

PRIMMER

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October 28, 2016

VIA EMAIL AND FIRST CLASS MAIL

Noel Hudson, Esq., Hearing Officer
Director of Health Policy
Green Mountain Care Board
89 Main Street, Third Floor City Center
Montpelier, VT 05620

Re: Docket No. GMCB-010-15con, Proposed Ambulatory Surgery Center, Request for Reconsideration of Decision Granting Confidentiality to Applicant

Dear Mr. Hudson:

We are writing to request reconsideration of the written decision dated October 20, 2016 (the “Decision”) granting the Green Mountain Surgery Center’s (“GMSC” or the “Applicant”) request to prevent the disclosure of the identities of Applicant’s investors. During what was noticed to be a brief conference call on October 20, 2016, the Applicant argued at length that the investors feared retaliation without providing any evidence to support this specter. We appreciate the opportunity to address these concerns and to reiterate the position of the Vermont Association of Hospitals and Health Systems (“VAHHS”) and Northwestern Medical Center (“NMC”), collectively the “Interested Parties”, that the names of the investors in the GMSC must be disclosed to the public..

Any applicant for a Certificate of Need (“CON”) under Vermont law is required to submit detailed information regarding its qualifications and its finances to enable the Green Mountain Care Board (the “Board”) to evaluate whether the proposed health care project is in keeping with public policy¹ and meets the requirements of 18 V.S.A. § 9437. Where there are for-profit investors, the identity of the responsible investors must be disclosed to evaluate the Applicant’s financial wherewithal. Once this information is disclosed to the Board, it is part of the public

¹ See 18 V.S.A. § 9431. (“It is declared to be the public policy of this state that the general welfare and protection of the lives, health, and property of the people of this state require that all new health care projects be offered or developed in a manner which avoids unnecessary duplication and contains or reduces increases in the cost of delivering services, while at the same time maintaining and improving the quality of and access to health care services, and promoting rational allocation of health care resources in the state; and that the need, cost, type, level, quality, and feasibility of providing any new health care project be subject to review and assessment prior to any offering or development.”)

record² and is subject to the public disclosure requirements of the Public Records Act (“PRA”). As noted in the Decision, the names of the investors do not fall within an exception to the PRA. Vermont courts have held that the “public interest clearly favors the right of access to public documents and public records” and “the burden” is on the agency to overcome the presumption in favor of disclosure.³ *Trombley v. Bellows Falls Union High School Dist. No. 27*, 160 Vt. 101, 106-107 (1993). This burden cannot be discharged by “conclusory claims or pleadings; [the agency] must make the specific factual record necessary to support the exception claim.” *Id.*

The Applicant has sought to prohibit the disclosure of the names of the GMSC investors and the Board has granted the request to deny the public access to this public record. However, the Applicant’s justification for overcoming the PRA’s strong presumption in favor of disclosure is a conclusory and unfounded claim that the Interested Parties will potentially engage in retaliation against the named investors. There is no evidence that the Interested Parties have ever engaged in retaliation against the parties for their involvement in the GMSC. On the contrary, the Interested Parties have previously demonstrated that information disclosed in the context of this proceeding will be used appropriately.⁴ The heightened scrutiny and consistent public questioning of the actions of VAHHS’s hospital members provides added assurance that the Interested Parties will not misuse information received in this proceeding. Further, Vermont is a small state with a finite number of physicians. It is in no one’s interest, particularly the Interested Parties’ interest, to reduce access and have any fewer physicians available. Given the speculative, conclusory nature of the Applicant’s retaliation claims, the burden of providing factual support to overcome the presumption in favor of disclosing public records has not been met and the names of the investors must be disclosed to the public.

Beyond the case at hand, prohibiting the disclosure of public records based on unfounded claims of retaliation creates a dangerous precedent, particularly where a for-profit health care entity seeks to withhold crucial information from the public. Here, the Applicant seeks to establish a health care facility in the State of Vermont while only allowing the public to know the identities of two principals – a non-physician (Amy Cooper) and an eye surgeon (Tom Dowhan), who to date has not indicated that he will be operating at the GMSC. In its Application, the GMSC relies on the contributions of seven other private investors for the majority of funds to support this facility.⁵ As a result of the Decision, only the Board will know the identities of these key private investors, thwarting the public’s right to know who stands to profit from the health care facility the Applicant seeks to establish. Permitting the GMSC to keep the names of these investors confidential contrary to the PRA would permit future CON applicants making unsupported claims about retaliation to abrogate the public’s rights of access and to prevent

² A public record is “...any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business.” 1 V.S.A. § 317(b).

³ In its Decision, the Board, acting as the “agency” for purposes of the PRA, adopts the Applicant’s claims of potential retaliation. (“The Applicant raises the concern that the individual investors will be potentially vulnerable to retaliation...Accordingly, the Board will grant a limited confidentiality to the requested information...”)

⁴ Detailed information has been disclosed under the GMSC’s December 11, 2015 confidentiality agreement in order that the Board and the Interested Parties could more fully review the application.

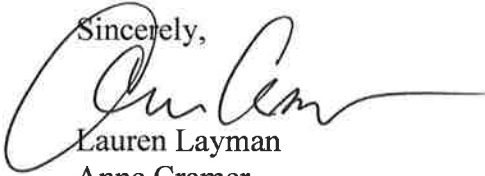
⁵ The GMSC states that it anticipates raising \$1,132,838 through equity contributions, out of the \$1,812,838 non-construction project costs. Green Mountain Surgery Center Certificate of Need Application, 58 (July 2, 2015).

interested or competing parties from accessing information necessary to evaluate CON applications.

For the above reasons, we respectfully request that the Decision be overturned.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to be "Lauren Layman" and "Anne Cramer" written together in a cursive style.

Lauren Layman
Anne Cramer

Cc: Eileen Elliott, Esq.
Lila Richardson, Esq.
Kaili Kuiper, Esq.