

STATE OF ALASKA

DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE

In the Matter of:)
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 PREMERA BLUE CROSS CONVERSION)
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 R 03-07)
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)
 _____)

Order No. 7 - Regarding
 Motion/Request to Seal
 Reports

Background

On January 7, 2004, Premera Blue Cross (PBC) filed with the director its expert reports with a cover letter indicating that the reports were marked confidential and proprietary and not for public disclosure. PBC subsequently filed a Motion to Seal Expert Reports. Pursuant to Order No. 6, PBC filed with the director redacted versions of these reports on February 2, 2004. The Division of Insurance (DOI) staff also filed redacted executive summaries of the Alaska consultants’ reports and the underlying reports unredacted and under seal. The DOI staff requested that the director designate the unredacted reports as confidential because they contain proprietary business information of PBC protected from disclosure under AS 21.06.060 and because the underlying consultant reports are exam work papers, which are confidential under AS 21.06.150(g).

Amici, Anchorage Neighborhood Health Center, United Way of Anchorage and John Garner, filed a response to PBC’s Motion to Seal Expert Reports.

Discussion

a. PBC’s Expert Reports

Under AS 21.06.060(f), information or records submitted to the director are confidential if the person submitting the information or records establishes to the director’s satisfaction that the information or records represent a trade secret or proprietary business information. The statute does not expressly define trade secret or proprietary business information, except to say that it includes “detailed health insurance claim cost data” and “justification for usual, customary, and reasonable charge determinations.”

The Alaska Supreme Court also has held that trade secrets and confidential business information are protected under both the Alaska and United States Constitutions. *See, e.g., State*

v. Arctic Slope Regional Corporation, 834, P.2d 134, 138 (Alaska 1992) (in a takings case, oil well data constituted trade secret). In determining whether something is a trade secret, the court has relied on Alaska's Uniform Trade Secrets Act at AS 45.50.910 – 45.50.945 relating to misappropriation of a trade secret. *Id.* Under AS 45.50.940, "trade secret" is defined as information 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.

Courts in other jurisdictions interpreting the same or similar definition language have considered six factors as set forth in Section 757 of the Restatement of Torts (now Section 39 of the Restatement (Third) of Unfair Competition) in determining whether a trade secret exists. *See, e.g., In re Bass*, 113 S.W.3d 735, 739 (Texas 2003) (Restatement's six factors relevant criteria to consider and will be weighed in context of surrounding circumstances to determine if trade secret exists). The six factors are:

(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of the measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

With respect to confidentiality of proprietary business information, the Alaska Supreme Court has inferred that a party must show that the party would be competitively disadvantaged by disclosure of the information and how the harm would come about. *See City of Fairbanks v. Alaska Public Utilities Commission*, 611 P.2d 493, 497 (Alaska 1980) (considering confidentiality of a utility's income statements and balance sheets).

Based on the foregoing, PBC must show that information it seeks to treat as confidential is a trade secret or proprietary under the above standards. Apart from the conclusory statement that information is a trade secret or proprietary, PBC has not made such a showing for the redactions in its reports. Accordingly, PBC must supplement its motion to seal expert reports with a showing that, for each redaction or group of redactions, establishes the information is a trade secret or proprietary business information.

b. Alaska Consultant Reports

The DOI staff has requested that the division's consultant reports be designated as confidential because they contain proprietary business information of PBC and because they are work papers of an exam.

Under AS 21.06.150(g), information or records obtained in an examination conducted under AS 21.06.120 and related work papers of an examination are confidential. However, the director has authority to publish an examination report or summary of it if the director determines publication is in the public interest. *Id.*

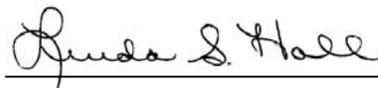
I do not believe that the consultants' reports, which I previously deemed as final reports on PBC's original Form A application, are fairly characterized as exam work papers. The consultants were retained to perform the examination function in lieu of division staff because of their specialized expertise in evaluating conversion transactions. In my view, the consultants' reports are part of or the functional equivalent of a report on examination as contemplated under AS 21.06.150. In the context of an exam, work papers represent worksheets or other records documenting the examiners review, analyses, and testing of facts and data. *See, e.g.,* NAIC Financial Examiners Handbook, 2002 Edition. The exam report serves the function of providing the results of such review, analyses, and testing with conclusions and recommendations of the examiner. *See* AS 21.06.150(a).

Accordingly, I conclude that the consultant reports are examination reports and not confidential work papers. I further conclude that it is in the public interest to publish these reports on the division's website, subject to any claim of privilege by the division or a claim of trade secret or proprietary business information by PBC. To that end, I ask the parties to submit to me redacted versions of the Alaska consultant reports identifying all claims of privilege, trade secret or proprietary business information. The parties also must provide support for each claim of privilege, trade secret, or proprietary business information.

THEREFORE, IT IS HEREBY ORDERED:

1. By March 8, 2004, the parties, jointly or separately, shall submit redacted versions of the Alaska consultant reports identifying all claims of privilege, trade secret, or proprietary business information. The parties must provide the factual and legal support for each claim of privilege, trade secret, or proprietary business information. If a party disagrees over the scope or extent of a redaction, then the party should file an objection with the director on the same date that outlines the factual and legal basis supporting the objection.
2. By March 8, 2004, PBC shall supplement its Motion to Seal Expert Reports with a showing that establishes for each redaction or group of redactions that the information redacted is a trade secret or proprietary business information.

Dated: February 19, 2004



Linda S. Hall
Director