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BEFORE THE STATE OF WASHINGTON

OFFICE OF INSURANCE COMMISSIONER Patricia D. Petersen
Hearings Unit, DiC
Chief Hearing Officer

In the Matter of the Proposed Acquisition of)
Control of:)
)
COLUMBIA UNITED PROVIDERS, INC.,)
a Washington Health Care Service Contractor,)
)
by)
)
PEACEHEALTH, a Washington Non-Profit)
Corporation)
)
)

NO. 10-0234

JOINT MOTION
FOR AN IN CAMERA
EXAMINATION
AND
PROTECTIVE ORDER

I. INTRODUCTION

At the hearing in the above-captioned matter on January 3, 2011, Chief Hearing Officer, Patricia Petersen, directed that PeaceHealth produce for her inspection a copy of the Affiliation Agreement ("Agreement") it has entered into with Southwest Washington Health System ("SWHS"). PeaceHealth is doing so subject to this joint motion for an in camera examination and a protective order, which is filed by PeaceHealth and Southwest Washington Health System (hereinafter jointly referred to as "Movants"). Movants request that neither the Chief Hearing Officer nor the Office of the Insurance Commissioner treat the Agreement as a public record. PeaceHealth and SWHS request that only sections 1.1, 3.1, 3.2, 3.4 (K.) and (M.), 8.4, 9.3, 10.3 and 10.15 (collectively, "CUP Sections") of the Agreement be treated as a public record because the other sections (collectively, "Non-CUP Sections") of the Agreement are not relevant to this hearing and contain confidential proprietary trade secrets of PeaceHealth and SWHS.

MOTION FOR PROTECTIVE ORDER

Movants request an opportunity to conduct supplemental in camera oral argument concerning the relevancy and confidential proprietary and trade secret status of the Agreement. Portions of the document are highly sensitive from a competitive standpoint and, as such, cannot be fully discussed in this pleading, which will become a public document, without disclosing the very information sought to be protected.

II. ARGUMENT

A. LACK OF RELEVANCY UNDER WASHINGTON RULES OF EVIDENCE

This public hearing is governed by the Washington Administrative Procedure Act, RCW 34.05.452(2), which states that any evidentiary rulings must be guided by the Washington Rules of Evidence. Under ER 402, "Evidence which is not relevant is not admissible." The Non-CUP Sections of the Agreement are irrelevant to the specific matter under consideration in this hearing. This hearing pertains only to review of a change of control over Columbia United Providers, Inc. ("CUP"), pursuant to RCW 48.31C.030. Only the CUP Sections of the Agreement have any relevance over the change of control over CUP. The Non-CUP Sections involve terms, conditions, and agreements about other entities and have no relevance to the specific change of control matter of this hearing; therefore, they should be excluded from PeaceHealth and SWHS' production.

Even if the Court were to determine that the entire Agreement was tangentially relevant to this hearing, ER 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Non-CUP Sections involve confidential, proprietary information about PeaceHealth and SWHS's strategic plans, policies, governance structures and initiatives. PeaceHealth and SWHS' economic and privacy interests in protecting the highly confidential and sensitive information in the Agreement substantially outweighs any probative value gained in this hearing by a review of entire Agreement. The classification of the private business plans and initiatives of PeaceHealth and SWHS as a "public record" would severely prejudice PeaceHealth and SWHS' economic and strategic interests. The following three situations exemplify the types of prejudice PeaceHealth will suffer.

First, PeaceHealth was one of several health systems considered by Southwest Washington Health System for its affiliation partner. Significant factors in PeaceHealth's selection were its unique governance structure and the financial and capital allocation policies that it has internally developed over many years. Those very elements of governance and internal policies are contained within the Agreement and PeaceHealth is now in direct competition with the other health systems that sought to affiliate with Southwest Health System. If as a result of this hearing they can learn of PeaceHealth's financial policies and capital allocation policies, it will allow them to unfairly compete by anticipating PeaceHealth's actions through knowledge of how it allocates capital and manages its finances.

Second, PeaceHealth anticipates that it will soon be responding to additional Requests for Proposals ("RFPs") from other stand-alone hospitals in the Northwest and that in doing so it will be in competition with the same health systems that sought to affiliate with Southwest Washington Health System. If those competing respondents to other RFPs know through public disclosure of this Agreement the proprietary PeaceHealth structural design, financial policies and capital policies, they will unfairly be able to replicate them when making their future RFP proposals, thus rendering PeaceHealth's years of developing its internal model of governance and finance policies of no value.

Third, the Agreement contains timelines for the creation and implementation of key strategic plans. These plans form the basis of PeaceHealth's competitive efforts vis-a-vis other health systems operating in Clark County that have been or are seeking to take market share from Southwest Washington Health System. If those competitors are able to unfairly learn of PeaceHealth's internal planning timelines, they will be able to time their own actions accordingly, thus stifling fair competition through the acquisition of sensitive proprietary planning information belonging to PeaceHealth.

A reasonable balance in determining relevancy should allow introduction of the CUP Sections of the Agreement that relate to the change of control of CUP without requiring production of the entire Agreement that would so prejudice PeaceHealth in its future dealings.

B. THE AGREEMENT CONSTITUTES CONFIDENTIAL PROPRIETARY AND TRADE SECRET INFORMATION UNDER RCW 42.56.400

In addition to lack of relevancy, the Agreement should not be made public because RCW 42.56.400 specifically provides for the exemption from the Public Records Act ("PRA") of "confidential proprietary and trade secret information" produced to the Office of the Insurance Commissioner pursuant to RCW 48.31C.030. RCW 42.56.400 states in pertinent part as follows:

The following information relating to insurance and financial institutions is exempt from disclosure under this chapter: ...
(9) confidential proprietary and trade secret information provided to the commissioner under RCW 48.31C.020 through 48.30C.050 and 48.31C.070;...

As discussed above, the Non-CUP Sections of the Agreement contain highly confidential strategic planning initiatives, internal board policies and governance structures that both PeaceHealth and SWHS have endeavored to protect throughout the negotiation process. These are proprietary information, which belong exclusively to PeaceHealth and SWHS. These initiatives, policies and structures, therefore, qualify as a "trade secrets," which are defined by the Uniform Trade Secrets Act ("UTSA") in pertinent part at RCW 19.108.010(4).

"Trade secret" means information. . . that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, 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.

In *Evergreen Freedom Found. v. Locke*, 127 Wn. App. 243 (2005), the court held that the terms of an agreement between Boeing and the Washington State Department of

Community, Trade and Economic Development could qualify as a trade secret exempt from PRA disclosure.

[The agreement] discusses and details the program components that Boeing is clearly attempting to keep confidential. And the disclosure of certain program details could potentially make the overall Agreement less profitable and less viable.

Id. at 250-251.

PeaceHealth and SWHS similarly derive actual and independent value from the confidentiality of the Non-CUP Sections of the Agreement. For example, several sections of the Agreement disclose the time periods in which PeaceHealth and SWHS intend to undertake certain market initiatives. If PeaceHealth's competitors were to learn of the timelines and initiatives, they would be able to act in advance of PeaceHealth's initiatives and unfairly foreclose competition by PeaceHealth. It is many of these initiatives, internal policies and unique PeaceHealth commitments that caused the SWHS Board to select PeaceHealth as their affiliation partner over other direct competitors who also responded to their affiliation Request for Proposal. PeaceHealth and SWHS have worked diligently to maintain the secrecy and confidentiality of these initiatives, policies, and commitments.

Therefore, the Non-CUP Sections of the Agreement are confidential proprietary trade secrets that are exempt from disclosure under the PRA.

**C. THE AGREEMENT ALSO CONSTITUTES TRADE SECRET INFORMATION
UNDER RCW 19.108**

Even if the Court were to find that RCW 42.56.400 did not protect the Non-CUP Sections of the Agreement, RCW 42.56.070(1) would separately exempt the Agreement from PRA disclosure. Under RCW 42.56.070(1), "Each agency. . .shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of...[an]other statute which exempts or prohibits disclosure of specific information or records." (Emphasis added).

The above-referenced trade secret protections of the UTSA, RCW 19.108, qualifies as one such "other statute." See, *Evergreen Freedom Foundation v. Locke*, 127 Wn. App. 243, 248 (2005), citing *PAWS v. UW*, 125 Wn.2d 243, 250 (1994). According to the Washington State Supreme Court, "The Public Records Act is simply an improper means to acquire knowledge of a trade secret." *PAWS*, 125 Wn. at 262.

As stated, the definition of "trade secret" under RCW 19.108.010(4) precisely applies to the type of confidential, proprietary information contained within the Agreement and thus it should be exempted from disclosure as containing trade secrets.

**D. AT THE VERY LEAST, DISCREET SECTIONS OF THE AGREEMENT
SHOULD BE GRANTED EXEMPTION FROM THE PRA.**

For particularly sensitive reasons, which Movants will explain at the in camera oral argument, the following portions of the Agreement should, at the very least, be determined not relevant and protected as proprietary and trade secret information:

- 5.1 through 5.3 (Creation of the newly combined Columbia Region and Regional network of care.)
- 6.2 (Transition of SMG to PHMG)
- 6.5 (Integration of SMG with the Columbia Region)
- 7.13 (Financial Parameters and Capital Policies)
- 8.3 (b) (Implementation Plan)
- 8.7 (Laboratory Services)
- 8.9 (Performance Commitments)
- 9.6 (Approval of Affiliation by at Least Three Class A Directors of SWRSC)
- 9.17 (Amended SWRSC Operating Agreement)
- 10.6 (Approval of Affiliation by at Least Three Class A Directors of SWRSC)
- 9.17 (Amended SWRSC Operating Agreement)
- Schedule 5.1.1 (Columbia Region Guidelines for ICTF)
- Schedule 5.1.2 (Columbia Region Map)
- Schedule 5.3 (ICTF Charter and Deliverables)
- Schedule 7.13 (PeaceHealth's Financial Parameters and Capital Policies)
- Schedule 8.4 (Payment Arrangement for PeaceHealth's System Fee)
- Exhibit B (Restated Bylaws of SWHS)
- Exhibit D (Restated Bylaws of SWMC)
- Exhibit E (Restated Bylaws of PeaceHealth: Attachment 2.19 – Reservation and Delegation of Powers)

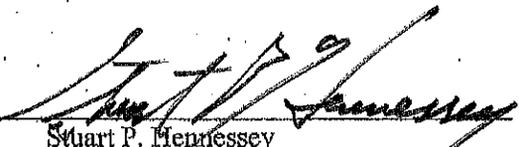
III. CONCLUSION.

The Non-CUP Sections of the Agreement are not relevant to the issues under consideration in this hearing. The court should exercise its discretion by requiring the production

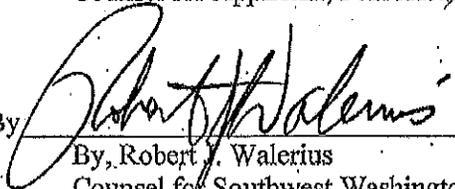
and entrance into evidence of only those CUP Sections of the Agreement that are pertinent to the change of control CUP, as set forth above.

Even if the Court should find the entire Agreement to be relevant to this hearing, the Agreement is still exempt from public disclosure by two Washington State statutes. RCW 42.56.400(9) specifically discusses documents produced to the Office of the Insurance Commissioner under the exact situation presented by this matter and provides that confidential proprietary information is exempted from public disclosure. In addition, RCW 42.56.070(1) of the PRA, together with the UTSA at RCW 19.108, also exempts the high sensitive and confidential information contained within the Agreement. For the foregoing reasons, PeaceHealth and SWHS request that the Chief Hearing Officer grant their Motion and allow disclosure of only the designated portions of the Agreement.

By


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By


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