

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



_____)
In the Matter of _____)
PROMEDICA HEALTH SYSTEM, INC. _____)
a corporation. _____)
_____)

Docket No: 9346
Chief Administrative Law Judge
D. Michael Chappell

[PUBLIC]
**NON-PARTY THE OHIO HOSPITAL ASSOCIATION'S
MOTION FOR IN CAMERA TREATMENT OF PROPOSED EVIDENCE**

Pursuant to 16 C.F.R. § 3.45(b), the Ohio Hospital Association (“OHA”), which is a not a party to the above-captioned action, respectfully requests *in camera* treatment of a document that Complaint Counsel intends to offer into evidence. By letter dated April 28, 2011, Complaint Counsel notified the OHA of its intention to place the document marked by Complaint Counsel as Exhibit No. PX01810 (“OHA’s Confidential Document”) into evidence at the administrative hearing. This document contains confidential data which is held in strict confidence by the OHA. Data contained in this document contains serious personal information of Ohio hospital patients. Further, public disclosure of this document is likely to cause direct, serious harm to the OHA and its member hospitals. When this document was produced by the OHA it was with the understanding that it would be kept confidential. Therefore, the OHA respectfully moves for *in camera* treatment of the confidential information contained in the OHA’s Confidential Document.

I. Description of the OHA’s Confidential Document.

The OHA seeks *in camera* treatment for the information contained in the OHA’s Confidential Document which was produced by the OHA to Complaint Counsel in response to a

subpoena *duces tecum*. This document contains data on inpatient admissions and discharges and outpatient treatment episodes from all hospitals in the State of Ohio from January 1, 2004 to September 30, 2010. Specifically, the document contains individual-level patient information such as the patient's unique identifier, zip code of residence, age, and basic clinical condition. Additionally, the document contains confidential proprietary, clinical and financial data of Ohio hospitals. Attached hereto as Exhibit A is the data request which lists the scope of the request and data categories requested and received by Complaint Counsel. The OHA's Confidential Document contains all of the data produced from this request. The confidential nature of the specific information provided is discussed more fully in the affidavit of Dan Paoletti, Vice President of Data Services of the OHA, attached hereto as Exhibit B.

II. Law and Analysis

The document described in this motion warrants *in camera* treatment as provided by 16 C.F.R. § 3.45(b). Under 16 C.F.R. § 3.45(b), requests for *in camera* treatment must show that public disclosure of the document in question “will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment” or “that the material constitutes sensitive personal information.” Moreover, a request for *in camera* treatment by an organization, such as the OHA, which is not a party to this proceeding, should be given “special solicitude.” *In re Crown Cork & Seal Co.*, 71 F.T.C. 1714 (1967). The OHA document contains sensitive patient information, the public disclosure of which would result in serious injury to the OHA and its member hospitals. Thus, *in camera* treatment is warranted.

A. The OHA's Confidential Document Contains Sensitive Personal Information.

The OHA's Confidential Document contains sensitive personal information thus warranting *in camera* treatment of the document. Under 16 C.F.R. § 3.45(b), “sensitive personal

information” includes, but is not limited to, “... any sensitive health information identifiable by an individual, such as an individual’s medical records.”

As discussed above and in Exhibit B, the information in the OHA’s Confidential Document contains individual-level patient data for all patients who received services at any Ohio hospital from January 1, 2004 to September 30, 2010. This includes such sensitive health information as the patient’s unique identifier, diagnosis and procedure codes, the patient’s status upon discharge, and health insurance information. Specifically, the following patient-level health information was provided:

- Hospital unique identifier;
- Age;
- Sex;
- Zip code of residence;
- County code;
- Admission type;
- Admission source;
- DRG and MCD codes;
- Payer source;
- Primary diagnosis;
- Primary procedure;
- Total charges;
- Discharge status;
- Patient class;
- Admission date; and

- Discharge date.

This sensitive health information contains patient identifiable data which should be kept confidential. The privacy and security of this type of health information is strictly protected by the Health Insurance Portability and Accountability Act of 1996, and numerous other State and Federal privacy laws. 42 U.S.C. § 1320d, *et seq.*; 45 C.F.R. Parts 160 and 164. Therefore, the OHA respectfully requests that the OHA's Confidential Document permanently be accorded *in camera* status.

B. Disclosure of the OHA's Confidential Document is Likely to Cause Direct, Serious Harm to the OHA and its Member Hospitals.

In addition to the foregoing, the OHA's Confidential Document merits receiving *in camera* treatment as public disclosure would likely cause direct, serious harm to the OHA and its member hospitals. *In camera* treatment is warranted when it is shown that public disclosure of the document in question "will result in a clearly defined, serious injury to the person or corporation whose records are involved." *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). That showing can be made by establishing that the document in question is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury." *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). The following factors should be weighed when determining whether the required showing of secrecy and materiality have been met "(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and to [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which

the information could be properly acquired or duplicated by others.” *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977).

The information in the OHA’s Confidential Document constitutes a substantial portion of the database maintained by the OHA. The OHA has taken substantial measures to guard the secrecy of the information contained in the OHA’s Confidential Document, limiting dissemination of such information and taking reasonable steps to protect its confidentiality. Access to that database is limited to member hospitals and access is only granted for limited purposes. The database is password protected. All member hospitals that are granted access to the database are required to sign a data use agreement which requires strict confidentiality of the data maintained by the OHA. Further, all vendors, contractors, consultants, and employees who come in contact with the database are required to sign a confidentiality or non-disclosure agreement. The OHA spends a large amount of time and money maintaining the integrity and security of the database.

The information in the OHA’s Confidential Document contains data, the disclosure of which could harm member hospitals who provided data to the OHA. This includes individual-level patient data and hospital proprietary, clinical and financial data. This information was provided to the OHA under the agreement that it would be kept confidential and not made public. It would severely harm the OHA’s ability to collect necessary data in the future if the information were disclosed and made public. Further, public disclosure of this information could harm the hospitals’ competitive positions in the market.

The OHA’s policies and procedures provide that the information maintained in the database is to be kept confidential and safeguarded. Unauthorized uses, disclosures and reproductions are strictly prohibited by the OHA’s policies and procedures.

The database maintained by the OHA is the most comprehensive database of hospital information in the State of Ohio. It has been compiled for years and it would be extremely expensive and time-consuming for another organization to replicate.

As outlined above, the factors weigh in favor of *in camera* treatment. Thus, disclosure of the information in the OHA's Confidential Document will result in a clearly defined, serious injury to the OHA and its member hospitals. For the foregoing reasons, the OHA respectfully requests that the document be permanently given *in camera* treatment.

C. Protection of the OHA's Confidential Document Should Extend Indefinitely.

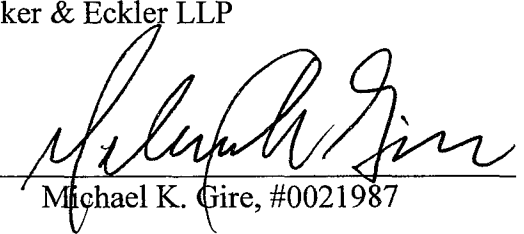
The nature of the sensitive personal information contained in the OHA's Confidential Document warrants permanent protection. Under 16 C.F.R. § 3.45(b), documents containing sensitive personal information "shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law." Accordingly, the OHA respectfully requests that the information in the OHA's Confidential Document be afforded permanent *in camera* protection.

DATED: May 4, 2011

Respectfully submitted,

Bricker & Eckler LLP

By:


Michael K. Gire, #0021987

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Columbus, Ohio 43215
Telephone: (614)227-2318
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ATTORNEY FOR NON-PARTY
THE OHIO HOSPITAL ASSOCIATION

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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| In the Matter of |) | |
| |) | |
| PROMEDICA HEALTH SYSTEM, INC. |) | Docket No: 9346 |
| |) | |
| a corporation. |) | Chief Administrative Law Judge |
| |) | D. Michael Chappell |
| |) | |

PROPOSED ORDER

On May 5, 2011, non-party the Ohio Hospital Association (“OHA”) filed a motion for *in camera* treatment of confidential information contained in a document identified by Complaint Counsel as proposed evidence.

IT IS HEREBY ORDERED that the OHA’s motion is GRANTED. The information set forth in the OHA document numbered by Complaint Counsel as Exhibit PX01810 shall be subject to permanent *in camera* treatment pursuant to 16 C.F.R. § 3.45 and will be kept confidential and not placed on the public record.

IT IS FURTHER ORDERED that only authorized Federal Trade Commission (“FTC”) personnel, and court personnel concerned with judicial review may have access to the above-referenced information, provided that I, the FTC, and reviewing courts may disclose such *in camera* information to the extent necessary for the proper disposition of the proceeding.

ORDERED: _____
D. Michael Chappell
Chief Administrative Law Judge

DATED: _____

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2011, I filed via Federal Express a paper original, one paper copy and a true and correct electronic copy of the foregoing Motion for *In Camera* Treatment with:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW Room H-135
Washington, DC 20580
(secretary@ftc.gov)

I also certify that on May 4, 2011, I filed via Federal Express a paper copy and a true and correct electronic copy of the foregoing Motion for *In Camera* Treatment with:

Hon. D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW Room H-106
Washington, DC 20580
(oalj@ftc.gov)

I also certify that on May 4, 2011, I delivered via electronic mail a copy of the foregoing Motion for *In Camera* Treatment with:

Matthey J. Reilly (mreily@ftc.gov)
Jeffrey H. Perry (jperry@ftc.gov)
Sara Y. Razi (srazi@ftc.gov)
Jeanne H. Liu (jliu@ftc.gov)
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Janelle L. Filson (jfilson@ftc.gov)
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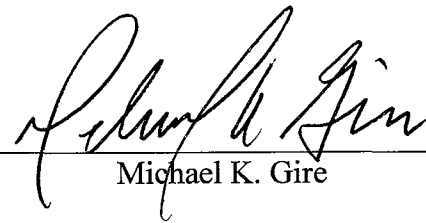
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Michael K. Gire

EXHIBIT A

In the Matter of PROMEDICA HEALTH SYSTEM, INC., Docket No. 9346
Data Produced by the Ohio Hospital Association

Inpatients Discharged from an Ohio or Other Participating Hospital from
January 2004 through September 2010

The following categories of patient-level data were included:

Hospital ID
LOS
Age
Sex
Zip
County Code
Admit Source
Admit Type
Payer
DRG
MDC
Diagnosis_Primary
Procedure_Primary
Total_Charges
Discharge_Status
Patient_Class
Admit_Date
Discharge_Date
MSDRG
MSMDC

EXHIBIT B

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AFFIDAVIT OF DAN PAOLETTI

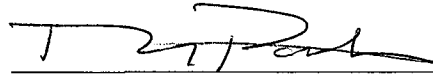
After having been duly sworn, Dan Paoletti declares and states:

1. I am the Vice President of Data Services for the Ohio Hospital Association (“OHA”), which responded to a third-party subpoena *duces tecum* issued by Complaint Counsel in the above-referenced matter.
2. In response to this subpoena, the OHA provided to Complaint Counsel a document that contained information maintained by the OHA regarding all Ohio hospitals from January 1, 2004 to September 30, 2010. At the request of Complaint Counsel, the following patient-level health information was provided:
 - Hospital unique patient identifier;
 - Age;
 - Sex;
 - Zip code of residence;
 - County code;
 - Admission type;
 - Admission source;
 - DRG and MCD codes;

- Payer source;
 - Primary diagnosis;
 - Primary procedure;
 - Total charges;
 - Discharge status;
 - Patient class;
 - Admission date; and
 - Discharge date.
3. The information produced constituted a substantial portion of the database maintained by the OHA. This database is not public. Access to the database is restricted to member hospitals and such access is limited. The database is password protected. The OHA requires all member hospitals that access the database to sign a strict confidentiality provision as part of a data use agreement. The OHA also requires any vendor, contractor, consultant or employee who accesses the system to keep the information confidential.
 4. The information in the database was collected by the OHA from member hospitals. The member hospitals provided this proprietary and clinical information to the OHA with the understanding that the information would be kept confidential. The information in the database was never intended for public disclosure. It would severely harm the OHA's ability to collect necessary data in the future and to continue to serve its members if the information were disclosed and made public.
 5. The information in the produced document and the database from which it was drawn are valuable assets of the OHA. Maintaining and securing the database requires a substantial

amount of time, effort and money by the OHA. It would be very difficult and expensive for another organization to replicate the data.

6. The OHA's policies and procedures provide that the information maintained in the database is to be kept confidential and safeguarded. Unauthorized uses, disclosures and reproductions are strictly prohibited by the OHA's policies and procedures.
7. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Dan Paoletti

SUBSCRIBED AND SWORN TO before me by the said Dan Paoletti on the 4th day of May, 2011.



Notary Public

MARY LOUISE GALLAGHER, Attorney At Law
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

My Commission Expires:
N/A