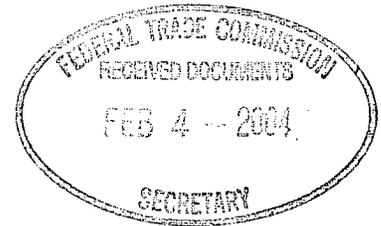


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

Docket No. 9312

**ORDER ON MOTION OF NON-PARTY UNITED HEALTHCARE
OF TEXAS, INC. TO QUASH OR LIMIT SUBPOENA
DUCES TECUM AND SUBPOENA AD TESTIFICANDUM**

I.

On January 26, 2004, non-party United Healthcare of Texas, Inc. ("United") filed a motion to quash or to limit the subpoena *duces tecum* and the subpoena *ad testificandum* 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 February 4, 2004.

For reasons set forth below, the motion to quash the subpoena *duces tecum* is GRANTED IN PART and DENIED IN PART. The motion to quash the subpoena *ad testificandum* is DENIED.

United shall have 10 calendar days from the date of this order to produce a privilege log and the responsive documents as limited by this Order.

II.

United moves to quash or limit the subpoena *duces tecum* served on it by Respondent on two main grounds. United argues that the subpoena is overly broad and unduly burdensome and seeks irrelevant information; and that some of the documents sought are privileged, confidential, or proprietary, or are considered trade secrets.

Respondent asserts that its subpoena seeks relevant information and the subpoena is not unduly burdensome. Respondent further asserts that the time frame is not unreasonable.

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. United raises several general objections as well as specific objections to three 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 United to the three contested requests are discussed in the subsequent section.

A.

United raises the following general objections: (1) the definition of United; (2) the requests seek documents that are confidential and proprietary; and (3) the requirement of a privilege log is burdensome and time consuming. In addition, United argues that Respondent should reimburse United for its expenses.

1. Definition of United

United requests that the subpoena be limited to United HealthCare of Texas, Inc. and that United should not have to respond to this request on behalf of its “parents, subsidiaries, affiliates” or its “predecessors or successors.” Respondent responds that only United HealthCare of Texas, Inc. or related entities which dealt with NTSP or have other responsive data would appear to need to respond.

The scope of the subpoena is limited to demand production only from United HealthCare of Texas, Inc., and its employees.

2. Confidential documents are discoverable

United asserts that the subpoena requests production of documents containing confidential and commercially sensitive information, including competitively sensitive pricing information and United’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 United asserts that the documents requested contain extremely sensitive information, the burden on United 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, United is not required to disclose patient information. Information concerning particular patients’ names or other data is not relevant and shall be redacted by United. In addition, United is not required to produce privileged information. If information is withheld, on grounds of privilege or any similar claim, United 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. United’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, United 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.

3. Time for producing privilege log and responding to the subpoena

Under the Commission’s Rules of Practice, “[a]ny person withholding material responsive to a subpoena issued pursuant to § 3.34 . . . shall assert a claim of privilege or any similar claim not later than the date set for production of the material. Such person shall, if so

directed . . . , submit, together with such claim, 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.” 16 C.F.R. § 3.38A. United shall have 10 calendar days from the date of this order to produce the responsive documents as limited by this Order and a privilege log.

4. 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 United is not an undue burden. United’s request for reimbursement is denied.

B.

The three challenged 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 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.

United asserts that it produced documents to the Texas Attorney General only after it had received repeated assurances that its confidentiality would be protected under Texas law and had negotiated a detailed protective order governing its submission. Because United believe that its data would be adequately protected by the state, the information was not reviewed for confidentiality, redacted, or otherwise treated to comply with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). United asserts that compliance with these requests would result in production of vast quantities of irrelevant and sensitive information. United further asserts that the ramifications of responding to NTSP’s subpoena extend beyond the disclosure of United’s confidential trade secret information, because these requests would require United to produce sensitive health information related to Texas patients, protected by HIPAA as well as provisions of the Texas Insurance Code.

Respondent asserts that the requested documents are highly relevant and that the request is not burdensome because United has already produced documents to the Texas Attorney General. Respondent further asserts that, during the deposition of United’s corporate representative, Respondent learned that United provided data to Complaint Counsel and ran

special reports specifically requested by Complaint Counsel. Respondent also states that any privileged patient information may be redacted.

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 United than to request production, a second time, from United, a non-party.

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. To the extent that documents responsive to this request (including any analysis of those documents and supporting documentation) have been provided to Complaint Counsel and 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). 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 Numbers 2 and 3 are quashed.

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.

United objects to this request on grounds that it calls for irrelevant information, is over broad, and unduly burdensome. United further asserts that, to the extent that the request asks for comparisons of physician costs, it is duplicative of Request Number 5.

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. Respondent further asserts that the term "cost" refers to external marketplace cost to patients and insurers.

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.

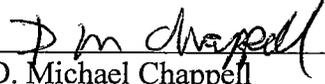
IV.

United also requests that the subpoenas *ad testificandum* seeking corporate representatives to provide deposition testimony relating to the document requests be limited. Specifically, United asks that the topic of examination be limited in accordance with limits placed on the subpoena *duces tecum* by this Order.

Respondent asserts that the topics are relevant, not unduly burdensome, and adequately protected by the Protective Order entered in this case.

The scope of depositions may include any information relevant and not privileged. *See* 16 C.F.R. § § 3.33, 3.31(c). United's motion to limit the subpoenas *ad testificandum* is DENIED.

ORDERED:


D. Michael Chappell
Administrative Law Judge

Date: February 5, 2004