

ORIGINAL

FEDERAL TRADE COMMISSION
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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

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

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*

because the AIT determined that these contracts are sufficiently important and material to CMS that

disclosure will result in injury serious enough to outweigh the substantial public interest in holding

agreements of a fiduciary nature. The four contracts covered in summary treatment are

[REDACTED]

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 scrutiny, regardless of their age. Disclosure~~

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

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 rates 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 employees

go to great lengths to ensure the continued confidentiality of the contracts regardless of the age of

sufficiently secret and material to warrant its various treatment

confidential information. The ALJ recognized the need for protection for at least 10 years for a

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

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

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

United States of America
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

In the Matter of EVANSTON)
NORTHWESTERN HEALTHCARE CORP.)

Docket Number 9315

**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:

representation, receiving assurances 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

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 plan 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 CX05105 is a

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

hospital contracting with CMS at the time without first obtaining assurances of confidentiality. Furthermore, distribution of the foregoing documents is extremely limited

negotiation with a hospital ever have access to the negotiated contract. The number of

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EVANGELINE NORTHWESTERN)
D-1-1-1-0315)

HEALTHCARE CORP. and ENH MEDICAL)
GROUP, INC.)

CHIEF ADMINISTRATIVE LAW

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)
CERTIFICATE OF SERVICE

This is to certify that on February 1, 2005, I served a copy of the attached
[REDACTED]

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

~~Jeff Dabala~~

~~Duane M. Keller~~

Complaint Counsel
~~Federal Trade Commission~~

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Chul Pak
~~Assistant Director Messers IV~~

Daniel S. Fewkes
~~Deputy General Counsel~~