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2014 DEC 18 A 11:45

STATE OF WASHINGTON  
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of

COMMONWEALTH  
INSURANCE COMPANY OF  
AMERICA,

Authorized  
Domestic Insurer.

Docket No. 14-0214

WAOIC# 111240  
NAIC 10220

OIC'S MOTION FOR  
CLARIFICATION AND  
RECONSIDERATION OF ORDER ON  
COMMONWEALTH INSURANCE  
COMPANY OF AMERICA'S  
MOTION FOR PROTECTIVE ORDER

**I. RELIEF REQUESTED**

The Office of the Insurance Commissioner ("OIC") respectfully seeks (1) clarification of the directive that the "Pro-Forma Financial Statement shall not be filed in the public record" and (2) reconsideration of the finding that the document contains trade secrets.

**II. CLARIFICATION REQUEST**

The plain language of the Protective Order withholds Commonwealth's Pro-Forma Financial Statement from the public record. We understand the intent of that language to be limited to a decision by the Hearings Unit regarding what portion of the public record will be immediately posted online, rather than a decision concerning public records more generally. The OIC seeks clarification that this understanding is correct.

By virtue of being introduced in a hearing before the OIC, Commonwealth's records are *already* filed in the public record and cannot be removed unless pursuant to an exemption. See RCW 40.16.010; *Ameriquest Mortgage Co. v. State Attorney General*, 170 Wn.2d 418, 440 (2010). Also, because there is no public records request before the agency, the OIC cannot yet make that determination. *Wood v. Lowe*, 102 Wn. App. 872, 876 (2000). Moreover, when records are requested, the OIC's Public Records Unit is charged with making exemption determinations, rather than the Hearings Unit. Per the Insurance Commissioner's commitment to information transparency and public access to records, it is the Hearing Unit's general

1 practice to post the complete hearing record online, with some personal information redacted.<sup>1</sup>

### 2 III. RECONSIDERATION REQUEST

3 The Hearings Officer has the authority to determine whether certain documents are  
4 “trade secrets,” pursuant to RCW 48.02.120(3). This finding would support redaction before  
5 posting them on the OIC website.

6 However, the determination of “trade secret” for purposes of the Insurance Code does  
7 not automatically apply to these types of documents. The plain language of the statute states  
8 that it applies to *actuarial* assumptions,<sup>2</sup> not balance sheets (which are typically produced by  
9 accountants rather than actuaries). RCW 48.02.120(3). Moreover, Commonwealth has failed to  
10 support its request with appropriate evidence. Because the designation “trade secret” results in  
11 protection that is counter to the general public policy of transparency and disclosure, it requires  
12 a detailed factual analysis to trigger the protection. Here, the only evidence Commonwealth  
13 provided are an attorney’s conclusory assertions.

14 This is insufficient for protective orders, trade secret determinations, and administrative  
15 orders. Protective orders must use affidavits and concrete examples to show that specific  
16 prejudice or harm will result absent a protective order. *See McCallum v. Allstate Prop. & Cas.*  
17 *Ins. Co.*, 149 Wn. App. 412, 422-23 (2009). Trade secrets will not be found where the parties  
18 failed to provide specific evidence. *Belo Management v. Click! Network*, No. 45577-3, 2014  
19 Wash. App. LEXIS 2765, at \*6-8 (declining to find trade secrets where the parties submitted  
20 detailed affidavits and briefs<sup>3</sup> claiming that disclosure would result in losses of millions of  
21 dollars). Administrative orders must rest on reliable evidence and contain an “explicit  
22 statement of the underlying evidence of record to support the findings.” RCW 34.05.461.  
23 Finally, protective orders and injunctions concerning trade secrets are more appropriately  
24 sought in superior court. *See* RCW 19.108.020; RCW 48.02.065(6). Accordingly, the OIC  
25 requests that the Protective Order be rescinded upon reconsideration.

26 <sup>1</sup> If the Hearings Unit is persuaded that some portion of the public hearings record should not be  
immediately posted, we recommend that a statement of that fact (similar to a redaction log) be placed in the  
hearings record to place the public on notice that documents may be available that are not posted.

<sup>2</sup> The *Robbins Geller* court’s construction arguments support the OIC’s reading of RCW 48.02.120(3), in  
which the word “actuarial” modifies the listed items because “actuarial” comes “at the beginning of the sentence  
preceding the three” items separated by commas (not semi-colons). 179 Wn. App. 711, 734, n.14 (2014).

<sup>3</sup> Available at [www.courts.wa.gov](http://www.courts.wa.gov), in the Division II appellate court brief database.

1 **IV. CONCLUSION**

2 For the reasons set forth above, the OIC respectfully requests that the Protective Order  
3 be reconsidered and clarified.

4 Dated this 18th day of December, 2014.

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7 DREW STILLMAN  
8 Insurance Enforcement Specialist  
9 Legal Affairs Division

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CERTIFICATE OF MAILING

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing **OIC'S MOTION FOR CLARIFICATION AND RECONSIDERATION OF ORDER ON COMMONWEALTH INSURANCE COMPANY OF AMERICA'S MOTION FOR PROTECTIVE ORDER** on the following individuals as described below.

Hon. George Finkle, Chief Hearing Officer  
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DATED this 18<sup>th</sup> day of December, 2014, at Tumwater, Washington.

SIGNED BY: Christine M. Tribe  
Christine M. Tribe  
Paralegal