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Re: Docket No. GMCB-010-15con; Ambulatory Surgical Center; Requests for reconsideration submitted by VAHHS and the HCA

Dear Attorneys Elliott, Cramer, and Kuiper,

This letter is a response to ACTD, LLC's (ACTD's, or Applicant's) October 5, 2016 request to provide confidential responses to Questions 16 and 17(a) issued by the Green Mountain Care Board on August 25, 2016, which request information regarding ACTD's physician-investors and their investments in ACTD. This letter also responds to the interested parties' requests to reconsider or clarify the limited grant of confidentiality issued on October 20, 2016. The Board declines to rescind the limited grant of confidentiality, but offers the following analysis and clarification.

Background

ACTD has applied to the Board for the Certificate of Need (CON) necessary to construct an ambulatory surgical center in Chittenden County. In issuing Questions 16 and 17(a) on August 25, 2016, the Board requested



information regarding ACTD's physician-investors<sup>1</sup> and their investments in ACTD's proposed ambulatory surgical center. ACTD argues that the information requested by the Board consists of personal documents, personal financial information, and trade secrets that are exempt from public disclosure under 1 V.S.A. § 317(c)(7) and (c)(9). In a letter dated October 10, 2016, the intervening parties, the Vermont Association of Hospitals and Health Systems (VAHHS) and Northwestern Medical Center (NMC), opposed the requested confidential treatment. ACTD issued a second letter on October 12, 2016, and the hearing officer, undersigned, convened a telephone conference with the parties' attorneys and the Board's General Counsel on October 20, 2016, granting limited confidentiality on that same date. The Office of the Health Care Advocate (HCA) requested reconsideration on October 26, and VAHHS and NMC requested reconsideration on October 28. ACTD submitted a response to the requests for reconsideration on November 4. The Board's initial determination on October 20, 2016, which is here restated and incorporated by reference, narrowed the scope of the issue to potential retaliation by VAHHS member hospitals and NMC against ACTD's physician-investors, and stated that the Board would release the information with the names of ACTD's physician-investors redacted.

On reconsideration, the HCA concedes that this CON application poses unusual retaliation concerns. However, the HCA requests an exception to the granted confidentiality. The HCA objects to being excluded from receiving the requested information in full because the HCA's statutory role is to represent the public, and the HCA poses no threat of retaliation against ACTD's investor physicians.

VAHHS and NMC argue that the ACTD's request for confidentiality is based on conclusory and unfounded claims regarding potential retaliation that are insufficient to overcome the presumption in favor of disclosure under Vermont's Public Records Act, 1 V.S.A. § 315 *et seq.* VAHHS and NMC contend 1) that there is no evidence that member hospitals have retaliated against the physician-investors in ACTD; 2) that VAHHS and NMC have executed confidentiality agreements regarding information that may be disclosed by and exchanged between parties to this application and this demonstrates their commitment to using confidential information appropriately; 3) that public scrutiny of VAHHS and NMC attendant to this application would prevent VAHHS and NMC from engaging in retaliation; 4) that it is in no party's interest to reduce the finite number of physicians in Vermont; and 5) granting ACTD's confidentiality request would compromise the public's and the intervening parties' ability to evaluate fully ACTD's CON application.

ACTD argues in response that the information requested by the Board may be withheld from public inspection under the Public Records Act because it consists of personal and financial documents relating to individuals. 1 V.S.A. § 317(c)(7). ACTD also contends that potential retaliation against physician-investors by VAHHS-member hospitals and NMC would undermine or eliminate a competitive business advantage held by ACTD such that the physician-investors' identities may be shielded from release under 1 V.S.A. § 317(c)(9). ACTD further argues that knowledge of the size and terms of the investments by the physician-investors will allow interested parties to fully evaluate the potential impact of the proposed project on themselves and on the public, and that the identities of the physician-investors would become public should the CON be granted and the proposed surgery center apply to receive Medicare payments. Finally, ACTD requests that the physician-investors' professional qualifications and employment history be sufficiently anonymized prior to release, as the physician-investors have exact specialties and documented employment histories such that mere redaction of their names from the requested information would not protect their identities.

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<sup>1</sup> This letter refers to "physician-investors" throughout, though the group reportedly includes one health care administrator who is also an investor in ACTD and employed by a party-affiliated hospital.



## Analysis and Decision

As is common to regulatory proceedings, the parties to this CON application executed a confidentiality agreement prohibiting public disclosure of some confidential business information that the Board requested from the ACTD on August 28, 2015. VAHHS and NMC offer to execute a similar agreement in regards to the information at issue here, arguing it would provide adequate security to address ACTD's concerns. The prior agreement, however, only prevents release to the general public of information that the ACTD disclosed to the Board and to the other parties. Such an agreement would not resolve the present dispute and suggests that the parties' focus on the technicalities of the Public Records Act has somewhat obscured the more fundamental nature of the disagreement over ACTD's present confidentiality request. On one hand, the Applicant's constituent members desire to organize a new business and secure regulatory approval for its formation while currently employed by, or dependent on, their potential future competitors. Given the significance of this CON application and the physician-investors' vulnerable position, their concerns that they may be subject to workplace or professional retaliation cannot be deemed unreasonable. In opposition, VAHHS and NMC are interested parties to the application with due process rights to the information necessary to assess the impact of the proposed project on their operations and to opine on how the project may affect the delivery and overall cost of healthcare in Vermont. Neither the Applicant's nor the hospitals' position immediately implicates the Public Records Act.

Resolving this initial balance of interests in favor of anonymity for the physician-investors is fairly straightforward. Through two rounds of written argument and an extensive telephone conference, VAHHS and NMC have not convincingly explained the prejudice they would suffer if they received redacted and anonymized versions of the information requested by the Board. VAHHS and NMC will be able to view the capital contributions of individual investors, the contractual terms attendant to the investments, and the medical specialties and general professional background and level of experience of each investor. In conjunction with the already large volume of data amassed by the Board for this CON application, this information should allow VAHHS and NMC to assess the likely impact of the proposed surgery center on their individual operations, and should enable them to offer commentary to the Board on the surgery center's possible systemic effects on healthcare delivery in the state. VAHHS's and NMC's contentions that they must also know the identities of the physician-investors in order to participate fully as parties to the proceeding are largely conclusory and unsupported.<sup>2</sup>

Accepting that the ACTD physician-investors' retaliation concerns outweigh the interests in disclosing their identities during this CON application has one significant consequence. As a practical matter, it requires withholding their identities from the public as well, and this decision therefore requires a secondary determination under the Public Records Act. Vermont's Public Records Act requires that records collected by the Board in the course of its business be open to examination by the public, unless the information contained in the records falls under one of the exceptions specified in 1 V.S.A. § 317(c). Under § 317(c)(7), the Board may withhold records from public inspection if they contain personal documents relating to an individual, including personal financial information "that *might* subject the person to embarrassment, harassment, disgrace, or loss of employment or friends." *Trombley v. Bellows Falls Union High School Dist. No. 27*, 160 Vt. 101 (1993), at 110 (emphasis added, internal quotes omitted). Under § 317(c)(9), the Board may withhold records from public inspection if the records contain a compilation of information that would give its owner business advantage over its competitors, and the information is not patented, is known only to the individuals within a commercial concern, and gives the owner an

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<sup>2</sup> Concededly, anonymity may hinder or preclude VAHHS and NMC from advising the Board regarding the quality and professional competence of the physician-investors in ACTD. However, the significance of this concern recedes in light of the high probability that all of them are currently performing surgeries on Vermonters in VAHHS-member hospitals and/or NMC, and would continue to do so should the Board decline to approve the present CON application.



opportunity to obtain a business advantage over competitors who do not know or use that information. *Springfield Terminal Ry. Co. v. Agency of Transp.*, 174 Vt. 341 (2002), at 347. The Board may keep such business information confidential to protect the party requesting confidentiality as well as to protect the Board's ability to collect from its regulated entities on a cooperative basis the information that is necessary to make intelligent, well-informed decisions. *See id.*, at 348-49. Both § 317(c)(7) and § 317(c)(9) weigh in favor of withholding from public disclosure the identities of the ACTD physician-investors during the present CON application.

VAHHS and NMC do not address the above standards under the Public Records Act beyond incorrectly stating that the Board's October 20 decision in this matter concluded that the names of the investors do not fall within an exception to the Act.<sup>3</sup> Instead, VAHHS and NMC argue that the Board did not, and could not, make the specific factual findings necessary to grant the investors confidentiality because there is no evidence that VAHHS and NMC have ever engaged in retaliation against the investors for their involvement with ACTD and its proposed surgery center. This argument is unpersuasive. VAHHS and NMC (and the Board) do not yet know who these investors are, and thus the opportunity to retaliate has not arisen. Moreover, the Public Records Act does not require that the Board permit that opportunity to arise and bear fruit prior to acting. *Trombley* authorizes confidentiality for information under § 317(c)(7) when disclosure *might* lead to harassment or loss of employment, impliedly acknowledging that state agencies would need to use reasonable discretion when confronting the present circumstances. Moreover, confidentiality under § 317(c)(9) is expressly premised on the condition that VAHHS and NMC do not know the information at issue and cannot act upon it. Finally, accepting the hospitals' position would require the Board to release the identities of the physician-investors despite circumstances counseling caution on behalf of one of the Board's regulated entities, and could as a result unduly inhibit or obstruct the Board's required information-gathering duties in the present and in future proceedings. The Board is not obligated to apply the Public Records Act so as to lead to unreasonable consequences or absurd or irrational results. *See Springfield Terminal Ry. Co.*, 174 Vt. at 348.

Finally, the HCA, whose statutory mission is to represent consumer interests in proceedings before the Board, is an interested party to this CON application. As the HCA underscores in its concise request for reconsideration, it poses no threat of retaliation against ACTD's physician-investors. The HCA is not the Applicant's business competitor, nor is it positioned to punitively harm the Applicant's physician-investors in their professional dealings. Since the HCA is an advocate of the public interest and a party to the application, and no countervailing interest weighs against disclosure, the HCA is entitled to the information at issue. However, as the HCA impliedly acknowledges, this application presents unusual security concerns connected with information handling. Accordingly, the HCA's attorneys will be permitted *in camera* review of the information in its un-redacted form and will keep the information in strictest confidence. Should the HCA's attorneys need to share this information with HCA non-attorney staff, the HCA's attorneys will execute on behalf of the Office of the HCA an appropriate confidentiality agreement with the Board, and will thereafter be provided with un-redacted paper copies of the information.

### Conclusion

For the above-stated reasons, ACTD must respond in full to the Board's Questions 16 and 17(a) issued on August 25, 2016. ACTD may also provide the Board a proposed version of the responses for distribution to VAHHS, NMC, and the HCA that redacts the names of ACTD's physician investors and, to the extent reasonably necessary to conceal the identities of those physician-investors, generalizes the descriptions of their professional history and

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<sup>3</sup> On the contrary, the portion of the Oct. 20 decision in this matter addressing § 317(c)(7) identified information that the Board will collect and release to all parties and will allow to be inspected by a member of the public upon request.



medical specialties. The HCA's attorneys will be permitted *in camera* review of ACTD's original, un-redacted responses, or provided paper copies of the original responses subject to the conditions described above.

Sincerely,



Noel Hudson, Esq.  
Hearing Officer  
Director of Health Policy  
Green Mountain Care Board

CC: Judy Henkin, General Counsel, GMCB  
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