

January 10, 2019

Donna Jerry
Senior Health Policy Analyst
Green Mountain Care Board
144 State Street
Montpelier, VT 05620

**Re: Docket No. GMCB-010-15con, Green Mountain Surgery Center
Request to Modify Condition 21**

Dear Donna:

ACTD LLC ("ACTD") hereby requests relief from, and modification of, the following condition of its Certificate of Need ("CON") for the Green Mountain Surgery Center pursuant to Green Mountain Care Board ("GMCB") Rule 4.500(4):

B. The applicant shall appear before the Board prior to commencing operations to demonstrate its compliance with, or where appropriate its ability to comply with, each of the following conditions:

- 21. [T]he applicant shall quarterly update, compile for inclusion in its implementation report, and post to its website within forty-five (45) days of the close of each quarter, the following information for each provider:**
 - a. A breakdown of the types of procedures/surgeries he or she performed at the ASC.**
 - b. A breakdown of the procedures/surgeries he or she performed at the ASC, by payer mix.**
 - c. A breakdown of the procedures/surgeries he or she performed at local hospitals (specify the hospital) by payer mix.**
 - d. The number of patients he or she determined were inappropriate for care at the ASC, and the reason for each determination.**

ACTD respectfully requests leave to report all information under CON Condition 21 on an aggregated level by specialty for the ASC, rather than on an individual level by provider. The reason for this request is that the information on an individual provider level qualifies as exempt from public inspection and copying under Vermont's Public Records Act, 1 V.S.A. § 315 *et seq.*

The information to be reported under CON Condition 21 will reveal each Green Mountain Surgery Center provider's individual procedure volumes and concomitant financial productivity. This is private and competitively sensitive personal financial information, which the providers keep confidential, and the Green Mountain Surgery Center will not disclose other than as required by the GMCB. Public disclosure of this information on the Green Mountain Surgery Center's website, in implementation reports, or via a public

records request to the GMCB may harm providers in several respects. It could disadvantage them in negotiating future offers of employment with hospitals or other potential employers because a physicians' historical record of procedure volumes and location of their procedures is not information typically available for review by future employers, unless it is voluntarily and confidentially provided by the physicians themselves. The public disclosure of provider-specific information regarding procedures/surgeries performed at the ASC vs. at local hospitals could also increase a provider's risk of retaliation from local hospitals if a particular hospital is not satisfied with the number or types of cases that an individual provider performs at the hospital versus the ASC. Even after the ASC opens, local hospitals will continue to control access to the operating rooms providers must use to perform their more complicated inpatient procedures and their procedures on their more elderly or at-risk patients.

Additionally, the type of personal and competitively sensitive financial information that ACTD is being asked to report on an individual provider level under Condition 21 also qualifies to be withheld from public inspection under Vermont Public Records Act Sections 317(c)(7), (9). 1 V.S.A. §§ 317(c)(7),(9). Under Section 317(c)(7), records may be withheld from public inspection if they contain personal information 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, 110 (1993)(emphasis added). Under Section 317(c)(9), records may be withheld from public inspection if they contain confidential information that gives its owner an opportunity to obtain business advantage over competitors who do not know that information. *Springfield Terminal Ry. Co. v. Agency of Transportation*, 174 Vt. 341, 347 (2002).

During the CON proceeding, the GMCB's Hearing Officer acknowledged that Green Mountain Surgery Center investors, most of whom will also be providers in the ASC, are legitimately fearful of retaliation: "Applicant's constituent members desire to organize a new business . . . while currently employed by, or dependent on, their potential future competitors. Given . . . the physician-investors' vulnerable position, their concerns that they may be subject to workplace or professional retaliation cannot be deemed unreasonable." Docket No. GMCB-010-15con, Letter re. Requests for reconsideration submitted by VAHHS and the HCA (November 17, 2016) at 3. The identities of the ACTD physician-investors were therefore withheld from public disclosure during the CON proceeding: "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." *Id.* at 4.

The approval of the CON did not resolve the Green Mountain Surgery Center providers' concerns about retaliation or the confidentiality of their personal financial information. As previously discussed, public disclosure of the provider-specific data to be reported under CON Condition 21 may increase the risk of retaliation against providers by hospitals, and may also disadvantage providers with respect to future employment and other professional opportunities. ACTD therefore requests permission to deliver the

information requested under Condition 21 on an aggregated level by specialty for the ASC, rather than on an individual provider level.

Thank you for your consideration.

Respectfully,

Amy Cooper

Manager, ACTD LLC