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STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of the Redomestication of COMMONWEALTH INSURANCE COMPANY OF AMERICA, Authorized Domestic Insurer.	No.14-0214 MOTION FOR PROTECTIVE ORDER

I. RELIEF REQUESTED

Commonwealth Insurance Company of America ("Commonwealth") requests that the following documents containing personal, proprietary, and trade-secret information submitted to the OIC for review by the hearing officer in connection with its Application for Redomestication not be filed in the public record but kept confidential, pending the OIC's receipt of a public record request seeking the information:

- Biographical affidavit personal information
- Pro-Forma Financial Statement
- Management Discussion and Analysis
- Actuarial Opinion

In the event the OIC receives a request for the information, the OIC shall notify Commonwealth of such request and afford it no less than ten business days to object to such production and seek an order enjoining disclosure.

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II. AUTHORITY

A. Public Records Act and Protective Orders

The Public Records Act, chapter 42.56 RCW, requires public agencies to make records available for inspection and copying unless they fall within an exemption in the Public Records Act "or other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1). As explained below, exemptions to the Public Records Act apply to certain documents and information produced by Commonwealth. Exempt information is exempt from the general requirement that the OIC preserve records of hearings for public inspection. *See* RCW 48.02.120(1), (2); *see also* RCW 42.56.070(1) (Public Records Act). Where the legislature has exempted a record or information from public disclosure, no discretion exists to permit disclosure. *Bldg. Indus. Ass'n of Wash. v. Dep't of Labor & Indus.*, 123 Wn. App. 656, 666, 98 P.3d 537 (2004). The hearing officer has authority under RCW 34.05.446(1) to enter a protective order. A protective order is appropriate "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." CR 26(c). A tribunal has discretion to shield documents or information from discovery and to order "that a trade secret or other confidential research, development, or commercial information not be disclosed." *See* CR 26(c)(1), (7).

B. Protection of Personal Information Submitted to the OIC

The Public Records Act requires that personal identifying information be protected from public disclosure. It provides,

> To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, ***an agency shall delete identifying details*** in a manner consistent with this chapter when it makes available or publishes any public record[.] RCW 42.56.070(1).

The Act further provides that personal privacy interests are invaded and violated if disclosure of information about a person "(1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.56.050.

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Consistent with the protection for personal information afforded by the Public Records Act, an executive order requires state agencies to protect personal information from disclosure:

> Each state agency shall immediately establish procedures and practices for the handling and disposal of public records and copies to provide reasonable assurances that those containing confidential personal information are properly safeguarded.

Wash. Executive Order 00-03 (2000). In addition to protecting personal information, the executive order affords specific protection for Social Security numbers:

> To the extent practicable, each state agency ***shall eliminate*** the use of Social Security numbers and other sensitive personal and financial identifying numbers from documents that may be subject to public scrutiny. . . .

Id.; *see also* WAC 284-03-105 ("The OIC reserves the right to protect personal information [in responding to a public disclosure request].").

Commonwealth's directors and officers have a reasonable concern that their social security numbers, home addresses, dates of birth, signatures, and fingerprints, if disclosed on the OIC's website or otherwise made publicly available, could compromise personal privacy and readily be used to commit identity theft, which is a crime. *See* RCW 9.35.020. Additional personal information that is not of legitimate concern to the public in the context of the proposed Redomestication would include personal unrelated civil litigation and non-felony civil infraction or criminal history. Commonwealth requests entry of a protective order that will except this information from filing in the public record and provide Commonwealth an opportunity to seek protection in the event the OIC receives a public disclosure request.

C. Actuarial Formulas, Statistics, and Assumptions.

A specific exemption in the Insurance Code provides that "[a]ctuarial formulas, statistics, and assumptions...submitted to the commissioner upon his or her request shall be withheld from public inspection in order to preserve trade secrets or prevent unfair competition." RCW 48.02.120(3). Commonwealth has submitted information that fits

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squarely within this exemption. For instance, the Pro-Forma Financial Statement and Actuarial Opinion include projections of Commonwealth's financial performance, based on assumptions, which plainly is proprietary and nonpublic. Preserving the confidentiality of this and similar information is essential to prevent unfair competition.

D. Proprietary and Trade-Secret Information.

The Public Records Act exempts confidential proprietary and trade secret information from public disclosure. The Act provides:

> The following financial, commercial, and proprietary information is exempt from disclosure under this chapter:
>
> . . .
>
> (11) Proprietary data, trade secrets, or other information that relates to: (a) A vendor's unique methods of conducting business; [or] (b) data unique to the produce or services of the vendor[.]

RCW 42.56.270(11). In addition, the Uniform Trade Secrets Act (UTSA) is an independent exemption to the Public Records Act. *Progressive Animal Welfare Soc'y (PAWS) v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) (holding that the PRA is "an improper means to acquire knowledge of a trade secret"). The UTSA defines "trade secret" as:

> [I]information, including a formula, pattern, compilation, program, device, method, technique, or process 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.

RCW 19.108.010(4). "A trade secrets plaintiff need not prove that every element of an information compilation is unavailable elsewhere. ... Such a burden would be insurmountable since trade secrets frequently contain elements that by themselves may be in the public domain but together qualify as trade secrets." *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 50, 738 P.2d 665 (1987) (citation omitted).

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Ownership of a trade secret is a constitutionally protected property interest. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-12 (1984). *See also Mountain States Telephone & Telegraph Co. v. Dep't of Pub. Serv. Reg.*, 634 P.2d 181, 185-86 (Mont. 1981). "A trade secret which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless or of less value to its owner if disclosure of the information to the public and to one's competitors were compelled." *Id.*; *see also Ruckelshaus*, 467 U.S. at 1011-12 ("Once the data that constitute a trade secret are disclosed to others, or others are allowed to use the data, the holder of the trade secret has lost his property interest in the data."). Filing trade secrets in the public record not only would violate state law, but could result in a taking of private property for public use in violation of the Fifth and Fourteenth Amendments to the United States Constitution. *See Ruckelshaus*, 467 U.S. at 1014-16. CR 26(c)(7) contains specific authority to enter a protective order to shield "a trade secret or other confidential...commercial information" from disclosure.

The elements of a trade secret under the UTSA are met here. First, the Pro-Forma Financial Statement, Actuarial Opinion, and other listed documents derive economic value from their confidentiality. For example, they contain assumptions regarding interest rates that would be used by competitors to underprice Commonwealth's interest-rate sensitive insurance products. Similarly, competitors could use Commonwealth's assumptions about anticipated returns on its investments to gain a competitive advantage. And public disclosure of Commonwealth's projected financial performance would put Commonwealth at a competitive disadvantage to its competition and the financial markets as a whole, as companies are not generally required to publicly release internal forecasts and projections at the level of detail contained in the pro forma financial statements.

The second element of a trade secret is met because Commonwealth undertakes reasonable efforts under the circumstances to maintain the secrecy of the information at issue,

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including not disclosing it in public filings, requiring employees not to disclose it, and requesting that it be kept confidential as it has in this proceeding.

III. CONCLUSION

The hearing officer should enter a protective order under which the documents listed above will not be filed in the public record but will be kept confidential pending the OIC's receipt of a public record request seeking the information. In the event the OIC receives a public record request for the information, the OIC shall notify Commonwealth of such request and afford it no less than ten business days to object to such production and seek an order enjoining disclosure.

DATED this 2nd day of December, 2014.

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By _____
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

☐ Legal messenger service, for delivery on _____, to the following:

☐ Overnight mail service, for delivery on _____, to the following:

☐ Other _____.

DATED this _____ day of _____, 2014.

_____
, Legal Assistant

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