

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



In the Matter of)
)
)
North Texas Specialty Physicians,)
Respondent.)
_____)

Docket No. 9312

**ORDER ON MOTION OF NON-PARTY HUMANA HEALTH PLAN
OF TEXAS TO QUASH OR LIMIT SUBPOENA *DUCES TECUM***

I.

On January 12, 2004, non-party Humana Health Plan of Texas, Inc. (“Humana”) filed a motion to quash or to limit the subpoena *duces tecum* served upon it by Respondent in this matter (“motion to quash”). Respondent North Texas Specialty Physicians (“NTSP”) filed its opposition to the motion to quash on January 22, 2004.

For reasons set forth below, the motion to quash is GRANTED IN PART and DENIED IN PART.

Humana shall have 10 calendar days from the date of this order to produce the responsive documents as limited by this Order.

II.

Humana moves to quash or limit the subpoena served on it by Respondent on three main grounds. Humana argues: (1) the subpoena is overly broad and unduly burdensome; (2) some of the documents sought are privileged, confidential, or proprietary, or are considered trade secrets; and (3) the scope and short time frame for response make compliance impossible.

Respondent asserts that its subpoena seeks relevant information and the subpoena is not unduly burdensome. Respondent further asserts that the Protective Order Governing Discovery Material, entered on October 16, 2003 in this case (“Protective Order”) adequately protects Humana’s confidential and proprietary information.

III.

Discovery sought in a proceeding before the Commission must be "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent." 16 C.F.R. § 3.31(c)(1); *Federal Trade Commission v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979). However, discovery may be limited if the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive, or if the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c)(1). Further, the Administrative Law Judge may limit discovery to preserve privileges. 16 C.F.R. § 3.31(c)(2).

The subpoena *duces tecum* at issue consists of nine requests for documents. Humana raises several general objections in addition to specific objections to each of the nine requests. The general objections, Respondent's response to each of them, and a ruling on the general objections are set forth in the following section. The specific objections raised by Humana to each of the nine requests are discussed in the subsequent section.

A.

Humana raises the following general objections: (1) the length of time for which documents are sought is unduly burdensome; (2) the definition of Humana; (3) the requests seek documents that are confidential and proprietary; (4) the time provided for responding to the subpoena was unreasonably short; and (5) the form of documents requested imposes a burden. In addition, Humana argues that Respondent should reimburse Humana for its expenses.

1. Period of time for production

Respondent's subpoena instructs, unless otherwise indicated, the period of time for which documents should be produced is January 1, 1998 through the present. Humana objects to the scope of time of six years as placing an undue burden on it. Respondent asserts that it has requested documents from 1998 to present because this is the time frame being investigated by Complaint Counsel.

A request for documents relating to the time period which was investigated by Complaint Counsel is not unreasonable. Unless a request for production indicates otherwise, the period of time for which documents should be produced is January 1, 1998 through the present.

2. Definition of Humana

Humana asserts that Respondent, through definitions and instructions of the subpoena, attempts to require Humana to respond to the subpoena not only on its own behalf, but also on behalf of its "parents, subsidiaries, . . . and affiliates." Humana asserts that this instruction is overly broad. Respondent does not address this argument in its opposition.

The scope of the subpoena is limited to demand production only from Humana Health Plan of Texas, Inc., and its subsidiaries and employees.

3. Confidential documents are discoverable

Humana asserts that the subpoena requests production of documents containing confidential and commercially sensitive information, including competitively sensitive pricing information and Humana's proprietary analyses and trade secrets.

"The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery." *LeBaron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9th Cir. 1971). *See also Federal Trade Commission v. Rockefeller, et al.*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), *aff'd* 591 F.2d 182 (2d Cir. 1979) (An objection to a subpoena on grounds that it seeks confidential information "poses no obstacle to enforcement."). In addition, information on competitors is frequently crucial in proceedings such as this one. *See Service Liquor Distributors, Inc. v. Calvert Distillers Corp.*, 16 F.R.D. 507, 509 (S.D.N.Y. 1954) ("[I]n an action under the antitrust laws, based upon an alleged abuse of competition, a competitors' business records, where good cause has been shown are not only not immune from inquiry, but they are precisely the source of the most relevant evidence."). *Accord United States v. Lever Bros. Co.*, 193 F. Supp. 254, 257 (S.D.N.Y. 1961).

Although Humana asserts that the documents requested contain extremely sensitive information, the burden on Humana of production does not outweigh Respondent's need for the documents it requested, as limited by this Order. "Inconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case." *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965) (denying motion to quash subpoenas served on competitors). In light of the limitations set forth below and the confidentiality provisions of the Protective Order, enforcement of the subpoenas, as limited by this Order, would not be unreasonable or oppressive.

However, Humana is not required to disclose patient information. Information concerning particular patients' names or other data is not relevant and shall be redacted by Humana. In addition, Humana is not required to produce privileged information. If information is withheld, on grounds of privilege or any similar claim, Humana shall submit a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged. *See* 16 C.F.R. § 3.38A. Humana's objection to providing a privilege log on the basis that this is burdensome is overruled.

Pursuant to 16 C.F.R. § 3.31(d)(1), a protective order governing confidential information was issued in this case on October 16, 2003. The provisions of the Protective Order adequately protect the confidential documents of third parties through a number of safeguards. Documents

produced in compliance with this Order may be designated “Confidential” or “Restricted Confidential, Attorney Eyes Only,” pursuant to the Protective Order entered in this case.

In addition, Humana may file a motion for *in camera* treatment to prevent disclosure to the public of its confidential materials at the trial in this matter. Guidelines for filing applications for *in camera* treatment are set forth in the Protective Order.

4. Time for responding to the subpoena

Humana shall have 10 calendar days from the date of this order to produce the responsive documents as limited by this Order.

5. Format of requested documents

The subpoena requested Humana to produce responsive documents in hard copy and electronic form “where available.” Humana asserts that, to the extent this is an effort to require Humana to produce documents in a form in which they do not exist, Humana objects on grounds of burden. Respondent asserts that this instruction was intended to obtain documents in electronic form where the documents already existed in electronic form or would be easier to produce in electronic form.

Humana is not required to produce the same documents in both hard copy and electronic form. Humana is not required to expend time and money to format hard copies into electronic form. Responsive documents may be produced in the format in which they currently exist.

6. Costs of compliance

“Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.” *Federal Trade Commission v. Dresser Indus., Inc.*, 1977 U.S. Dist. LEXIS 16178, *13 (D.D.C. 1977). In light of the limitations set forth below in this Order, the burden on Humana is not an undue burden. Humana’s request for reimbursement is denied.

B.

The nine requests for documents, the parties’ positions on each of the requests, and a ruling on each of the requests are set forth in order below.

Request Number 1: Documents previously produced or otherwise sent to the Federal Trade Commission concerning your business relationships with healthcare providers in the State of Texas.

Humana asserts that this request calls for irrelevant materials. Humana further asserts that it has already produced documents responsive to this request to the FTC. Respondent replies that a subpoena may not be avoided merely by saying the information sought is available from another.

Pursuant to Commission Rule 3.31(c)(1), discovery may be limited if it is obtainable from another source that is more convenient. 16 C.F.R. § 3.31(c)(1)(i). It is more convenient for a party, Complaint Counsel, to produce documents already obtained from Humana than to request production, a second time, from Humana, a non-party.

To the extent that documents responsive to this request are relevant, Respondent may request them from Complaint Counsel. The issue presented here is distinguishable from other orders addressing whether the Commission, as a repository of documents obtained from non-parties, should be compelled to produce documents obtained from non-parties. *Cf In re Schering-Plough Corp.*, Docket 9297 (Order on American Home Products Corporation's and Schering Plough Corporation's Motion to Compel and on Non-Parties Andrx Pharmaceutical, Inc.'s and Aventis Pharmaceutical Inc.'s Motion for a Protective Order, September 10, 2001) (available at www.ftc.gov/os/adjpro/index.htm). Here, the non-party, Humana, is not seeking to prevent Complaint Counsel from producing documents Humana previously produced to the Commission. Rather, it asserts that it has already produced these documents to Complaint Counsel. Complaint Counsel may not withhold relevant, responsive documents simply because they may be located in investigation or litigation files other than the ones it maintains for this proceeding. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 134, *11-12 (2000); *In re Exxon Corp.*, 1980 FTC LEXIS 121, *5-6 (1980).

Request Number 1 is quashed.

Request Numbers 2 and 3: Documents previously requested by and provided to the Office of the Attorney General of the State of Texas concerning business relationships with healthcare providers in the State of Texas, including those provided in response to the Written Notice of Intent to Inspect, Examine and Copy Corporate Documents, attached to the subpoena.

Humana asserts that the documents responsive to these requests are not relevant because the investigations by the Texas Attorney General were not in any way related to NTSP and did not concern any alleged antitrust violations. In addition, Humana asserts that these requests impose an undue burden as it has not yet gathered or provided to the Texas Attorney General many of the responsive documents. Humana also asserts that the information provided to the Attorney General in the course of an investigation is privileged and confidential.

Respondent asserts that the requested documents are highly relevant and that Respondent made its request for documents less burdensome by referencing a previous document production

which, Respondent asserts, Humana has already assembled. Respondent further asserts that Humana misconstrues the statute governing information provided to the Texas Attorney General.

The statute governing information gathered by the Texas Attorney General in the course of an investigation, cited by Humana, only prevents the Texas Attorney General from producing documents produced to it. Tex. Rev. Civ. Stat. Ann. art. 1302-5.04 ("The Attorney General, or his authorized assistants or representative, shall not make public . . ."). It does not insulate Humana from otherwise producing the documents in another proceeding or forum. Thus, Tex. Rev. Civ. Stat. Ann. art. 1302-5.04 does not provide a basis for Humana to withhold the requested information.

However, Request Numbers 2 and 3 are over broad in that they seek all documents previously requested by the Office of Attorney General without regard to whether such documents are relevant to this proceeding.

Request Numbers 2 and 3 are quashed.

Request Number 4: All internal and external correspondence, memoranda, and messages concerning or relating to NTSP.

Humana objects that the phrase concerning or relating to NTSP is vague and ambiguous since the request could be read broadly enough to include all documents regarding this industry or physician provider groups generally. Humana further objects to the request to the extent it calls for attorney-client and/or work product privileged information or materials.

Respondent asserts that a major issue in this case is its conduct towards payors such as Humana and the effect of that conduct in the marketplace. Thus, Respondent asserts, the scope of this request, any correspondence, memoranda, and messages, relating to this conduct, is not over broad. Respondent asserts that Humana should be compelled to produce materials referencing NTSP.

The subject matter, which relates solely to Respondent, is not overly broad. Humana's motion to quash Request Number 4 is denied. However, Request Number 4 is limited to only those documents that specifically mention or reference NTSP. Documents referencing NTSP may not be withheld unless Humana provides a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; and the names, addresses, positions, and organizations of all authors and recipients of the item.

Request Number 5: Documents comparing the cost or quality of medical service provided by any physician provider listed on Appendix A and any other physician providers.

Humana asserts that this request calls for materials which are irrelevant and documents that contain proprietary and trade secret information and analysis. Humana further asserts that any quality of care information about Humana's members is protected from disclosure by Texas law, and to the extent it includes Protected Health Information, by the Health Insurance Portability and Accountability Act of 1996. In addition, Humana asserts that the effort to locate, review and produce these documents will likely cost tens of thousands of dollars. Respondent asserts that the documents are highly relevant. Respondent asserts that it has specified the subject matter of the documents it requests to very particular information - cost or quality comparisons between a NTSP provider and another provider.

Request Number 5 is sufficiently narrow in subject matter. Absent a showing of the relevancy of information pertaining to the geographic area beyond the Dallas-Fort Worth Metroplex in Texas, Request Number 5 is limited to documents comparing the cost or quality of medical services provided in the Dallas-Fort Worth Metroplex in Texas. In addition, no information protected from disclosure by Texas law, and to the extent it includes Protected Health Information, by the Health Insurance Portability and Accountability Act of 1996. Documents referencing may not be withheld unless Humana provides a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; and the names, addresses, positions, and organizations of all authors and recipients of the item. In all other respects, Humana's request to quash Request Number 5 is denied.

Request Number 6: Documents sufficient to show the rate paid to each physician provider by Humana, the period for which that rate was paid, whether the rate was for a risk or non-risk contract, whether the rate was for a HMO or PPO or other contract, who the contracting parties were for the contract setting the rate, and which physicians were covered by such contract.

Humana asserts that this request is overly broad, unduly burdensome, and is not limited by geographic scope. Humana also asserts that the information requested is confidential and proprietary and that its agreements with physicians contain confidentiality provisions precluding Humana from disclosing the terms of the agreements (including rates paid by Humana to the physician provider groups). Respondent asserts that the documents are highly relevant as statistics from contracts between Humana, a payor, and providers will allow NTSP to show that it has not harmed competition.

The need for proprietary information from competitors was not sufficiently demonstrated. Humana is not required to produce the complete contracts between Humana and healthcare providers. Request Number 6 is quashed except that any tables or similar summary charts that Humana keeps in the ordinary course of business shall be produced. Privileged information may be redacted.

Request Number 7: Documents concerning or relating to comparisons of the cost of physician services, hospital care, pharmacy cost, or cost of health insurance in the State of Texas.

Humana asserts that this request calls for irrelevant information, specifically, it calls for comparisons relating to hospital and pharmacy costs that do not appear to be related in any way to this proceeding. In addition, Humana asserts the burden of gathering these materials outweighs any probative value gained by NTSP. In addition, Humana asserts that the request calls for commercially sensitive business information.

Respondent asserts that the request seeks only documents containing comparisons of costs of health care in Texas. Any health care costs, including hospital care and pharmacy costs, asserts Respondent, are relevant because they relate to the marketplace cost and availability of services similar to those offered by NTSP.

The motion to quash is granted to the extent that Request Number 7 will be limited to only documents containing (as opposed to relating to) comparisons of external marketplace cost of health care to patients and insurers in the Dallas-Fort Worth Metroplex in Texas. In all other respects, the motion to quash Request Number 7 is denied.

Request Number 8: Documents sufficient to show your policies, rules, and access standards establishing the geographic areas to be serviced by physician providers in the State of Texas.

Humana asserts that this request is vague and ambiguous and calls for proprietary or privileged information or materials. Respondent asserts that the request is not vague and seeks relevant information.

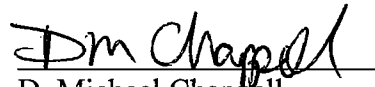
Humana's motion to quash is granted to the extent that Request Number 8 will be limited to documents used by Humana to determine which providers will service which geographic areas. In all other respects, the motion to quash Request Number 7 is denied.

Request Number 9: A sample contract used for each contracting entity involving more than 75 physicians in the Counties of Dallas and/or Tarrant and any amendments, revisions, or replacements thereof.

Humana asserts that it will provide sample contracts, but, since these will be sample contracts, no "amendments, revisions or replacements" will be produced. Respondent asserts that it will accept as responsive the documents Humana has agreed to produce.

Humana's request to limit Request Number 9 is granted. Humana shall produce only sample contracts for the provision of physician services and need not produce amendments, revisions or replacements. In addition, Humana may redact financial information from the contracts it produces.

ORDERED:


D. Michael Chappell
Administrative Law Judge

Date: February 4, 2004