

did not make CMS a party to the complaint, the FTC sought from CMS the production of six healthcare services contracts hereinafter identified as CX 5715, CX 5125, CX 5124, CX 5127, CX 5128, and CX 5129. The contracts are examples of the many contracts that the State of Illinois, through CMS, negotiates to provide healthcare to its State employees and retirees. The contracts contain the rates that the State of Illinois has agreed to pay for specific healthcare services at specific hospitals. The State of Illinois and CMS negotiate the rates separately and confidentially with each of the approximately 225 hospitals under contract with the State of Illinois. The quality and confidentiality of the negotiations are integral in keeping costs down for Illinois taxpayers while still providing State employees and retirees with adequate healthcare.

CMS agreed to produce the six contracts sought by the FTC only after receiving verbal and written assurances that the contracts would be kept confidential. A protective order was entered to protect “against the improper use and disclosure of confidential information.” Pursuant to this protective order, CMS marked each contract as “confidential - FTC Docket No. 9315.”

On December 13, 2004, the FTC notified CMS that it intended to offer the six contracts into evidence in the administrative trial on the underlying complaint. Accordingly, on January 11, 2005, CMS filed a motion seeking *in camera* treatment for the six contracts. The information sought to be protected in each of the six contracts is of the same character, i.e. the negotiated terms and rates of healthcare services. CMS sought to protect this information on the basis that the contracts satisfy the standard set forth in *In re Bristol-Myers Co.*, 90 FTC 455 (1977), for *in camera* treatment. The FTC did not oppose this motion.

On January 26, 2005, Chief Administrative Law Judge (hereinafter “ALJ”) Stephen J. McGuire, issued an Order on Non-Parties’ Motions for *in camera* Treatment of Documents Listed

on Parties' Exhibit Lists (hereinafter "Order") granting *in camera* treatment for a period of ten years, to expire on February 1, 2015, to four of the six contracts. The ALJ "denied without prejudice" CMS's motion with respect to CX05715 and CX05125. The ALJ noted in his Order that the declaration of Daniel S. Fewkes, Deputy General Counsel of CMS, attached to CMS's motion "fails to indicate whether the agreements, some of which are more than five years old, are still in effect." See Order pg. 8. The ALJ allowed CMS until February 2, 2005 to file a renewed motion for *in camera* treatment for CX05715 and CX05125.

ARGUMENT

I. THE STANDARD FOR *IN CAMERA* TREATMENT.

Administrative Law Judges have broad discretion in determining what information should be placed *in camera*. *In re General Foods Corp.*, 95 F.T.C. 352 (1980). The extension of *in camera* treatment to documentary evidence is justified, pursuant to 16 C.F.R. 3.45(b), if the movant demonstrates that public disclosure of the documents "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 (1984). The movant may make this showing by establishing that the documentary evidence is sufficiently secret and sufficiently material to the movant's business that disclosure would result in serious injury. *Kaiser*, 103 F.T.C. at 500. Finally, the movant must balance the serious injury that may occur against the importance of the information in explaining the rationale of Commission decisions. *Kaiser*, 103 F.T.C. at 500.

II. CX05715 and CX05125 MEET THE STANDARD FOR *IN CAMERA* TREATMENT.

In this case, the ALJ determined that all of the contracts sought to be protected by CMS, with the exception of CX05715 and CX05125, warrant *in camera* treatment for a period of ten years. In

essence, the ALJ determined that these contracts are sufficiently secret and material to CMS that disclosure will result in injury serious enough to outweigh the substantial public interest in holding open all aspects of adjudicative proceedings. The four contracts afforded *in camera* treatment, like CX05715 and CX05125, are contracts that the State of Illinois, through CMS, negotiates to provide healthcare services to its employees and retirees. CX05715 and CX05125 are substantially similar to these four contracts and the injury sustained by disclosure of CX05715 and CX05125 is of the same character and seriousness. Accordingly, CX05715 and CX05125 also meet the standard for *in camera* treatment.

A. CX05715 and CX05125 ARE SUFFICIENTLY SECRET AND MATERIAL TO CMS TO WARRANT *IN CAMERA* TREATMENT.

In determining the secrecy and materiality of CX05715 and CX05125, the ALJ may consider the following factors as set forth in *In re Bristol-Myers Company*, 90 F.T.C. 455 (1977): the extent to which the information is known outside of CMS's business; (2) the extent to which it is known by employees and others involved in CMS's business; (3) the extent of the measures taken by CMS to guard the secrecy of the information ; (4) the value of the information to CMS; (5) the amount of effort or money expended by CMS in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *In re Bristol-Meyers Co.*, 90 F.T.C. 455 (1977) citing Restatement of Torts § 57, Comment b at 6 (1939).

CX05715 and CX05125 satisfy the first three *Bristol-Meyers* factors because, as set forth in CMS's Motion for *in camera* treatment of proposed evidence, CMS has taken significant and substantial steps to protect the confidential nature of all six contracts including CX05715 and CX05125. Specifically, CMS protected the confidential nature of CX05715 and CX05125 by including terms within the contracts requiring the parties to keep confidential information collected

pursuant to the agreement and pertaining to patient medical records. Further, none of the six contracts, including CX05715 and CX05125, are held at the State of Illinois Comptroller's office. These contracts are never made available for public scrutiny² regardless of their age. Finally, as stated by Daniel Fewkes in his Declaration attached hereto, CMS has never consented to the disclosure of any of the six contracts, including CX05715 and CX05125, except for to those persons directly involved in the contracts' procurement and negotiation and except for the instant case. In the instant case, CMS disclosed the contracts in response to the FTC's discovery request only after physically labeling each contract as confidential and procuring assurances of confidentiality by a protective order.

Not only are the State's healthcare contracts, including CX05715 and CX05125, protected from disclosure outside CMS, they are also closely guarded within CMS. Daniel Fewkes asserts in his Declaration that CMS limits access of these types of contracts to only those CMS employees who are directly involved in the contracts' procurement and negotiation process. CMS employs these methods to protect the confidentiality of the contracts, regardless of the age of the contract, due to the highly sensitive information contained within. To date, CX05715 and CX05125, like the four contracts deemed by this ALJ as worthy of protection, have remained extensively guarded due to

² State of Illinois healthcare services contracts, including CX05715 and CX05125, are also protected from public scrutiny under the Illinois Freedom of Information Act (hereinafter FOIA). FOIA exempts from disclosure contracts "which if [they] were disclosed would frustrate procurement or give advantage to any person proposing to enter into a contract or agreement with the body." 5 ILCS 140/(h) (2004). This exemption applies to CX05715 and CX05125 because the rate and term information contained in these contracts would give hospitals an advantage in negotiations with CMS during the procurement process thereby frustrating CMS' attempts to negotiate lower rates. The F.T.C. in *In re General Foods Corp.*, *supra* noted that FOIA exemption is a relevant consideration because a document is more likely sufficiently secret and material if the document is the type excluded from disclosure under FOIA.

CMS's efforts and, as such, deserve *in camera* treatment.

The fourth *Bristol-Meyers* factor examines the value of the information to CMS. Disclosure of CX05715 and CX05125, or any State healthcare contract for that matter, will allow access to the confidential rates and terms negotiated by the State. The State's healthcare budget is based on its ability to negotiate each term and rate with each hospital. If the terms and rates become public, hospitals can compare the rates that they receive and demand higher prices thereby increasing the cost to CMS and Illinois taxpayers. This information is clearly of great value to CMS and Illinois taxpayers.

The fifth *Bristol-Meyers* factor examines the amount of effort or money expended in developing the contracts. Each year, the State spends hundreds of millions of dollars on its employee healthcare program. This has been true regardless of the year in question. As stated above, disclosure of CX05715 and CX05125 may affect future contract negotiations. The cost to CMS, the State of Illinois, and its taxpayers could be literally millions of dollars if the terms and rates paid to the various hospitals increases. This possibility illustrates the secrecy and materiality of the contracts in question as well as the seriousness of the potential injury.

The sixth *Bristol-Meyers* factor considers the ease or difficulty with which the information sought to be protected could be properly acquired or duplicated by others. As explained above, CMS has taken extraordinary steps to limit public and internal access to its healthcare contracts and specifically, CX05715 and CX05125. For example, each of the contracts contains a confidentiality provision, the contracts are not made available for public scrutiny, CMS allows access to the contracts only to those employees integral in the negotiation and procurement process, and, as demonstrated by the protective order and Motions for *in camera* treatment in this case, CMS will

go to great lengths to ensure the continued confidentiality of the contracts regardless of the age of the contract. The difficulty in obtaining these documents demonstrates that the contracts are sufficiently secret and material to warrant *in camera* treatment.

As demonstrated by an analysis of the six factors set forth in *Bristol-Myers*, CX05715 and CX05125 are sufficiently secret and material to CMS to warrant *in camera* treatment.

B. DISCLOSURE OF CX05715 and CX05125 WILL RESULT IN A CLEARLY DEFINED, SERIOUS AND ONGOING INJURY TO CMS AND ILLINOIS TAXPAYERS.

When determining whether a movant has proven a clearly defined, serious injury, the ALJ must consider the documents on a case-by case basis. *In re Coca-Cola Co.*, 1990 F.T.C. LEXIS 364. A specific demonstration of the manner in which other companies will use material to the disadvantage of the movant is not specifically required. It is appropriate to infer that disclosure of allegedly sensitive information will seriously affect the movant's commercial position. *In re E.I. Dupont de Nemours*, 97 FTC 116. If the information is "old" the movant has a greater burden. *In re General Foods Corp.*, 95 F.T.C. 352 (the F.T.C. generally does not grant *in camera* treatment to documents more than three years old). However, the F.T.C. has recognized the value of older documents and has granted *in camera* status to documents more than three years old in the past. See *In re Coca-Cola Co.*, 1990 F.T.C. LEXIS 364 (1990) (granting *in camera* treatment to documents over three years old); *In re I.E. Dupont de Nemours & Co.*, 97 F.T.C. 116 (1981) (granting *in camera* treatment to documents over six years old).

The ALJ in this case granted *in camera* treatment for a period of ten years, until February 1, 2015, to the State's healthcare contracts dating back to the State's 2000 fiscal year. The ALJ recognized the serious and continuing injury that would result from disclosure of this sensitive and

confidential information. The ALJ recognized the need for protection for at least 10 years for a contract more than 5 years old. The injury that would result from disclosure of CX05715 and CX05125, dating back to the State's 1996 and 1999 fiscal years respectively, is no different and certainly no less serious.

As previously stated, disclosure of CX05715 and CX05125, or any State healthcare contract for that matter, will allow access to the confidential rates and terms negotiated by the State. The result could be an increase in the cost of healthcare services to CMS and Illinois taxpayers.

The ALJ noted in his Order that the Fewkes Declaration failed to indicate whether the contracts, some of which are more than five years old, are still in effect. The injury that will result from disclosure of CX05715 and CX05125 persists despite the age of the contracts. The information in CX05715 and CX05125 is significant because the State has a continuing relationship with each hospital. Although healthcare contracts are generally renegotiated each year, the contracts build upon each other and each year's contract serves as a basis for future negotiations. Even if the contract is more than five years' old, disclosure of its terms and rates will allow hospitals to compare the history of its negotiations with the State. Additionally, despite the age of the contract, the terms and rates in CX05715 and CX05125 may be higher than other current rates causing hospitals to demand a similar, higher rate. Or, the terms and rates set forth in a contract may have changed little, if at all, thereby giving hospitals insight into the State's relationship with others. In sum, CX05715 and CX05125 are significant to the procurement process today and will continue to be significant. The need for confidentiality of the contracts is not likely to decrease over time or, at the very least, in the near future. Therefore, disclosure of CX05715 and CX05125 will result in a clearly defined, serious and ongoing injury to CMS and Illinois taxpayers.

III. THE LIKELIHOOD OF SERIOUS HARM GREATLY OUTWEIGHS THE PUBLIC INTEREST IN DISCLOSURE OF CX05715 and CX05125.

As stated above, there is a great likelihood of serious harm not only to CMS but also to the State of Illinois and its taxpayers. An understanding of the FTC's proceedings does not depend on public access to the documents of non-parties. As such, CMS deserves "special solicitude" as a non-party requesting in camera treatment for its confidential contracts. See *Kaiser*. This "special solicitude" encourages cooperation with future adjudicative discovery requests." *Kaiser*. Clearly, the harm to the public if there is disclosure of CX05715 and CX05125 greatly outweighs the public interest in open administrative proceedings.

CONCLUSION

WHEREFORE, for the foregoing reasons, like CX05124, CX05127, CX05128 and CX05129, CX05715 and CX05125 satisfy the standard for *in camera* protection under FTC rules and precedent. Non-party, CMS respectfully requests that this Honorable ALJ grant its Renewed Motion for *in camera* Treatment for CX05715 and CX05125 for a period of ten years or for whatever period this ALJ deems necessary and proper.

Respectfully submitted,



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FEDERAL TRADE COMMISSION
Washington, D.C. 20580

In the Matter of EVANSTON
NORTHWESTERN HEALTHCARE CORP.
and ENH MEDICAL GROUP, INC.

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Docket Number 9315
CHIEF ADMINISTRATIVE LAW
JUDGE: Stephen J. McGuire

**DECLARATION OF DANIEL S. FEWKES IN SUPPORT OF NON-PARTY,
ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES'
RENEWED MOTION FOR *IN CAMERA* TREATMENT OF CX05715 and CX05125**

I, DANIEL S. FEWKES, declare as follows:

1. I am Deputy General Counsel of Illinois Department of Central Management Services ("CMS").
2. I submit this declaration in support of CMS's renewed motion for *in camera* treatment of CX05715 and CX05125 in the administrative trial against Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.
3. I am familiar with the documents marked as exhibit numbers CX05715 and CX05125 by the Federal Trade Commission ("FTC") that the FTC seeks to admit as evidence in the above-mentioned case.
4. Each of the Exhibits contain confidential CMS information including, but not limited to the negotiated fees paid to specific hospitals for particular health services. These contracts are solely for the use of CMS and the specific hospital contracting with CMS at the time. The contracts have extremely limited distribution and accessibility within CMS. Furthermore, CMS has taken significant measures to guard their secrecy, including, but not limited to, placing confidentiality provisions in each contract, limiting the access of the contracts to only those CMS employees that are directly involved in the contracts' procurement and



negotiation, receiving assurance from the FTC that the documents would be placed under a protective order when produced in response to the FTC discovery request, and labeling the contracts as confidential prior to producing them to the FTC. To my knowledge, these documents have never been distributed to anyone outside of CMS or the specific hospital contracting with CMS at the time. CMS has never consented to the disclosure of these documents or information to the public either in connection with this proceeding or any other context. To the extent that any information in the documents have been disclosed to third parties, such as the FTC in the present case, CMS has done so only upon first procuring assurances of confidentiality, usually by written agreement.

5. Although these documents are not currently in effect, they are a part of an ongoing series of contracts that build upon each other and effect the current relationship of the parties.
6. Because of the highly sensitive nature of the information contained in these documents, the information will remain critically confidential for an ongoing and permanent time period.
7. More particularly:
 - a. Exhibit CX05715 is a hospital service agreement between CMS and Highland Park Hospital for the fiscal year of 1996 (07/01/95 - 06/30/96) regarding the State of Illinois employees' group health plan. This contract includes the negotiated fees that CMS agreed to pay Highland Park Hospital for particular healthcare services. Even though this contract is no longer in effect, it is a part of a series of contracts and reflects the ongoing relationship between CMS, the State of Illinois, and Highland Park Hospital. Disclosure of Exhibit CX05715 will reveal how CMS values Highland Park Hospital and its services. If these rates and terms became public knowledge, any hospital receiving lower rates or different terms would exert pressure

on the State in future negotiations. Disclosure of Exhibit CX05715 may effect the negotiation of future healthcare contracts with other hospitals. Consequently, the State would lose its present bargaining position, resulting, necessarily, in higher health care costs for the State of Illinois and, ultimately, the Illinois taxpayers.

- b. Exhibit CX05125 is a hospital service agreement between CMS and Evanston Northwestern Healthcare for the fiscal year of 1999 (07/01/98 - 06/30/99) regarding the State of Illinois and local government employees' group health plans and the teachers' retirement insurance program. This contract includes the negotiated fees that CMS agreed to pay Evanston Northwestern Healthcare for particular health care services. Even though this contract is no longer in effect, it is a part of a series of contracts and reflects the ongoing relationship between CMS, the State of Illinois, and Evanston Northwestern Healthcare. Disclosure of Exhibit CX05125, therefore, will reveal how CMS values Evanston Northwestern Healthcare and its services. If these rates and terms became public knowledge, any hospital receiving lower rates or different terms would exert pressure on the State in future negotiations. Disclosure of Exhibit CX05125 may effect the negotiation of future healthcare contracts with other hospitals. Consequently, the State would lose its present bargaining position, resulting, necessarily, in higher health care costs for the State of Illinois and, ultimately, the Illinois taxpayers.
8. All of the information contained in Exhibits CX05715 and CX05125 was developed by CMS employees or for CMS employees, from confidential financial and health service information, solely for the use and distribution by CMS, employees and the specific hospital contracting with CMS at the time.

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9. I am informed and believe that the information contained in Exhibits numbers CX05715 and CX05125 has never been distributed or otherwise made known outside CMS and the specific hospital contracting with CMS at the time without first obtaining assurances of confidentiality. Furthermore, distribution of the foregoing documents is extremely limited within CMS and only designated individuals directly involved in a contract procurement and negotiation with a hospital ever have access to the negotiated contract. The number of such employees is not large. Indeed, only I, Daniel S. Fewkes and other CMS contracting and procurement personnel have been directly involved in any contract negotiations.
10. It would not be possible for the approximately 225 hospitals that contract with CMS to determine the information contained in the contracts with other hospitals from any source other than CMS.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 1st Day of February, 2005.

DATED: February 1, 2005


Daniel S. Fewkes

3. one (1) paper copy served by Regular Mail to:

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I further certify that the electronic copy sent to the Secretary of the Commission and the Honorable Stephen J. McGuire is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission by Federal Express.

DATED: February 1, 2005



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