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Michael Williams
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Fred Bruyns
Department of Consumer and Business Services
Workers' Compensation Division
350 Winter Street NE
Salem, OR 97301

Re: Petition for Public Records Disclosure Order
Workers' Compensation Division, Department of Consumer and Business Services
DOJ File No.: 440420-GA0012-23

Dear Mr. Williams and Mr. Bruyns:

This letter is the Attorney General's order responding to Mr. Williams' petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. His petition, received by this office on January 19, 2023,[1] asks the Attorney General to order the Workers' Compensation Division (WCD) of the Department of Consumer and Business Services to disclose certain medical equipment reimbursement claims and payment information relating to Zynex, a durable medical equipment company. For the reasons discussed below, we grant Mr. Williams' petition.

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(1). The law is a disclosure law, and exemptions from disclosure must be express. Even express exemptions are construed narrowly to further the public purposes served by disclosure. If a responsive record contains both exempt and nonexempt material, the agency shall separate and disclose the nonexempt material. ORS 192.338. Any person denied the right to inspect or to receive a copy of a public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.411(1). The agency carries the burden to sustain its actions. ORS 192.411(1).

[1] We thank Mr. Williams for granting an extension on the deadline to issue this order.

a. Background.

Mr. Williams' petition stems from a December 12, 2022, request for all medical equipment claims for reimbursement submitted to WCD by Zynex from 2015 to 2022. WCD informed Mr. Williams that it does not receive or pay claims involving Zynex, but that the department may have data relating to Zynex's claims if it was reported by private insurers that are regulated by WCD. Thereafter, Mr. Williams requested any documentation WCD may have relating to medical equipment reimbursement claims submitted by Zynex to private insurers, as well as any payments made by them to Zynex. In response, WCD disclosed to Mr. Williams a three-page table consisting of 48 responsive billing transactions. In the version disclosed to Mr. Williams, WCD redacted eight of fourteen columns from the table including the amounts billed by Zynex, the amounts paid to Zynex, patient diagnosis codes, and the associated Healthcare Common Procedure Coding System (HCPCS) codes.[2] WCD took the position that the redacted data was exempt as a trade secret belonging to Zynex. Mr. Williams' petition followed and asks us to order WCD to disclose the columns containing amounts billed, amounts paid, and the HCPCS codes.

b. WCD's Claim of Trade Secrets

WCD asserts that the information redacted from the table is exempt from disclosure as a trade secret under ORS 192.345(2), which conditionally exempts from disclosure:

> [A]ny 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.

We recognize that in responding to public records requests and petitions, agencies are in the difficult position of proving that third-party information is exempt as a trade secret. We have therefore advised that they obtain relevant factual information and, where appropriate, legal argument supporting the assertion of the trade secret exemption from the entity that provided the sensitive business information. *See Attorney General's Public Records and Meetings Manual* at 55 (2019). The relevant facts that agencies should solicit include: (a) internal steps the entity takes to keep the information secret, (b) steps taken to ensure information shared with outside parties is kept secret, (c) the economic value of the information to a competitor or how it could be used to economically harm the entity, and (d) the time, effort and expense needed to compile the information. *Id*. (citations omitted).

In this instance, WCD informed Zynex of Mr. Williams' records request and asked the company to identify any information it considered to be exempt as a trade secret as defined in ORS 192.345(2). Zynex replied that, when combined, the eight columns that were eventually

[2] An HCPCS code in this context is a standardized code, maintained by the American Medical Association, used to identify particular types of durable medical equipment.

redacted by WCD constitute a company trade secret. In support of its position, Zynex explained that information in the table generally is not patented and that it is used in its business. Zynex also represented that the information is:

> [O]nly available to certain team members and certain executive leaders responsible for claims submission process. This information is secured from other employees who don't need access to the information. The billing training manual and billing guidelines are in a secured shared drive folder that is accessible only to employees that need this information in order to perform their job. Additionally, every Zynex employee, upon accepting their employment offer, signs a confidentiality agreement * * *.

Zynex indicated that "[i]Information regarding HCPCS codes and diagnosis codes is kept on a restricted shared drive and is only disclosed to payers (when submitting claims), to the billing team (during training), and patients upon request." Regarding the commercial value of the information, Zynex stated that "the billing guidelines for each of our products for each payer have been researched and collected by a team of billing experts. This information, if disclosed, holds financial value to our competitors carrying similar products." With respect to whether disclosure would give its competitors a business advantage, Zynex explained that it has confidentiality agreements and contracted rates with Third Party Administrators, and that by "disclosing billed rates and paid rates, this information becomes public and potentially accessible to our competitors giving them a competitive advantage * * *." Zynex also noted that the "combination of HCPCS codes and diagnosis codes holds commercial value to our competitors as it may provide information about how to secure reimbursement for similar products."

c. Analysis

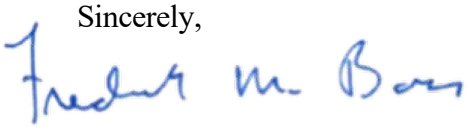
We begin by reiterating that WCD has the burden of sustaining its determination that the data Mr. Williams seeks is a trade secret and therefore conditionally exempt from disclosure. ORS 192.411(1). To meet that burden, WCD has elected to rely exclusively upon Zynex's representations. On this record, we conclude that WCD has not met its burden.

First, much of Zynex's position is based upon the association of diagnosis codes with HCPCS codes, but Mr. Williams petition does not ask us to order WCD to disclose the diagnosis codes. This significantly undermines any argument that the remaining information that he seeks is a trade secret. Second, we observe that none of the data in the table was supplied to WCD by Zynex; rather, it was known to and supplied by private insurers. Zynex, in its response to WCD about Mr. Williams' records request, provided no documentation to WCD showing that Zynex identified this data as a trade secret when it submitted its claims to the insurers. Similarly, there is nothing in the available record indicating that the insurers informed WCD that this data is a trade secret. Zynex has also acknowledged that it makes this data available to patients upon request. Under the circumstances, we cannot conclude that the requested data is "only known to certain individuals" within Zynex or that Zynex took reasonable steps to ensure information shared with outside parties was kept secret.

Next, we cannot conclude that the amounts approved by the insurers for payment of claims is a trade secret belonging to Zynex, at least insofar as payment data is depicted in the table at issue. If it is the case that the payment amounts reflect confidential reimbursement rates that Zynex negotiated with various insurers, neither Zynex nor WCD presented such a case. More importantly, we do not believe that such negotiated rates can be gleaned from the table because it does not contain any information about the insurers. Finally, we are not convinced that all of the data in the table "is used in a business" that Zynex currently conducts or that its disclosure would give its competitors a financial advantage. For example, most of the data is historical – the table shows that more than 90% of the reported transactions occurred prior to 2022 and that Zynex's prices for various HCPCS codes have changed regularly since 2015. Neither Zynex nor WCD have explained how any of this historical data is used in Zynex's current business or how its disclosure would put Zynex at a competitive disadvantage.

For the foregoing reasons, we conclude that WCD has failed to meet its burden in demonstrating that the data Mr. Williams seeks is a trade secret within the meaning of ORS 192.345(2). We therefore grant his petition and order WCD to disclose those columns in the table reflecting the amounts billed, amounts paid, and the HCPCS codes. WCD has seven days within which to comply or announce its intention to seek judicial review. ORS 192.411(2).

Sincerely,



for Lisa M. Udland
Deputy Attorney General

ACF:pjn