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STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In re the Matter of the Redomestication of COMMONWEALTH INSURANCE COMPANY OF AMERICA, Authorized Domestic Insurer.	No. 14-0214 OPPOSITION TO OIC'S MOTION FOR CLARIFICATION AND RECONSIDERATION OF PROTECTIVE ORDER

I. INTRODUCTION

The OIC mainly repeats the arguments it made in opposition to Commonwealth's motion, ignoring that the Protective Order is without prejudice to de novo consideration upon the OIC's receipt of a public records request. The OIC's motion should be denied.

II. AUTHORITY AND ARGUMENT

A. No clarification of the Protective Order is needed as the applicability of exemptions is subject to de novo consideration upon the OIC's receipt of a public records request.

The Protective Order is not binding on the OIC in the event it receives a public records request for any of the information subject to the order. It is expressly "without prejudice to de novo consideration of the facts and law if a public record request for information contained by this Order is presented." There is no merit to the OIC's suggestion that the Hearings Unit has overstepped its authority and pre-determined the applicability of exemptions. If the OIC were to receive a public records request, the normal procedures would apply. As provided in the

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order, the OIC would be authorized to notify Commonwealth and determine the applicability of exemptions, subject to Commonwealth's right to seek a court injunction. *See* RCW 42.56.080, .520; WAC 284-03-015(4), -025(6). All the Protective Order does is conditionally protect certain information from disclosure (*i.e.*, posted online) before any public records request for the information has been received.

The OIC asserts that the subject records are already in the public record and cannot be removed, citing a statute that provides that the willful and unlawful removal of a record from a public file is a class C felony. RCW 40.16.010. The Protective Order plainly requires that the protected information be redacted, even if it is already technically "in the public record." But the OIC concedes that removal or redaction pursuant to an exemption is not willful or unlawful. *See also* RCW 48.02.120(1), (2); RCW 42.56.070(1). Where the Presiding Officer has made an initial determination that exemptions apply and has entered a protective order pursuant to express authority under RCW 34.05.446(1) and (3), no one in the OIC is at risk of felony prosecution.

The OIC further asserts that the applicability of exemptions cannot be determined in advance of a public records request, citing *Wood v. Lowe*, 102 Wn. App. 872, 876, 10 P.3d 494 (2000). But, as already discussed, the Protective Order is not binding in the event of a public records request; it only prevents disclosure in advance of any such request. *Wood* actually supports the entry of the Protective Order, as the court held that "public disclosure is not necessary until and unless there has been a specific request for public records." *Id.*, quoting *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998). No clarification of the Protective Order is needed.

B. For purposes of entering the Protective Order, Commonwealth did not need to establish as a matter of law that the Pro Forma Financial Statement contains trade secrets.

The Presiding Officer was not asked to make, and did not make, a binding determination that Commonwealth's Pro Forma Financial Statement contains trade secrets as

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a matter of law. The Presiding Officer determined only that Commonwealth made a sufficient showing to justify not disclosing the information in advance of a public records request. The OIC cites no authority for requiring that Commonwealth submit affidavits to obtain such relief. Neither of the cases cited by the OIC involved entry of a protective order to prevent disclosure conditionally, pending receipt of a public records request. The first case was not even a public records case. *See McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 204 P.3d 944 (2009). The second case was a PRA injunction case. *Belo Mgmt. Svcs., Inc. v. Click! Network*, __ Wn. App. __, __ P.3d __, 2014 WL 6806880 (2014). Commonwealth will submit affidavits at the appropriate time, if and when it is forced to seek a court injunction in response to notice of intended disclosure in response to a public records request.

Contrary to the OIC's assertion, RCW 48.02.120(3), which protects "actuarial formulas, statistics, and assumptions" submitted to the OIC, does not only protect assumptions made by an actuary, as opposed to financial and claim projections of the type contained in Commonwealth's Pro Forma Financial Statement. The OIC relies upon *Robins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 734 n.14, 328 P.3d 905 (2014). But unlike the statute at issue there, RCW 48.02.120(3) is written in the conjunctive. "Statutory phrases separated by the word 'and' generally should be construed in the conjunctive." *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 474 n.94, 61 P.3d 1141 (2003). The statute protects actuarial formulas, and more generally protects proprietary statistics and assumptions.

But, regardless of whether RCW 48.02.120(3) applies, the Protective Order also cites the exemption for proprietary data and trade secrets in RCW 42.56.270(11). And trade-secret protection is also afforded under the Uniform Trade Secrets Act (UTSA), an independent exemption to the Public Records Act. RCW 19.108.010(4); *Progressive Animal Welfare Soc'y (PAWS) v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) (holding that the

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PRA is "an improper means to acquire knowledge of a trade secret"). Neither of these bases for protection is addressed substantively by the OIC's motion.

III. CONCLUSION

The OIC's motion should be denied.

DATED this 19th day of December, 2014.

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CERTIFICATE OF SERVICE

I, Christine Williams, under oath hereby declare as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. On December 19, 2014, I caused to be delivered via ***e-mail and U.S. mail*** a copy of the foregoing document on the following parties at the last known address as stated:

OIC Hearings Unit – **ORIGINAL** Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 Email: kellyc@oic.wa.gov Hon. George Finkle (Ret.) Email: gfinkle@jdrllc.com forbes@jdrllc.com	Legal Affairs Division Drew Stillman Insurance Enforcement Specialist Legal Affairs Division Office of the Insurance Commissioner P.O. Box 40255 Olympia, WA 98504-0255 Email: drewst@oic.wa.gov

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 19th day of December, 2014, at Seattle, Washington.

Christine Williams

Christine Williams, Legal Assistant

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