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July 3, 2012

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Re: Petition for Public Records Disclosure Order:
Oregon Health Authority/Cascade Comprehensive Care Records
DOJ File No. 443001-GA0049-12

Dear Ms. Knivila:

This 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, which we received on June 15, 2012, asks the Attorney General to direct the Oregon Health Authority ("OHA") to make available:

> Public records reflecting the final upper and lower rate ranges (or bounds) of the "actuarially sound rate ranges" referenced in the Oregon Health Plan Medicaid Demonstration, Capitation Rate Development Report for October 2011-September 2012, prepared by the Actuarial Service Unit of OHA and dated September 16, 2011 ("October 2011 Report").

For the reasons that follow, we respectfully deny your petition.

Discussion

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). In this case, OHA asserted the ORS 192.501(2) exemption for "trade secrets" when it declined to provide the information you requested.

1. The withheld material constitutes trade secrets.

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[.]

Oregon's Uniform Trade Secrets Act (UTSA), ORS 646.461(4), is also relevant to our analysis. 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." 128 Or App at 658-59. Those factors overlap somewhat with the definition of "trade secret" in the Public Records Law, and we consider the factors in ORS 192.501(2) to be included in the six factors set out in *Citizens' Utility Board*, for purposes of this analysis.

Formulas and other underlying figures used to develop pricing may be trade secrets. *E.g.*, *ACS Partners, LLC v. Americon Group, Inc.*, 2010 WL 883663 (WD NC 2010) (pricing methodology was trade secret); *Newman v. Dinallo*, 2009 WL 637697 (NY Sup 2009)

(information comprising the variables that factor into pricing premiums, constituted trade secrets). For example, in *Belth v. Insurance Dept. of New York*, 95 Misc 2d 18, 406 NYS2d 649 (1977), the insurance company's documents, consisting of computer programs, mathematical models, procedures, and statistical assumptions, used in pricing newly issued insurance policies, were held to constitute trade secrets exempt from disclosure. The court explained: "[T]here would be an unfair advantage to competitors of the insurance company if the information was to be disclosed, since the competitors would be in a position to know how the insurance company arrived at the cost and prices of newly issued insurance policies, and could then adjust their own internal cost procedures to take advantage of that knowledge." 406 NYS2d at 650.

The Seventh Circuit Court of Appeals has determined that information comparable to the information you request constituted trade secrets, in the context of a private insurer's requests for bids to participate in the insurer's Preferred Provider Organization ("PPO"). *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F2d 1325, 1345, 1346 (7th Cir 1986). In *Ball Memorial Hosp.*, Blue Cross and Blue Shield ("the Blues") requested bids from hospitals to be included in the Blues' PPO. The Court of Appeals held that "data on prices bid by each hospital and the calculations the Blues performed to decide which hospitals to include in the PPO" were trade secrets. The Blues "feared the Hospitals could use the comparative price information to raise their prices or collude in future years." The Court of Appeals agreed with the Blues: "The price data are also unquestionably sensitive trade secrets of the Blues. Hospitals armed with the data could use it to advantage in the next round of negotiations," and for collusion. The court noted: "A rule requiring a buyer to tell the seller how low is low enough would reduce the power of competition. * * * The price one will accept is usually a negotiator's closely guarded secret. [Internal citation omitted.]" 784 F2d at 1344.

We have previously concluded that certain fee schedules and price lists contained in public records were protected trade secrets. Public Records Order, December 7, 1989, Baldwin (fee schedules and price lists submitted to the Oregon Health Sciences University (OHSU) in response to a request for proposals). More recently, we determined that information held by the Department of Insurance and Finance relating to rates, costs, and fees for good faith loan estimates and truth-in-lending disclosure statements was protected as trade secrets. Public Records Order, November 15, 2006, Stephenson.

Most pertinently, we have found that the trade secrets exemption applied to Regence Blue Cross and Blue Shield's projections of trend, claims cost and administrative expenses, and target loss rations, included in Regence's rate filing with the Insurance Division. Public Records Order, August 8, 2007, Kirsch. Those projections were based on Regence's actuaries' review of past performance as well as protected future claims, costs, and enrollment trends. The actuarial figures were a core component of rate setting and were the result of specialized knowledge known only to Regence's actuaries, and provided only to certain individuals within Regence. Regence took extensive measures to protect the information from being released to its competitors and the public.

We noted that the projections contained information that had economic value to Regence, and that disclosing the 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. "Additionally, this information could be used by competitors to understand and better predict how Regence might price its products in the future. Thus, the information relating to trend[,] retention and target loss ration in the rate filings is a trade secret pursuant to the UTSA." Kirsch at 3-4.

Your request presents the question whether the same kind of information, when produced by the OHA, is exempt as a trade secret of the OHA, under Oregon's Public Records Law.[1] In our previous orders, we have assumed that a state agency may have trade secrets of its own. Public Records Order, April 26, 2010, Bachman; Public Records Order, February 25, 2008, Hunsberger;[2] Public Records Order, December 30, 1987, O'Neill (Public Records Order, December 30, 1987, O'Neill (schedule of rates for preferred provider services was trade secret information of both OHSU and Blue Cross and Blue Shield of Oregon). We have been unable to find any legal basis for concluding that Oregon public entities cannot, as a matter of law, have proprietary trade secrets. To the contrary, the Trade Secrets Act protects a "person" against misappropriation of information, and defines "person" to include a "government, governmental subdivision or agency or any other legal or commercial entity." ORS 646.462(2), (3). As a result, we conclude that the trade-secrets exemption may apply to information pertaining to the business of a public body. Whether the trade-secret applies is a fact-specific inquiry, dependent on the particular circumstances.

We conclude that, for the same reasons Regence's projections in Kirsch and the insurers' calculations in *Ball Memorial Hosp., Inc.* were protected trade secrets, the actuarial figures computed from OHA's proprietary actuarial formulas are protected trade secrets under ORS 192.501(2).

Specifically, OHA's actuarial figures—in particular, the high and low rates in the rate ranges—meet the four requirements of a trade secret under the Public Records Law. Those figures are indisputably production data or compilations of information that are not patented. They are known only to certain individual within OHA and used in OHA's business. We spoke to David Rohrer, Administrator, Actuarial Services Unit of OHA. Mr. Rohrer told us that the only persons who know the rate ranges are the OHA actuary and the authorized employees of

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[1] The Oregon appellate courts have not addressed the extent to which the state's trade-secrets exemption applies to a public entity. Other jurisdictions have concluded that the exemption applies to governmental entities under their own laws. *See State ex rel Besser v. Ohio State Univ.*, 87 Ohio St 3d 535, 721 NE 2d 1044, 1049–1051 (2000) (the Ohio Supreme Court held that state universities can have trade secrets that are exempt from disclosure under that state's Uniform Trade Secrets Act); *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wash 2d 243, 255, 884 P2d 592 (1994) ("the valuable research data implicit in [a university researcher's] unfunded grant proposals is precisely the kind of information or record envisaged by this exemption"); *see also Swedish Civil Aviation Administration v. Project Management Enterprises, Inc.*, 190 F Supp 2d 785 (D Md 2002) (information owned by Swedish state agency met requirements of a trade secret).

[2] In Bachman, we overruled the order in Hunsberger, concluding that the public interest compelled disclosure of the information we had previously determined to be exempt. Although, in Bachman, we declined to consider whether Hunsberger correctly determined the specific information at issue in that case was a trade secret, we did not express any doubt as to whether public bodies could possess trade secrets at all.

contractor Optumas. OHA's contract with Optumas includes strict confidentiality provisions. What is more, the only employees of OHA who could potentially have access to the folders containing the information are the 14 people in the Actuarial Services Unit. Within OHA, only the actuary has actually seen the rate ranges. OHA safeguards the confidentiality of the rate ranges by keeping it in folders in the Unit and by requiring that Optumas keep the information confidential.

The commercial value to OHA of the rate ranges is that, ultimately, they allow OHA to settle on a rate as low as possible and still acquire the services and health access required. The figures also have actual or potential commercial value to MCO and CCO applicants, in two respects. First, an applicant could use the upper limit of the range in future negotiations with OHA or to challenge OHA's future rates based on the October 2011 highest rate. Second, a CCO or MCO could use the lowest rate in the range as justification for paying its providers at a lower rate. A CCO or MCO with that information potentially could adjust its future cost estimates based on OHA's high and low figures. Thus, the figures "[d]erive[] independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from [their] disclosure or use." ORS 646.461(4)(a).

Knowing the October 2011 rate ranges would give the MCO or CCO an opportunity to obtain a business advantage over its "competitors" who do not know them. ORS 192.501(2). As you correctly point out, the current Request for Applications ("RFA") process is not competitive in the traditional sense that the applicants are "bidding against one another." Petition 5. But the definition of "competitor" includes both "a rival" and "one selling or buying goods or services in the same market as another." *http://www.merriam-webster.com/dictionary/competitor* MCOs and CCOs are in the same "market" for OHA contracts and for providers. In addition, those entities "compete" with each other in submitting their cost estimates, in the sense that the resources for the state's health care system are limited, and each one's share is affected by the other others' contracts with OHA. And as already discussed, knowing the October 2011 rate ranges would give the MCO or CCO a business advantage in negotiating for its own rates and for the services of providers in the area.

In view of the above factors, we conclude that the rate ranges are OHA's trade secrets under ORS 192.501(2).

Your petition asserts that OHA is not an organization conducting business, within the meaning of ORS 192.501(2). We respectfully disagree. Contrary to your assertion, OHA is not excluded from the definition of an "organization" by virtue of being a public body. As already discussed, we reject your assertion that the trade-secrets exemption applies only to *private* organizations conducting business, to the exclusion of state agencies. We also conclude that the OHA conducts "business." Among its other statutory responsibilities, the OHA is charged with administering the Oregon Integrated and Coordinated Health Care Delivery System established in ORS 414.620 (2011). ORS 413.032(1)(b). The OHA must also "[b]e the state Medicaid agency for the administration of funds from Titles XIX and XXI of the Social Security Act and administer[ing] medical assistance under ORS chapter 414." ORS 413.032(1)(j). Thus, the OHA conducts "business" in complying with its statutory mandates.

We also disagree with your assertion that the OHA's proprietary rate ranges data have no "'actual or potential commercial value' to OHA." Petition 5. As discussed above, the commercial value to the OHA is the ability to maximize the use of the limited funds available under the state budget by engaging in arms-length negotiations with MCOs—a position that potentially would be undermined by the negotiating advantage to an MCO if the information were disclosed.

Your petition further asserts that knowing the October 2011 rate ranges would not afford any advantage to an MCO or CCO over another, because all the contracts for that period have already been signed. That assertion is mistaken. Mr. Rohrer has told us that the body of information used in OHA's methodology has not changed significantly in the past six months. Thus, an MCO or CCO could readily extrapolate the current rate range from the October 2011 figures.

Finally, we disagree with your assertion that the exemption does not apply because "OHA is not using the rate ranges to compete in a marketplace against other "competitors[.]" Petition 5. Under ORS 192.501(2), a trade secret must "give *its user* an opportunity to obtain a business advantage over competitors who do not know or use it[.]" (Emphasis added.) Presumably, the requested information would be *used*, if it were disclosed. Disclosure would give an MCO or CCO that uses the information the opportunity to obtain a business advantage over other MCOs and CCOs in the ways discussed above.

Accordingly, we disagree with your reading of the requirements of trade secrets under ORS 192.501(2).

2. On balance, the public interest does not favor disclosure.

Having concluded that the actuarial information you requested from the OHA is a trade secret, we must consider whether the public interest nevertheless requires disclosure. We apply "heightened scrutiny" to your contention that the public interest requires disclosure of this trade secret information. Kirsch; Attorney General's Public Records and Meetings Manual at I.E.4.c.(2) (2010). We conclude that the public interest does not require disclosure in this instance.

Some degree of public interest in keeping the information confidential is necessarily implied by the conclusion that the information is a "trade secret" as defined in ORS 192.501(2). Although that conclusion is not determinative, it is nevertheless significant in balancing the public interest in maintaining the confidentiality of the information against the public interest in disclosing it.

The public has an interest in maximizing the use of the limited funds available for the state's integrated and coordinated health care system. The public also has an interest in reducing medical care inflation. Pursuant to the state's policy and its current methodology, an MCO's lowest cost estimate must be based on the MCO's own actual historical costs. Therefore, it is in the public's interest that the lowest cost estimates not be influenced by the OHA's prior

determinations of actuarially sound rate ranges. The public's interest in maintaining the confidentiality of OHA's trade secrets, to ensure that cost estimates are based on accurate information, is weighty.

In comparison, your petition fails to identify any meaningful public interest in disclosing the OHA's trade secrets. You have provided no reason for concluding that disclosure of the rate ranges would enable the State Budget Office to "ensure that OHA is acting as a good steward of public funds" and complying with federal requirements for receiving federal funds. We fail to understand how providing the trade secrets you request would advance the public interest in "ensuring that government functions according to law." And your invocation of the public's general interest in "open government" does not identify any specific way in which disclosing the OHA's trade secrets would serve that interest. Finally, your assertion that the confidentiality of OHA's trade secrets is intended to "allow[] OHA to operate outside the law in its negotiations with CCC" lacks any support in fact or law.

In sum, the public's interest in following the state's policy for containing health costs, while providing integrated and coordinated health care, far outweighs the public's interest in allowing Cascade access to the OHA's trade secrets.

Conclusion

We conclude that the specific information you requested meets the factors that define a trade secret. Furthermore, we do not find that there is a significant public interest that would require disclosure of that information. Therefore, the information is exempt from disclosure under ORS 192.501(2).

For the reasons stated above, we respectfully deny your petition.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

MHW:nog/JUSTICE-#3478610
c: Keely West, OHA/CCC