

December 11, 2015

Donna Jerry
Senior Health Care Policy Analyst
Green Mountain Care Board
89 Main Street, Third Floor City Center
Montpelier, VT 05620

**Re: Docket No. GMCB-010-15con, Proposed Ambulatory Surgical Center
Confidentiality Request**

Dear Donna:

Pursuant to Green Mountain Care Board (“GMCB”) Rule 4.403(3), the applicant in the above matter, ACTD LLC, hereby requests leave to submit its response to question 4 of the set of questions posed by the GMCB on August 28, 2015 confidentially. The response contains information that is exempt from the Vermont public records law. Specifically, the information for which we are seeking protection may be used to identify individual physicians and interfere with their ability to pursue their professional livelihoods.

Under Vermont Statutes, “personal documents relating to an individual” and “information in any files relating to personal finances” are exempt from public inspection and copying. 1 V.S.A. § 317(c) (7) Similarly, Vermont’s public records law also contains an exemption for “trade secrets, meaning confidential business records or information, including any...production data or compilation of information which is not patented, which a commercial concern makes efforts that are reasonable under the circumstances to keep secret, and which gives its user...an opportunity to obtain business advantage over competitors who do not know it or use it.” 1 V.S.A. § 317(c) (9).

Question #4 asks the applicant the following: “The table on page 27 of the application shows the number of procedures that will be performed by Physicians A-P by specialty in year 1-4 of operation. In a table format, for Physician A-P (include specialty) provide the most recent two years of data (noting the year for each) showing the number of surgeries, procedures performed, and the location where they were performed.”

Although the information requested is reasonable for the GMCB to review in its utilization analysis, it calls for practice-specific information known only to Physicians A–P about how much and where they perform surgeries and procedures. Given the limited number of independently employed surgeons in Chittenden County who specialize in GI, OB/GYN, orthopedics, pain management and general surgery, and the restricted number of venues for their operations and procedures (essentially hospitals), it is a relatively easy task to match up the number of surgeries performed in a location, identify the physician and extrapolate his or her income. As such, this information is proprietary and should not be made publically available.

The GMCB rules contemplate that some information in support of a CON may not be a public record, and specify a procedure for determining whether the information submitted is a public record. ACTD LLC respectfully requests a written determination that the information submitted in response to question 4 is exempt from public review under 1 V.S.A. § 317(c) (7) and (9) because it could be used to identify particular physicians who intend to practice at the proposed facility.

- a. The information is exempt from disclosure as personal information protected by 1 V.S.A. 317(c) (7).

The personal document exemption in 1 V.S.A. § 317 (c) (7) applies to information that might subject a person to harassment or loss of employment. It requires balancing the public interest in disclosure against the harm to the individual. *Rutland Herald v. City of Rutland et al.*, 2012 VT 26, ¶ 11. Although the Court found the balance tipped in favor of disclosure in the *Rutland* case because the public's interest in determining if the City's police department followed its own internal affairs policy outweighed any expectation of privacy the officers had in viewing pornography while on duty, the balance in the instant case tips towards protecting the physicians from disclosure of their proprietary business and financial records.

There is no public interest in disclosing the physicians' private surgery records. Although there may be a legitimate need for the GMCB to review the last two years of data pertaining to Physicians A-P's number of surgeries and procedures, the fact that these same surgeons' only option for performing these surgeries is the local hospital makes the specialist surgeons easily identifiable. The physicians all have independent practices and are not hospital employees. They have an expectation of privacy as independent practitioners they would not have as hospital employees about how they run their practices, including how often and where they perform surgeries/ procedures. Moreover, they are voluntarily submitting vital information regarding their proposed utilization of the ASC. They could not be so forthcoming if their private business information is made public.

Therefore, the balance clearly tips in favor of exempting the physicians' practice data from public disclosure. There is no legitimate reason for making this private information available to the public, yet the surgeons have an expectation of privacy in how often and where they perform surgery based on the business model they have chosen.

- b. The information is exempt from disclosure as a trade secret or other confidential business information protected by 1 V.S.A. 317(c) (9).

As stated above, 1 V.S.A. § 317(c) (9) exempts from public disclosure a "trade secret, meaning confidential business records or information, including any...production data or compilation of information which is not patented, which a commercial concern makes efforts that are reasonable under the circumstances to keep secret, and which gives its user...an opportunity to obtain business advantage over competitors who do not know it or use it."

The legislature did not intend to limit the statutory definition of "trade secret" under the public records law to the type of proprietary information that is in the nature of intellectual property. "Instead, the Legislature chose to broaden the scope of exempted documents by expressly defining trade secrets as "including, but not limited to" specific compilations of information." *Springfield Terminal Railway Co. v.*

Agency of Transportation, 174 Vt. 341, 346 (2002) (confirming that financial documentation and compilations of several years of passenger flow projections submitted in support of an RFP was exempt from public disclosure under 1 V.S.A. 317(c) (9).)

In the instant matter, the practice data requested is a compilation of information that the privately employed Physicians A-P treat as confidential and do not share with other surgeons or hospitals because the information could give the latter a competitive advantage. The information will allow the physicians to be identified based on the number of surgeries they performed in each of the past two years at a particular hospital, and this information could be used to further limit the OR time the hospitals make available to non-employees. The physicians are also concerned that if their identities and surgery volumes are made public, they could be targeted for retaliation, lose privileges, or otherwise see their patient base eroded through anti-competitive behaviors.

On May 17, 2006, the Department of Banking, Insurance, Securities and Health Care Administration, predecessor to the GMCB as the agency overseeing the CON process, determined that physicians' practice records were confidential trade secrets under 1 V.S.A. § 317(c) (7). (See Exhibit 1, attached). The physicians were similarly situated in that the applicant argued that public disclosure of the physicians' private records would reveal their identities and subject them to anti-competitive behaviors.

Accordingly, the applicant makes the same request today based on a similar set of facts and applicable exemptions to the Access to Public Records Act. ACTD LLC respectfully requests confidentiality of the proprietary information sought through question 4 under both 1 V.S.A. § 317(c) (7) and (9).

Thank you for your consideration.

Sincerely,



Eileen Elliott

Cc: Judy Henkin, Health Policy Director
Lauren Layman, Esq., Vermont Association of Health and Hospital Systems
Jill Berry Bowman, Northwestern Medical Center
Julia Shaw, Office of the Healthcare Advocate



Vermont . . .

Department of Banking, Insurance,
Securities and Health Care Administration

Exhibit 1

Consumer Complaints/Assistance only:
Insurance: 1-800-964-1784
Health Care Administration: 1-800-631-7788
See other division numbers below.

May 17, 2006

Jacqueline A. Hughes, Esq.
Kimbell & Storrow
26 State Street, Suite # 8
Montpelier, VT 05602-2943

Re: Vermont Eye Surgery & Laser Center, L.L.C.
Docket No. 05-058-H

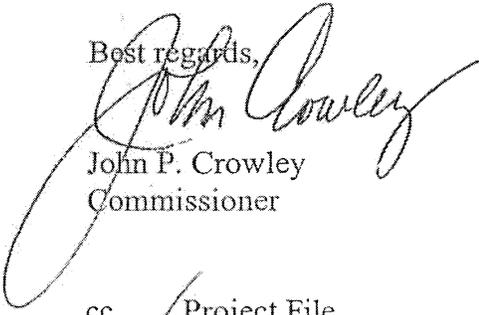
Dear Jackie:

In response to your letter, dated May 11, 2006, regarding the identity of the physicians mentioned in the narrative exhibits 2, 3, and 4 of the above referenced Certificate Of Need (CON) application, I have determined that your request meets the statutory requirements pertaining to materials exempted from Vermont's public records laws as a trade secret. The information will be maintained confidentially in our records as requested. The identity key you supplied will be held out of the public files until 30 days after the final decision on the CON application is rendered.

Your justification for exemption indicated you believe the information meets the standards for confidentiality as personal information or trade secrets (1 V.S.A. §317 (c) (7) & (9)). As noted above, I have determined the information may be protected as a trade secret under 1 V.S.A. §317 (c)(9) but not pursuant to the personal information provisions in 1 V.S.A. §317 (c)(7).

If you have any further questions or concerns, please contact Bruce Spector at 828-2963.

Best regards,


John P. Crowley
Commissioner

cc ✓ Project File

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www.bishca.state.vt.us

Banking
(802) 828-3307

Insurance
(802) 828-3301

Captive Insurance
(802) 828-3304

Securities
(802) 828-3420

Health Care Admin.
(802) 828-2900