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HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of:

The Form A Application for the Proposed Acquisition of Control of:

ARCADIAN HEATH PLAN, INC. a subsidiary of HUMANA INC.,

and

The Form E Application for the proposed Acquisition of Control of:

HUMANA INC. a Non-Domiciliary Insurer,

By

AETNA INC., a Pennsylvania corporation.

Docket No. 16-0027

ORDER ON PARTIES' JOINT SUBMISSIONS ON CONFIDENTIALITY ISSUES

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Background.

In response to paragraph 5 of the Notice of Hearing on February 26, 2016, On March 11, 2016, the OIC Staff, Aetna, Inc. ("Aetna") and Humana, Inc. ("Humana") (collectively, "Parties"), submitted a Joint Submission on Confidentiality Issues ("Submission"). In the Submission, the Parties request confidential treatment as three categories of documents: (1) Form E Statement; (2) biographical affidavits; and (3) financial projections. The Parties also seek a protective order as to the Form E Statement and the financial projections, and ask that they receive confidential treatment and be maintained under seal.

I will address each of the categories of data in order, but first acknowledge that the parties Submission at page 4 is correct that *State v. S.J.C.*, 183 Wn.2d 408, 412, 352 P.3d 749 (2015) states whether an *Ishikawa* analysis is necessary depends on whether Const. art. I, § 10 applies. Furthermore, as the Parties aptly explain at page 4 of their Submission, per the Court's holding in *Mills v. Western Washington Univ.*, 170 Wn.2d 903, 915, 246 P.3d 1254 (2011), this provision of the Washington State Constitution does not apply to quasi-judicial proceedings, such as the instant one before the OIC. Therefore, the *Ishikawa* factors outlined in *State v. Waldon*, 148 Wn. App. 952, 958, 202 P.3d 325 (2009) are inapplicable to determining whether the three categories of documents at issue in the Submission should be sealed from public view or inspection, and not posted on the OIC's website.

Law Governing Discovery and Protective Orders in Matters before the OIC Hearings Unit.

WAC 284-02-070 articulates the standard for discovery in hearings before the OIC Hearings Unit, and states in part:

> (e) Discovery is available in adjudicative proceedings pursuant to Civil Rules 26 through 37 as now or hereafter amended without first obtaining the permission of the presiding officer or the administrative law judge in accordance with RCW 34.05.446(2).
>
> (i) Civil Rules 26 through 37 are adopted and incorporated by reference in this section, with the exception of CR 26 (j) and (3) and CR 35, which are not adopted for purposes of this section.
>
> (ii) The chief presiding officer or administrative law judge is authorized to make any order that a court could make under CR 37 (a) through (e), including an order awarding expenses of the motion to compel discovery or dismissal of the action.

(iii) This rule does not limit the chief presiding officer's or administrative law judge's discretion and authority to condition or limit discovery as set forth in RCW 34.05.446(3).

(Emphasis added).

RCW 34.05.446(1) states that a presiding officer may issue protective orders. RCW 34.05.446(3) provides the OIC's Presiding Officer with discretion to decide whether protective orders may be granted in a hearing before the OIC's Hearings Unit, and states:

> Except as otherwise provided by agency rules, the presiding officer may decide whether to permit the taking of depositions, the requesting of admissions, and all other procedures authorized by rules 26 through 36 of the superior court civil rules. The presiding officer may condition use of discovery on a showing of necessity and unavailability by other means. In exercising such discretion, the presiding officer shall consider: (a) Whether all parties are represented by counsel; (b) whether undue expense or delay in bringing the case to hearing will result; (c) whether the discovery will promote the orderly and prompt conduct of the proceeding; and (d) whether the interests of justice will be promoted.

(Emphasis added).

CR 26(c) provides courts with the ability to issue protective orders limiting discovery to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, and states:

> Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending. . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (1) that the discovery not be had;
>
> * * *
>
> (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; . . .
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(Emphasis added).[1]

[1] FED. R. CIV. P. 26(c) contains language very similar to that in CR 26(c). Where a Washington civil rule is identical to its federal counterpart, federal cases interpreting the federal rule are highly persuasive. *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 767, 82 P.3d 1223 (2004) (citing *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001), cert. denied, 536 U.S. 941, 153 L.Ed.2d 806, 122 S.Ct. 2624 (2002).

In examining the standard for a court to issue a protective order under CR 26(c), in *Marine Power & Equip. Co. v. Dep't of Transportation*, 107 Wn.2d 872, 875-876, 734 P.2d 480 (1987) the Court stated:

> CR 26(c) provides a court may "for good cause shown . . . make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." The United States Supreme Court has stated:
>
> > Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required. . . . The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.
>
> (Footnote omitted.) *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 36, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984).

In *McCallum v. Allstate Property and Casualty Insurance Co.*, 149 Wn. App. 412, 423-424, 204 P.3d 944 (2009), the Court explained what constitutes good cause under CR 26(c), stating:

> Accordingly, in determining whether a protective order is needed, we must decide whether a party has shown good cause to limit the scope of discovery. CR 26(c); *Rufer*, 154 Wn.2d at 541. To establish good cause, the party should show specific prejudice or harm will result if no protective order is issued. *See Dreiling*, 151 Wn.2d at 916-17 (citing *Foltz*, 331 F.3d at 1130). When possible, the party must use affidavits and concrete examples to demonstrate specific facts showing harm; broad or conclusory allegations of potential harm may not be enough. *Dreiling*, 151 Wn.2d at 916-17 (citing *Foltz*, 331 F.3d at 1130). And finally, in exercising its discretion to issue a protective order under CR 26(c) for raw fruits of discovery, a court must weigh the respective interests of the parties. *Rhinehart* I, 98 Wn.2d at 236; *see also T.S.*, 157 Wn.2d at 431; *Doe*, 117 Wn.2d at 778.

(Emphasis added). A movant must "make a specific demonstration of facts to support [its] request for the protective order and may not rely on conclusory or speculative statements concerning the need for a protective order." *Byrd v. District of Columbia*, 259 F.R.D. 1, 7 (2009) (citation omitted).

1. The Form E Statement.

Page 2 of the Submission requests that the undersigned "enter a protective order requiring that the Form E and all information reported therein receive confidential treatment as required by the Washington Insurance Code, and order that they are not subject to public inspection or disclosure, are not subject to subpoena or discovery, and are not admissible in evidence in any private civil action." This broad request is based on the statutory language outlined below in connection with the protection of information included in a Form E filing.

RCW 48.31B.020(3), states that the OIC "must give confidential treatment to information submitted under [RCW 48.31B.020(3) (i.e., Form E)] in the same manner as provided in RCW 48.31B.038." (Brackets and emphasis added). RCW 48.31B.038(1) states:

> (1) Documents, materials, or other information in the possession or control of the commissioner that are obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to RCW 48.31B.035 and all information reported pursuant to RCW 48.31B.015(2) (l) and (m), 48.31B.025, and 48.31B.030 are confidential by law and privileged, are not subject to chapter 42.56 RCW, are not subject to subpoena, and are not subject to discovery or admissible in evidence in any private civil action. However, the commissioner is authorized to use the documents, materials, or other information in the furtherance of any regulatory or legal action brought as a part of the commissioner's official duties. The commissioner shall not otherwise make the documents, materials, or other information public without the prior written consent of the insurer to which it pertains unless the commissioner, after giving the insurer and its affiliates who would be affected thereby, notice and opportunity to be heard, determines that the interest of policyholders, shareholders, or the public is served by the publication thereof, in which event the commissioner may publish all or any part in such manner as may be deemed appropriate.

(Emphasis added).

While the Submission does not state that specific prejudice or harm will result if a protective order concerning the Form E Statement is not issued, the Submission jointly submitted by the Parties refers specifically to RCW 48.31B.038(1). The language of that statutory provision is clear that discovery may not be had on any information submitted pursuant to RCW 48.31B.020(3), or in conjunction with a Form E. As such, under CR 26(c), I conclude that the Parties have shown good cause, and hereby impose a protective order preventing discovery of the Form E Statement, and information in connection therewith, filed by Aetna in this matter.

The last sentence of RCW 48.31B.038(1) gives the Commissioner the option to publish part or all of the information connected with the Form E Statement if he determines in the best interests of policyholders, shareholders, or the public to do so. However, in part because the Parties have jointly put forth the Submission, I conclude there is no basis for the OIC to make such information subject to public inspection or disclosure.

RCW 34.05.452 provides that the "presiding officer shall exclude evidence that is excludable based on . . . statutory grounds. . . ." Per RCW 48.31B.038(3), information Aetna submitted under RCW 48.31B.020(3), or with the Form E at issue, is not admissible in evidence in any private civil action, and therefore is not admissible in the adjudicative proceedings before the OIC.

I also conclude that RCW 48.31B.038(1)'s prohibition on subpoenaing information filed with Aetna's Form E under RCW 48.31B.020(3) trumps any subpoena powers granted parties to this matter under RCW 34.05.446(1), (6), and therefore conclude that such information is not subject to subpoena.

GR 15(c)(2) state in part:

> . . . [T]he court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record. Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:
>
> (A) The sealing or redaction is permitted by statute; or
>
> (B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); . . .

(Emphasis added).

To reiterate, per RCW 48.31.020(3), RCW 48.31B.038(1) permits the sealing of the information Aetna filed with its Form E, and the sealing furthers the protective order granted above under CR 26(c). Therefore, under GR 15(c)(2), compelling privacy or safety concerns outweigh the public interest in access to the information Aetna filed with its Form E.

2. Biographical Affidavits.

Page 3 of the Submission requests that the undersigned "enter an order allowing the Parties to redact that personal information contained in the Directors' and Officers' biographical affidavits, including social security numbers, dates of birth, phone numbers and home addresses," which Aetna filed with its Form A.

RCW 42.56.230(5) provides that social security numbers are exempt from public inspection under RCW Chapter 42.56. RCW 42.56.230(7)(a) adds: "Any record used to prove identity, age, residential address, social security number, or other personal information required to apply for a driver's license or identicard," is subject exempt from public inspection under RCW Chapter 42.56.

At page 2 of the Submission the Parties refer to RCW 48.31B.038(1) as *a* basis to redact the personal information above which Aetna submitted with the Form A. That said, RCW 48.31B.015(2)(a) is the impetus behind Aetna's submission of the biographical affidavits with its Form A. However, RCW 48.31B.038 does not render such information confidential by law and privileged (only RCW 48.31B.015(2)(l), (m) are covered by this provision).

RCW 48.02.065, which the parties cite at page 3 of their Submission, states in part:

> (1) Documents, materials, or other information as described in either subsection (5) or (6), or both, of this section are confidential by law and privileged, are not subject to public disclosure under chapter 42.56 RCW, and are not subject to subpoena directed to the commissioner or

any person who received documents, materials, or other information while acting under the authority of the commissioner. The commissioner is authorized to use such documents, materials, or other information in the furtherance of any regulatory or legal action brought as a part of the commissioner's official duties. The confidentiality and privilege created by this section and RCW 42.56.400(8) applies only to the commissioner, any person acting under the authority of the commissioner, the national association of insurance commissioners and its affiliates and subsidiaries, regulatory and law enforcement officials of other states and nations, the federal government, and international authorities.

* * *

(6) Working papers, documents, materials, or information produced by, obtained by, or disclosed to the commissioner or any other person in the course of a financial or market conduct examination, or in the course of financial analysis or market conduct desk audit, are not required to be disclosed by the commissioner unless cited by the commissioner in connection with an agency action as defined in RCW 34.05.010(3). The commissioner shall notify a party that produced the documents, materials, or information five business days before disclosure in connection with an agency action. The notified party may seek injunctive relief in any Washington state superior court to prevent disclosure of any documents, materials, or information it believes is confidential or privileged. In civil actions between private parties or in criminal actions, disclosure to the commissioner under this section does not create any privilege or claim of confidentiality or waive any existing privilege or claim of confidentiality.

(Emphasis added).

Under RCW 48.02.065, the biographical affidavits of the Directors and Officers, which Aetna filed with its Form A, are arguably confidential, and must at the very least be redacted insofar as personal identifiers.

GR 15(c)(3) states: "A court record shall not be sealed under this section when redaction will adequately resolve the issues before the court. . . ."

GR 31(e) mandates that parties redact personal identifiers from court records, and provides:

(1) Except as otherwise provided in GR 22, parties shall not include, and if present shall redact, the following personal identifiers from all documents filed with the court, whether filed electronically or in paper, unless necessary or otherwise ordered by the Court.

(A) Social Security Numbers. If the Social Security Number of an individual must be included in a document, only the last four digits of that number shall be used.

(B) Financial Account Numbers. If financial account numbers are relevant, only the last four digits shall be recited in the document.

(C) Driver's License Numbers.

(2) The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Court or the Clerk will not review each pleading for compliance with this rule. If a pleading is filed without redaction, the opposing party or identified person may move the Court to order redaction. The court may award the prevailing party reasonable expenses, including attorney fees and court costs, incurred in making or opposing the motion.

(Emphasis added).

GR 31(e)(1)(A) provides yet another basis to redact the social security numbers contained in the biographical affidavits of the Directors and Officers that Aetna filed with its Form A.

3. Financial Projections.

At page 3 of the Submission, the Parties request that the undersigned enter a protective order requiring that the financial projections of Arcadian health Plan ("Arcadian") Aetna submitted with the Form A (or Exhibit 10) be designated trade secrets, receive confidential treatment, and be sealed. The Submission explains that the financial projections contain key managerial strategic decisions concerning Arcadian's growth prospects. Arcadian would allegedly be competitively harmed if the financial projections were known to competitors.

Under RCW 48.02.065(6), the financial projections represent working papers, documents, materials, or information produced by, obtained by, or disclosed to the commissioner or any other person in the course of a financial or market conduct examination, and therefore under RCW 48.02.065(1) confidential by law and privileged, and not subject to public disclosure under RCW Chapter 42.56.

RCW 48.02.120(3) states that actuarial formulas, statistics, and assumptions submitted in support of a rate or form filing by an insurer shall be withheld from public inspection in order to preserve trade secrets or prevent unfair competition. RCW 42.56.270(1) states that valuable formulae and research data obtained by an agency within five years of the request for disclosure, when disclosure would produce private gain or public loss, is exempt from public disclosure under RCW Chapter 42.56.[2]

RCW 42.56.070(1) states: "Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records." (Emphasis added).

RCW 19.108.050 states: ". . . [A] court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery

[2] RCW 42.56.270(11), cited by the Parties at Page 3 of their Submission, while it mentions trade secrets, only applies to vendors doing business with the Department of Social and Health Services, and therefore I find it inapplicable to the facts herein.

proceedings, . . ., sealing the records of the action. . . ." (Brackets and Emphasis added). RCW 19.108.010(4) defines "trade secret" as:

> . . . [I]nformation, 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.

(Brackets added). RCW Chapter 19.108 qualifies as an "other statute" under RCW 42.56.070(1). *Robbins Geller Rudman & Dowd, LLP v. Office of Attorney General*, 179 Wn. App. 711, 721, 328 P.3d 905 (2014); *Belo Management Svcs., Inc. v. Click! Network*, 184 Wn. App. 649, 656, 343 P.3d 370 (2014). The Public Records Act [RCW Chapter 42.56] may not be used to acquire knowledge of a trade secret. *Id.* (Citation omitted). "To be a trade secret, information must be novel in the sense that the information must not be readily ascertainable from another source." *Id.* at 722 (citations omitted).

Given that the financial projections contain key managerial strategic decisions concerning Arcadian's growth prospects, I conclude that they are trade secrets not readily ascertainable from another source per RCW 19.108.010(4), and exempt from public disclosure under RCW 42.56.070(1) and RCW 42.56.270(1). RCW 48.02.120(3) supports this outcome as well.

Since the financial projections qualify as trade secrets, I conclude under CR 26(c)(7) that the parties have shown good cause, and hereby impose a protective order preventing discovery of the financial projections.[3] Also, RCW 48.02.065(6) permits the sealing of the financial projections. The sealing furthers the protective order granted above under CR 26(c)(7). Therefore, under GR 15(c)(2), discussed above, compelling privacy or safety concerns outweigh the public interest in access to the financial projections Aetna filed with its Form A.

Order.

Pursuant to the authority outlined above, the undersigned orders that:

A. The Parties have shown good cause, and I hereby impose a protective order preventing discovery of the Form E Statement, and information in connection therewith, filed by Aetna in this matter. In addition, information Aetna submitted with the Form E at

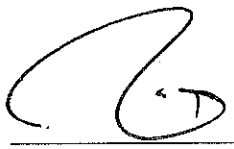
[3] The passing reference at page 3 of the Submission to RCW 48.31B.038(1) has no bearing on whether the financial projections are deemed confidential, privileged, not subject to discovery. This statutory provision clearly states that only information contained in subsections (2)(l), (m) of RCW 48.31B.015, not at issue with the financial projections, is protected.

issue, is not admissible in the adjudicative proceedings before the OIC. Also, such information is not subject to subpoena, and must be sealed;

B. The personal information contained in the Directors' and Officers' biographical affidavits that Aetna filed with its Form A, including social security numbers, dates of birth, phone numbers and home addresses," must be redacted. It is the responsibility of the parties to do so prior to the public hearing scheduled in this matter, so that the OIC Hearings Unit may post such documents on the OIC's website; and

C. The financial projections that Aetna filed with its Form A represent working papers, documents, materials, or information produced by, obtained by, or disclosed to the commissioner or any other person in the course of a financial or market conduct examination, and are therefore confidential by law and privileged. Given that the financial projections contain key managerial strategic decisions concerning Arcadian's growth prospects, I conclude that they are trade secrets not readily ascertainable from another source, and are exempt from public disclosure. The parties have shown good cause, and I thereby impose a protective order preventing discovery of the financial projections. The financial projections must also be sealed.

Dated: March 15, 2016



William G. Pardee
Presiding Officer

CERTIFICATE OF SERVICE

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 filed and served the foregoing Order on Parties' Joint Submissions on Confidentiality Issues on the following people at their addresses listed below:

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Dated this 15th day of March, 2016, in Tumwater, Washington.

Dorothy Seabourne-Taylor
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