

**STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD**

In re:

BlueCross and BlueShield Vermont 2020 Large Group Rate Filing
The Vermont Health Plan 2020 Large Group Rate Filing
BlueCross and BlueShield Vermont 2021 AHP Filing

GMCB-002-20rr
GMCB-003-20rr
GMCB-004-20rr

BCBSVT’S RESPONSE IN SUPPORT OF ITS CONFIDENTIALITY REQUESTS

BlueCross and BlueShield Vermont and The Vermont Health Plan (“BCBSVT”) seek to keep confidential certain information in BCBSVT’s Q3 2020 Large Group and 2021 AHP formula and factor filings and TVHP’s Q3 2020 Large Group formula and factor filing (the “Filings”). The HCA objects that these requests are “unduly broad” and the information has been disclosed in prior years. The HCA is wrong on both counts.

I. The redacted information is exempt from disclosure under 1 V.S.A. § 317(c).

BCBSVT seeks to protect certain confidential information regarding its proprietary actuarial methodology. Exemption 9 of Vermont’s public records law expressly protects from disclosure “confidential business records or information” that a business makes reasonable efforts to keep secret and that provides “an opportunity to obtain business advantage over competitors who do not know it or use it.” 1 V.S.A. § 317(c)(9); *see also id.* § 317(c)(15) (contract negotiations). The Board treats as confidential information that is exempt from disclosure under the public records law. *See* Board Rule 2.305(a).

As the Vermont Supreme Court has repeatedly held, Exemption 9 applies to “generally private corporate information that g[ives] its possessor a commercial advantage over others.” *Long v. City of Burlington*, 2018 VT 103, ¶ 24, 208 Vt. 418, 199 A.3d 542; *see also Springfield Terminal Ry. Co. v. Agency of Transp.*, 174 Vt. 341, 347-48, 816 A.2d 448, 453-54 (2002) (same; exemption covers certain “nontechnical, competitively useful business information”). In

Springfield Terminal, the Court held that sensitive financial information submitted with a contract bid was exempt because disclosure would “vitate the competitive advantage held by” the bidder. *Id.* at 348, 816 A.2d at 454. And *Long* held that a feasibility study was exempt because it contained “anticipated project costs and revenues, financial projections, and confidential lease terms . . . considered highly sensitive in the real estate development industry.” 2018 VT 103, ¶ 28. Disclosure would allow competitors to “reverse engineer” the developer’s pricing and models and give prospective tenants “an unfair advantage” in negotiations. *Id.*

Consistent with *Springfield Terminal* and *Long*, the Board should protect BCBSVT’s sensitive commercial information that competitors could exploit for their commercial advantage. First, the redacted material is proprietary business information. Schultz Decl. ¶¶ 2-5. The redactions in Sections 4.1, 4.2, 4.5 and 5.1 of the actuarial memoranda correspond to specific choices made by BCBSVT for its trend development methodology and pharmacy induced utilization methodology. *See id.* ¶ 4. BCBSVT’s actuaries must choose among “multiple actuarial options for performing analyses that feed into the trend and utilization factors.” *Id.* ¶ 2. These actuarial decisions are proprietary because they are specific to BCBSVT and to the plan year and market at issue. *Id.* Other actuaries could make different choices, *id.*; meaning, absent public disclosure through the rate review process, BCBSVT’s competitors do not know how BCBSVT conducts this analysis.

The other category of redactions protect specific confidential information concerning BCBSVT’s contract with its pharmacy benefit manager. *See id.* ¶ 6 (describing redactions in § 4.2, § 5.4, and Exhibit 3J). Public disclosure would disadvantage BCBSVT by revealing confidential information about BCBSVT’s contract with its pharmacy benefits manager that is only known to BCBSVT and its PBM. *Id.* It is thus protected under both Exemption 9 and

Exemption 15 as information “relating specifically to negotiation of contracts.” 1 V.S.A. § 317(c)(15).

Second, Mr. Schultz’s declaration confirms that BCBSVT’s proprietary methodology gives BCBSVT a “business advantage over competitors who do not know it.” 1 V.S.A. § 317(c)(9). “When actuaries develop trend and utilization factors, they analyze and assess the relevant data looking for patterns and use those patterns to make predictive judgments.” Schultz Decl. ¶ 3. Public disclosure of that methodology gives competitors access to BCBSVT’s unique “critical analysis and insights.” *Id.* Here, because BCBSVT serves the majority of covered lives in the Vermont marketplace, “it is in a substantially better position to analyze Vermont experience and develop relevant insights.” *Id.* If BCBSVT’s methodology is disclosed, competitors would “gain insight into drivers of trend and utilization in the Vermont marketplace, and access a complete blueprint for how to best analyze each driver or component of trend or utilization.” *Id.* ¶ 5.

Giving BCBSVT’s competitors access to this information that they would not otherwise have is precisely the type of “unfair advantage” that the Vermont Supreme Court addressed in *Long*, 2018 VT 103, ¶ 28. Public records laws are not intended to enable competitors to “reverse engineer” key economic calculations, assumptions, and predictions to gain commercial advantage. *Id.* But that is what will happen if BCBSVT’s methodology is disclosed publicly through this review process. Schultz Decl. ¶ 5. “[C]ompetitors would benefit substantially, at BCBSVT’s expense, from learning BCBSVT’s methodology and insights” and gain a “competitive commercial advantage that would not otherwise exist.” *Id.* ¶¶ 3, 8; *accord id.* ¶ 5.

Contrary to the HCA’s contention, BCBSVT has not asserted a “blanket” request for confidentiality. The redactions are limited to descriptions of BCBSVT’s proprietary trend

development methodology and proprietary pharmacy induced utilization methodology. As Mr. Schultz explains, in each section, BCBSVT has only redacted information that “would allow a competitor’s actuary to see the BCBSVT-specific methodology used to arrive at each trend component.” *Id.* ¶ 5. The HCA misses the point by arguing that words like “yearly” and “regression” are “generic” and therefore cannot be deemed confidential. HCA Obj. 2. Those words are not used in a vacuum; rather, they are an integral part of the description of the methodology. And the HCA is wrong to suggest that redaction must be limited to only “specific numbers or formulae.” *Id.* at 1. It is BCBSVT’s methodology that is proprietary and provides a competitive advantage. Redacting only specific numerical results is not sufficient to protect BCBSVT’s legitimate commercial interests.

BCBSVT’s requests also fully comply with Rule 2.305(a). BCBSVT has not made “blanket” assertions of confidentiality or attempted to keep large swaths of its filing from public view. *See* HCA Obj. 2. BCBSVT’s submissions clearly designate certain limited portions of its 36-page actuarial memoranda as confidential, and its accompanying letters and this filing provide detailed factual and legal grounds for the requests. The Board granted MVP’s request to keep quantitative and qualitative trend information confidential for MVP’s 2020 individual and small group filing on a substantially less detailed record. In sum, BCBSVT has met its burden and shown that the redacted information should be kept confidential and out of the public record.

II. BCBSVT takes reasonable steps to maintain the confidentiality of this information.

There is no dispute that BCBSVT takes reasonable steps within its organization to protect the confidentiality of this information. As Mr. Schultz explains, this proprietary information is governed by BCBSVT’s confidentiality policies and access to it is limited both internally and externally. Schultz Dec. ¶ 4.

The HCA nonetheless claims that BCBSVT has not acted reasonably to protect the confidentiality of the redacted information because it is supposedly “already publicly available,” HCA Obj. at 2, in prior filings submitted in other years. The HCA’s position reflects a fundamental misunderstanding of the relationship among past, present, and future rate filings, and therefore should be rejected.

Simply put, the actuarial analysis reflected in the Filings is “entirely independent of that completed for prior filings.” Schultz Dec. ¶ 7. This follows because BCBSVT’s rate development process comprises “a series of methodological decisions . . . among multiple actuarial options.” *Id.* ¶ 2. At each decision point, “[a]nother actuary could reasonably make different choices . . . or could choose to not pursue a particular line of analysis at all.” *Id.* Indeed, it would not be valid actuarial practice for BCBSVT to treat the methodology used in a previous filing as somehow binding on a subsequent filing for the same product. *Id.* ¶ 7 (quoting ASOP No. 8). An actuarially valid rate development process must start with a clean slate, even if the carrier had used the exact same methodology for the previous year, or five years, or 100 years. Therefore, the “particular series of choices” that yielded the trend and utilization factors in the Filings are “specific to BCBSVT and *to the year and market in question.*” *Id.* ¶ 2 (emphasis added).

The HCA’s reliance on *Long* is misplaced. Here, as in *Long*, the redacted information is kept confidential by BCBSVT. *Compare* 2018 VT 103, ¶ 32 (company’s efforts to keep information confidential, including non-disclosure agreements) *with* Schultz Decl. ¶ 4 (describing confidentiality policies and practices).

Further, the HCA is incorrect as a factual matter that BCBSVT has “provided substantial portions of the information it seeks confidential treatment of verbatim or slightly reworded in public portions of previous years’ filings.” HCA Obj. at 2. As explained above, the information

disclosed publicly in previous years' filings is not the same as the information about how this year's rates were developed. Each year's rate development is a separate, freestanding event—even if BCBSVT ends up making the same methodological choices across multiple years. As explained above, the fact that BCBSVT made a specific set of choices last year, and disclosed them, in no way dictates whether and how it will make those choices this year. Therefore, BCBSVT has not previously disclosed the information it now seeks to protect and has made reasonable efforts, consistent with *Long*, to maintain the confidentiality of the methodological choices underlying the Filings.

Finally, an important change in market dynamics underscores why prior filings cannot prevent BCBSVT from asserting confidentiality now. Last year, the Board allowed MVP to shield its trend development information, while BCBSVT's information was publicly disclosed. Schultz Dec. ¶ 9. Asymmetrical disclosure of this type of information—where some market participants disclose and others do not—causes a particular competitive harm. *See Biles v. Dep't of Health & Human Servs.*, 931 F. Supp. 2d 211, 224-25 (D.D.C. 2013) (noting in context of FOIA claim that “‘asymmetric’ disclosure, or the lack thereof” among competitors “is valid evidence that can help establish or nullify a claim of substantial competitive harm”). To protect its competitive interests, BCBSVT must seek confidential treatment of proprietary methodology that its competitors are not disclosing as part of the rate review process. Indeed, BCBSVT's redacted memorandum provides as much information as its competitors' filings in this market. Schultz Dec. ¶ 10. Therefore, to protect its competitive position, BCBSVT needs to maintain the confidentiality of its proprietary methodology going forward.

CONCLUSION

BCBSVT's confidentiality requests should be granted.

Dated: May 6, 2020

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CERTIFICATE OF SERVICE

I certify that I have served BCBSVT's Response in Support of Its Confidentiality Request and accompanying Declaration of Paul A. Schultz on Michael Barber, Amerin Aborjaily, Thomas Crompton, and Christina McLaughlin of the Green Mountain Care Board; and on Kaili Kuiper and Eric Schultheis, counsel for the HCA, by electronic mail, return receipt requested, on May 6, 2020.

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DECLARATION OF PAUL A. SCHULTZ

I, Paul A. Schultz, declare that the following is true and correct:

1. I have worked as an actuary in the health insurance field for over two decades. For the past seven-plus years, I have worked for BCBSVT, first as Director of Actuarial Services, and, since January 2015, as Chief Actuary. In that capacity, I oversee all aspects of rate development and construction for BCBSVT and its subsidiaries, including BCBSVT’s Q3 2020 Large Group and 2021 AHP formula and factor filings and TVHP’s Q3 2020 Large Group formula and factor filing (collectively, the “Filings”). I am fully familiar with all aspects of those filings.

2. **First**, BCBSVT seeks to preserve confidential information about how it develops medical trend, pharmacy trend, and pharmacy-induced utilization factors (“trend and utilization factors”). That information is proprietary because it results from a series of methodological decisions, each requiring BCBCVT to choose among multiple actuarial options for performing analyses that feed into the trend and utilization factors. Another actuary could reasonably make different choices at any or all of those decision points, or could choose to not pursue a line of analysis at all. In other words, the particular series of choices BCBSVT made is a methodology for developing Vermont-specific trend and utilization factors that is specific to BCBSVT and to the year and market in question.

3. Public disclosure of this proprietary information will give BCBSVT's competitors unique insight into its rate development process and Vermont health care cost experience that they otherwise would not have. When actuaries develop trend and utilization factors, they analyze and assess the relevant data for patterns and use those patterns to make predictive judgments. If an insurer's actuarial methodology is publicly disclosed, competitors gain access to its critical analysis and insights. Because BCBSVT serves the majority of the Vermont market, it is in a substantially better position than its competitors to analyze Vermont health care claims experience and develop relevant insights and judgments. Therefore, competitors would benefit substantially, at BCBSVT's expense, from learning BCBSVT's methodology and insights.

4. Our redactions in Sections 4.1, 4.2, 4.5 and 5.1 of the actuarial memoranda for the Filings correspond to these BCBSVT-specific choices, as follows:

- a. § 4.1: excluding from the trend analysis certain data that may otherwise skew results;
- b. § 4.1.1: developing the unit cost component of medical trend, including how to calculate or anticipate unit cost changes related to providers impacted by the Board's hospital budget review and those related to other providers;
- c. § 4.1.2: developing utilization and intensity factors, including how BCBSVT (i) normalizes its data for impacts other than utilization and intensity trend, and (ii) performs specific regression or time-series analyses;
- d. § 4.1.3: developing a separate trend for pharmaceuticals processed through each plan's medical benefit;
- e. § 4.2: developing its retail pharmacy trend, including how it accounted for non-specialty drug utilization, generic cost trend, brand cost trend, and specialty drugs;
- f. § 4.5: developing cost trends for Medicare Secondary plans.
- g. § 5.1: developing factors that measure the impact of benefit design on pharmacy utilization.

All of the information described in this paragraph is maintained as confidential by BCBSVT.

This proprietary information is only shared internally with employees who need access to it as part of their job. BCBSVT has confidentiality policies that prohibit disclosure of proprietary information by employees. Employees are annually trained on these requirements. If BCBSVT

shares proprietary information with third parties such as outside actuaries, it does so pursuant to agreements that protect that information from further disclosure.

5. In each of the above categories, BCBSVT redacted the text that would allow a competitor's actuary to see the BCBSVT-specific methodology used to arrive at each trend component. Requiring BCBSVT to make part or all of those choices available to the public would enable a competitor's actuary to gain insight into drivers of trend and utilization in the Vermont marketplace, and access a complete blueprint for how to best analyze each driver or component of trend or utilization. Put another way, BCBSVT derived the redacted information by analyzing the available data, spotting patterns or other relevant observations, and translating those insights into its rate development. Requiring public disclosure would allow BCBSVT's competitors to use the results of BCBSVT's work in making their pricing decisions, an advantage they would not have without the redacted information.

6. **Second**, BCBSVT seeks to protect from public disclosure specific confidential information concerning BCBSVT's contract with its pharmacy benefit manager: § 4.2 (p.14 and footnotes 5-6 on p.15 under the heading "Contract Adjustment Factors"); § 5.4 (pp.21-22); and Exhibit 3J. Public disclosure of this information would advantage competitors and disadvantage BCBSVT, by revealing information about BCBSVT's PBM contracts currently known only to BCBSVT and its PBM.

7. The HCA has objected to BCBSVT's confidentiality request in part because BCBSVT chose not to redact analogous information in past filings. Each filing's actuarial analysis, however, is entirely independent of that completed for prior filings. Actuarial Standard of Practice No. 8, governing health insurance rate filings, underscores this independence by instructing that actuaries "should": "determine which assumptions are necessary for the filing and select appropriate assumptions"; "review and understand the formulas used to calculate premium rates and determine that, based on the available data and relevant assumptions, they are appropriate for the purpose of setting premium rates"; "make adjustments to reflect any known or expected

changes” in past experience being used to project future results; and “review the assumptions employed in the filing for reasonableness.” ASOP No. 8, §§ 3.4, 3.5, 3.7, 3.12.

8. Because each year’s filing is independent of its predecessors, there is no publicly available information about the actuarial methodology that BCBSVT used in developing the trend and utilization factors for the Filings currently under review. Public disclosure of the redacted information in the Filings would thus provide BCBSVT’s competitors in this market a competitive commercial advantage that would not otherwise exist.

9. BCBSVT is exposed to further competitive harm in this market if BCBSVT’s actuarial methodology is publicly disclosed but analogous information from its competitors is not. That occurred in connection with the 2020 Vermont Individual and Small Group rate filings, when the Board allowed MVP to keep its trend development methodology confidential. Going forward, to the extent its competitors do not publicly disclose information about trend development, BCBSVT will be exposed to even greater competitive harm if its methodology is disclosed.

10. I have reviewed MVP’s and Cigna’s recent filings in the relevant markets. In my opinion as an experienced actuary, BCBSVT’s redacted (i.e. publicly available) memoranda provide at least as much information as the analogous filings submitted by MVP and Cigna. BCBSVT has provided more detailed information in the confidential portions of its memoranda, which is helpful to the Board and its actuary and to the HCA. Disclosure of that additional detail would expose BCBSVT to competitive harm.

Executed at Burlington, Vermont, on May 5, 2020.

/s/ Paul A. Schultz
Paul A. Schultz