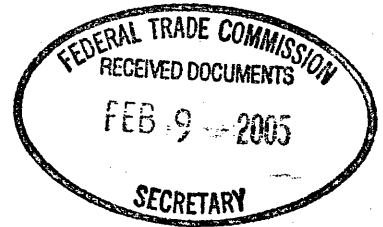


UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of )  
)

EVANSTON NORTHWESTERN HEALTHCARE )  
CORPORATION, )

and )

ENH MEDICAL GROUP, INC., )  
Respondents. )

) Docket No. 9315  
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**SECOND ORDER ON NON-PARTIES' MOTIONS FOR *IN CAMERA*  
TREATMENT OF DOCUMENTS LISTED ON PARTIES' EXHIBIT LISTS**

**I.**

Pursuant to Commission Rule 3.45(b) and the Scheduling Order entered in this litigation, several non-parties have filed motions for *in camera* treatment of documents that the parties have listed on their exhibit lists as documents that might be introduced at trial in this matter.

In Commission proceedings, requests for *in camera* treatment must show that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984); *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). That showing can be made by establishing that the documentary evidence is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury," and then balancing that factor against the importance of the information in explaining the rationale of Commission decisions. *Kaiser*, 103 F.T.C. at 500; *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Bristol Myers Co.*, 90 F.T.C. 455, 456 (1977).

Indefinite *in camera* treatment is granted only in those "unusual" cases where the competitive sensitivity or the proprietary value of the information will not diminish with the passage of time. *In re Coca-Cola Co.*, 1990 FTC LEXIS 364, at \*6-7 (Oct. 17, 1990). Examples of documents meriting indefinite *in camera* treatment are trade secrets, such as secret formulas, processes, and other secret technical information, and information that is privileged. *See Hood*, 58 F.T.C. at 1189; *In re R.R. Donnelley & Sons Co.*, 1993 FTC LEXIS 32, at \*3 (Feb. 18, 1993); *In re Textron, Inc.*, 1991 FTC LEXIS 135, at \*1 (Apr. 26, 1991). Where *in camera* treatment is granted for ordinary business records, such as business plans, marketing plans, or sales

documents, it is typically extended for two to five years. *E.g.*, *In re E.I. Dupont de Nemours & Co.*, 97 F.T.C. 116, 118 (1981); *In re Int'l Ass. of Conf. Interpreters*, 1996 FTC LEXIS 298, \*13-14 (June 26, 1996).

The Federal Trade Commission strongly favors making available to the public the full record of its adjudicative proceedings to permit public evaluation of the fairness of the Commission's work and to provide guidance to persons affected by its actions. *In re Crown Cork & Seal Co., Inc.*, 71 F.T.C. 1714, 1714-15 (1967); *Hood*, 58 F.T.C. at 1186 (“[T]here is a substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.”). A heavy burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Hood*, 58 F.T.C. at 1188. Further, requests for indefinite *in camera* treatment must include evidence to justify why the document should be withheld from the public's purview in perpetuity and why the requestor believes the information is likely to remain sensitive or become more sensitive with the passage of time. *See DuPont*, 97 F.T.C. at 117. Thus, in order to sustain the heavy burden for withholding documents from the public record, an affidavit or declaration demonstrating that a document is sufficiently secret and material to the applicant's business that disclosure would result in serious competitive injury is required. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at \*2-3 (Apr. 23, 2004). The parties and non-parties have been advised of these requirements. Scheduling Order, Additional Provisions, ¶ 16; Protective Order, ¶ 12.

## II.

Non-party Illinois Department of Central Management Services (“CMS”), on February 2, 2005, filed a motion seeking *in camera* treatment for two documents in addition to the four documents which have previously been granted *in camera* status. CMS seeks *in camera* treatment for a period of ten years. The parties do not oppose the motion for *in camera* treatment.

CMS's motion provides a declaration of Daniel S. Fewkes, Deputy General Counsel of Illinois Department of Central Management Services (“Fewkes Declaration”). As described by the Fewkes Declaration, the documents for which *in camera* treatment is sought are contracts that contain sensitive and confidential information, disclosure of which could undermine CMS's bargaining position and lead to higher healthcare costs for the state employees.

A review of the declaration in support of the motion and the documents reveals that the information sought to be protected meets the standards for *in camera* treatment, although not for the time period requested. Accordingly, CMS's motion is **GRANTED in part and DENIED in part**. *In camera* treatment, for a period of five years, to expire on February 1, 2010, is granted to: CX 5715 and CX 5125.

### III.

Non-party Humana, Inc. ("Humana"), on February 2, 2005, filed a motion seeking *in camera* treatment for seventy-eight documents. Humana seeks *in camera* treatment for a period of ten years. The parties do not oppose the motion for *in camera* treatment.

On January 26, 2005, Humana's initial request for *in camera* treatment of ninety documents was denied without prejudice and Humana was advised to file a request "more narrowly tailored to request *in camera* treatment for only that information that is sufficiently secret and material to Humana's current competitive position." January 26, 2005 Order. While Humana removed twelve documents from its request, the current request is still too broad, requesting *in camera* treatment for an excessive number of documents, many of which are well over ten years old, and some of which are clearly not entitled to *in camera* protection, such as RX 170 and RX 175.

Humana's motion provides a declaration of John Paul Maxwell, Vice President of Network Management ("Maxwell Declaration"). The Maxwell Declaration, again, fails to indicate whether the substantial number of agreements and amendments are still in effect. Without this information, the request for *in camera* treatment cannot be properly evaluated. Although prior contracts may form building blocks to current contracts, that factor alone is not sufficient to justify *in camera* treatment. Indeed, of the many other non-parties involved in this case, none has insisted on requesting *in camera* treatment for such a broad range of documents. Accordingly, Humana's motion is **DENIED WITHOUT PREJUDICE**. Humana has five days from the date of this Order to file another renewed motion for *in camera* treatment.

### IV.

Non-party Private Healthcare Systems, Inc. ("PHCS"), on February 8, 2005, filed a motion seeking *in camera* treatment for two documents. PHCS seeks *in camera* treatment for a period of ten years. No opposition to the motions for *in camera* treatment has been filed.

PHCS's motions provide declarations of Jason M. Dunn, Senior Vice President and General Counsel for Private Healthcare Systems, Inc. ("Dunn Declaration") and Irving Miller, Senior Actuary for Private Healthcare Systems, Inc. ("Miller Declaration"). As described by the Dunn and Miller Declarations, the information for which *in camera* treatment is sought has been maintained in confidence and its disclosure would cause serious competitive injury.

A review of the declarations in support of the motions and the documents reveals that the information sought to be protected meets the standards for *in camera* treatment. Accordingly, PHCS's motion is **GRANTED**. *In camera* treatment, for a period of ten years, to expire on February 1, 2015, is granted to: RX 1998 (PHCS 544 to 546) and CX 46 (PHCS 7530).

V.

Non-party Swedish Covenant Hospital ("SCH"), on January 26, 2005, filed an amended motion seeking *in camera* treatment for twenty-three documents. SCH seeks *in camera* treatment for an indefinite period. The parties do not oppose the motion for *in camera* treatment.

SCH's motion provides a declaration of Gary M. Krugel, Senior Vice President/Chief Financial Officer at Swedish Covenant Hospital ("Krugel Declaration"). As described by the Krugel Declaration, the information for which *in camera* treatment is sought is confidential information related to the prices and terms for healthcare contracts and SCH's business and strategic plans, disclosure of which would result in a competitive disadvantage.

A review of the declaration in support of the motion and the documents reveals that some of the information sought to be protected meets the standards for *in camera* treatment. However, the information does not meet the standards for indefinite *in camera* treatment. The declaration and documents do not provide adequate support for *in camera* treatment of RX 350, RX 57, RX 33, RX 27, RX 14, or RX 10, correspondence which ranges from seven to seventeen years old. Accordingly, SCH's motion is **GRANTED in part and DENIED WITHOUT PREJUDICE in part**. *In camera* treatment, for a period of ten years, to expire on February 1, 2015, is granted to:

RX 326 (347 to 48),  
RX 438 (425 to 27),  
RX 163 (1362 to 64, 1366 to 68, 1369 to 85),  
RX 42 (1536 to 37),  
RX 314 (1819 to 20),  
RX 354 (1850),  
RX 395 (SCH 2736 to 37, SCH 2739 to 40),  
RX 1277 (SCH 899),  
RX 1406 (SCH 1876 to 77),  
RX 332 (SCH 1938 to 39, SCH 1941 to 48),  
RX 1680 (SCH 1951 to 53),  
RX 1292 (SCH 4591 to 4620),  
RX 1354 (SCH 4654 to 4731),  
RX 1548 (SCH 4802 to 17, SCH 4832, SCH 4836 to 58),  
RX 1692 (SCH 5183 to 5258),  
RX 1342 (SCH 5501 to 10),  
RX 1578 (SCH 6074 to 6131).

## VI.

Non-party UniCare Health Plans of the Midwest, UniCare Health Insurance Company of the Midwest, and UniCare Life & Health Insurance Company (“UniCare”), on February 2, 2005, filed a motion seeking *in camera* treatment for fifteen documents. UniCare seeks *in camera* treatment for a period of ten years for current contracts, for a period of five years for recent contracts and correspondence, and for an indefinite period for two internal memoranda. The parties do not oppose the motion for *in camera* treatment.

UniCare’s motion provides a declaration of Lenore Holt-Darcy, Regional Vice-President of Network Services for UniCare (“Holt-Darcy Declaration”). According to the Holt-Darcy Declaration, the documents for which *in camera* treatment is sought contain sensitive and confidential material, the disclosure of which would result in competitive injury to UniCare.

A review of the declaration in support of the motion and the documents reveals that the information sought to be protected meets the standards for *in camera* treatment. However, the information does not meet the standards for indefinite *in camera* treatment. Accordingly, UniCare’s motion is **GRANTED in part and DENIED in part**. *In camera* treatment, for a period of ten years, to expire on February 1, 2015, is granted to:

CX 5080 (UN 13 to 23),  
CX 591 (UN 34 to 36),  
RX 1030 (WLP 3128 to 3147),  
CX 129 (WLP 929),  
CX 2203 and CX 5909 (WLP 823).

*In camera* treatment, for a period of five years, to expire on February 1, 2010, is granted to:

RX 568 (FTC-NB-110000124 to 140),  
RX 810 (FTC-NB-110000110 to 123),  
RX 811 (FTC-NB-110000243 to 249),  
RX 690 (WLP 3029 to 3031),  
RX 937 (WLP 705 to 743),  
RX 321 (WLP 2890 to 2914),  
RX 682 (WLP 1518 to 1519),  
RX 722 (WLP 1716 to 1719),  
RX 802 (WLP 1299 to 1300).

VII.

Non-party Louis A. Weiss Memorial Hospital ("Weiss"), on February 3, 2005, filed a motion seeking *in camera* treatment for two documents that are part of one exhibit. Weiss seeks *in camera* treatment for an indefinite period or, in the alternative, for a period of five years. The parties do not oppose the motion for *in camera* treatment.

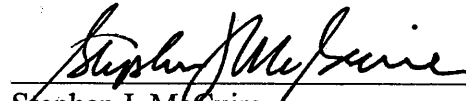
Weiss's motion provides the affidavit of Sandra Yule, Director of Risk Management for Louis A. Weiss Memorial Hospital ("Yule Declaration"). As described by the Yule Declaration, the information for which *in camera* treatment is sought includes two confidential agreements that are less than two years old, the disclosure of which would likely result in serious competitive injury to Weiss.

A review of the affidavit in support of the motion and the documents reveals that the information sought to be protected meets the standards for *in camera* treatment. Accordingly, Weiss's motion is **GRANTED**. *In camera* treatment, for a period of five years, to expire on February 1, 2010, is granted to: CX 882 (VHS 78 to VHS 111),

VIII.

Each non-party that has documents or information that have been granted *in camera* treatment by this Order shall inform its testifying current or former employees that *in camera* treatment has been extended to the material described in this Order. At the time that any documents that have been granted *in camera* treatment are offered into evidence or before any of the information contained therein is referred to in court, the parties shall identify such documents and the subject matter therein as *in camera*, inform the court reporter of the trial exhibit number(s) of such documents, and request that the hearing go into an *in camera* session. *In camera* status will be granted to the trial testimony of witnesses who provide live testimony regarding the information that has been granted *in camera* status in this Order.

ORDERED:

  
Stephen J. McGuire  
Chief Administrative Law Judge

Date: February 9, 2005