portland, Oregon 97201

David Witter, President
Oregon Health Sciences University
3181 SW Sam Jackson Park Road
Portland, Oregon 97201

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

Dear Mr. O'Neill and President Witter:

This letter responds to Mr. O'Neill's December 4, 1987 petition for an Attorney General's order directing the Oregon Health Sciences University (OHSU) to disclose certain public records. Mr. O'Neill seeks disclosure of a part of a contract between OHSU and Blue Cross and Blue Shield of Oregon (BCBSO), an organization providing health care insurance programs.

Specifically, Mr. O'Neill asks us to order OHSU to disclose a list of prices contained in Attachment A of the Preferred Provider Plan Institutional Provider Contract between OHSU and BCBSO. OHSU is willing to make other parts of this contract available for inspection by Mr. O'Neill, but it has denied Mr. O'Neill access to the payment schedule in Attachment

A of the contract on the ground that the pricing data is trade secret information that is exempt from the disclosure requirements of the Public Records Law. For the reasons set forth below, we respectfully deny Mr. O'Neill's petition.

At the outset, we note that price data developed by a health care insurer in the process of establishing a preferred provider program has been judicially recognized as "unquestionably sensitive trade secret information. . . ." Ball Memorial Hosp. Inc. v. Mutual Hosp. Ins., 784 F2d 1325, 1346 (7th Cir. 1986) (Easterbrook, J.). Mr. O'Neill contends, however, that the list of prices in Attachment A of the OHSU/BCBSO preferred provider contract does not meet the definition of "trade secrets" under Oregon law and therefore does not qualify for exception from public records disclosure under the trade secrets exemption now outlined in ORS 192.501(2) (1987). We disagree with those contentions.

We conclude that the payment schedule in the OHSU/BCBSO preferred provider contract is within the scope of Oregon statutory definitions of trade secrets. We further conclude that in this particular instance the public interest does not require disclosure of the payment schedule.

ORS 192.501(2) is part of the 1987 Oregon legislature's recent revision of the state's Public Records Law. That statute provides:

> "The following public records are exempt from disclosure under ORS 192.410 to 192.505 unless the public interest requires disclosure in the particular instance:
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> " . . . .
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> " . . . Trade secrets. '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. . . ."

It should be noted that the current definition of trade secrets in the Public Records Law uses terms that are broader and more general in nature than the recently repealed terms of the law's prior definition of trade secrets (former ORS 192.500(1)(b)), to which Mr. O'Neill alludes in his petition.[1] We also note that the 1987 Legislative Assembly contemporaneously enacted a version of the Uniform Trade Secrets Act, codified in ORS 646.461 to 646.475 (1987), effective January 1, 1988. That law also defines trade secrets in terms more general than the terms of former ORS 192.500(1)(b), and the Uniform Trade Secrets Act definition informs our construction of "trade secrets" as now used in the Public Records Law, ORS 192.501(2).[2] We examine the facts, as reported to us, in light of the recent Oregon redefinitions of trade secret information.

Attachment A of the preferred provider contract contains negotiated rates which OHSU agrees to charge, and which BCBSO agrees to pay, for various medical services provided by OHSU to persons enrolled in BCBSO's preferred provider plan. The rates which OHSU agrees to charge for preferred provider medical services are lower than the rates it would otherwise charge. BCBSO offers enrollees in its preferred provider program health care insurance coverage at lower premium rates and lower deductible levels. By entering into a preferred provider contract, BCBSO expects to improve its competitive position in the health care insurance market, and OHSU expects to increase its volume of patients.

The rate information which Mr. O'Neill seeks to inspect is the product of a competitive bidding process. OHSU had to bid against other hospitals to be designated by BCBSO as one of a limited number of BCBSO's preferred provider hospitals. In negotiating with OHSU, BCBSO was in competition with other health insurance carriers that offer preferred provider contracts to hospitals.

If another hospital or a consortium of medical providers knew the rates OHSU had agreed to charge as a BCBSO preferred provider, those competitors could use the information to OHSU's disadvantage. The competing providers could undercut OHSU rates to gain BCBSO preferred provider designation or to establish a preferred provider program that would be more attractive to health care insurance subscribers than the BCBSO program. In these circumstances, the flow of patients to OHSU could be reduced.

If other health care insurers know what rates BCBSO has agreed to pay to OHSU for preferred provider services, those other insurers could use the information to BCBSO's disadvantage, not only by attempting to lure OHSU away from BCBSO with promises of higher payments, but also by using OHSU/BCBSO rates in negotiating favorable preferred provider contracts with hospitals which are in competition with OHSU and which are not affiliated with BCBSO. And to the extent hospitals other than OHSU know the amount BCBSO is willing to pay OHSU for preferred provider services, the other hospitals could use the information collectively and collusively in future negotiations with BCBSO. See, Ball Memorial Hospital Inc., 784 F2d 1346.

Moreover, in recognition of the sensitivity of the payment schedule information in the preferred provider contract, both BCBSO and OHSU have taken steps to maintain the confidentiality of the information. BCBSO reports that provider bids were made available to a limited number of staff members, that extra copies of price bid documents were destroyed, and that after completion of the bidding process preferred provider rate manuals have been made available only to BCBSO employes who need the information to process claims. Similarly, OHSU reports that information on the rates it charges for BCBSO preferred provider services is available to its staff only on a need-to-know basis. The contract information is kept in a central repository, and access is allowed only on permission of OHSU's vice-president.

In sum, the schedule of rates for preferred provider services appears to be trade secret information of both BCBSO and OHSU. The price information compiled in the contract schedule is commercially valuable to BCBSO in its business of providing health care insurance. The information has commercial value to OHSU in its business of providing hospital services. Other health care insurers and other hospitals do not know the information, and consequently BCBSO and OHSU have a business advantage over their competitors. Although BCBSO and OHSU share this information with each other, this exchange is necessary given the particular relationship between a health care insurer and a health care provider. In this situation, the significance of the requirement that trade secret information be ". . . known only to certain individuals within an organization" (ORS 192.501(2)) is that, here, both BCBSO and OHSU limit access to the information within their respective organizations, by taking measures ". . . that are reasonable

under the circumstances to maintain its secrecy." (ORS 646.461(4)(b)). The information qualifies as trade secret information that is conditionally exempt from disclosure under the Public Records Law. The remaining issue is whether the public interest nevertheless requires disclosure of this sensitive data.

In this case, we must weigh competing public interests. The Public Records Law is based on a policy that the public has a significant interest in knowing how public officers are carrying out their official duties. In this case, the public has an interest in knowing the terms of the preferred provider agreement that officials at the state's principal medical teaching facility have reached with BCBSO, because that contract has a bearing on public financing of activities at a state institution. However, as to health care insurers such as BCBSO, the public has a significant interest in promoting programs, such as preferred provider arrangements, that are designed to reduce health care insurance costs by reducing fees charged for medical services. We are persuaded that disclosure of the trade secret information sought by the petitioner would disserve that public interest.

Regarding OHSU, the public has an interest in promoting a program that encourages persons to use the university's medical facilities. The legislature's prime directive to OHSU is to provide an educational function of clinical training in health services. The legislature expressly has recognized that "[a]s a necessary adjunct to its educational purpose, [OHSU] must provide medical service." ORS 352.055(2). By admitting patients for medical care, OHSU can provide valuable learning experiences for students. A program such as the OHSU/BCBSO preferred provider arrangement serves these important interests by ensuring a flow of patients to OHSU. But disclosure of the trade secret information that is the subject of Mr. O'Neill's petition reasonably could have a contrary result. BCBSO and other health care insurers likely would be quite reluctant to enter into preferred provider agreements with OHSU, on terms favorable to OHSU, if trade secret pricing data were disclosed without BCBSO's consent. The public interests served by nondisclosure of this information outweigh the public interest in disclosure.

The petition for a public records disclosure order is denied.

Respectfully submitted,

James E. Mountain Jr.

JAMES E. MOUNTAIN, JR.
Special Counsel to the
Attorney General

JEM:cm
cc: Jim Mattis, Assistant Attorney General
Janet Billups, Assistant Attorney General
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1 Former ORS 192.500(1)(b), defined trade secrets for purposes of exemption from the Public Records Law's disclosure requirements in the following terms:

> "'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 a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service or to locate minerals or other substances, having commercial value, and which gives its user an opportunity to obtain business advantage over competitors who do not know or use it;" (Emphasis added.)

The highlighted terms of this definition were deleted and replaced by the terms of ORS 192.501(2) (1987) which is set forth in the text above.

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2 The Oregon Uniform Trade Secrets Act defines "trade secret" as: