

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE EMERGENCY MEDICAL SERVICES REGULATORY BOARD

In the Matter of the License Application
of Children's Minnesota

SEALING ORDER

This matter came before Administrative Law Judge Jessica A. Palmer-Denig for a contested case hearing on September 24 to 28, 2018. During the hearing, requests were made to seal exhibits received into the record and to close the hearing in connection with testimony regarding certain of those exhibits.

Gregory J. Schaefer, Assistant Attorney General, appeared on behalf of the Minnesota Emergency Medical Services Regulatory Board (Board). Gregory R. Merz, Gray, Plant, Mooty, Mooty & Bennett, P.A., appeared on behalf of Children's Minnesota (Children's or Applicant). Christopher Heinze, Libby Law Office, P.A., appeared on behalf of the Minnesota Ambulance Association (MAA). Daniel D. Falknor, Dorsey & Whitney LLP, appeared on behalf of Mayo Clinic (Mayo) and Gold Cross Ambulance Service (Gold Cross). Konrad J. Friedemann and Teresa E. Knoedler, Friedemann Firm PLLC, appeared on behalf of North Memorial Health (North Memorial). Henry Parkhurst, Assistant Hennepin County Attorney, appeared on behalf of Hennepin Healthcare System, Inc. (Hennepin Healthcare). Randall S. Fischer participated on behalf of Stevens County Ambulance. Jake Howard participated on behalf of Bemidji Ambulance Service (Bemidji Ambulance). Mark Ebeling participated on behalf of Perham Area Emergency Medical Service (Perham Area EMS). James Ducharme participated on behalf of Meds-1 Ambulance Service Inc. (Meds-1).

On July 25, 2018, the Administrative Law Judge issued a Protective Order governing the use of not public and confidential data in this matter. The Protective Order permitted parties to designate information as confidential, but noted that data submitted in this proceeding may become public unless a determination is made that the data should be sealed.¹ On September 14, 2018, the Administrative Law Judge issued an Amended Protective Order. The Amended Protective Order retained the confidential designation, but also allowed parties or non-parties to mark confidential business, financial, or otherwise sensitive documents as "highly confidential - outside counsel's eyes only."² The Amended Protective Order provides that a party seeking to offer another party or non-party's confidential or highly confidential document must request that the document be sealed, and with respect to highly confidential documents, that the hearing be closed.

¹ Protective Order at 4 (July 25, 2018) (citing Minn. R. 1400.6700, subp. 4 (2017)).

² Amended Protective Order at 2 (Sept. 14, 2018).

At the hearing, the Administrative Law Judge determined that the hearing would not be closed, and required the parties to adopt procedures for identifying confidential information in documents during witness testimony without the need to close the hearing. As this issue was resolved, the remaining issue for consideration is whether certain documents should be sealed.

Applicant offered, among other exhibits, Exhibits 104, 124, 130, 144, 145, and 146. Exhibits 124 and 130 are designated “confidential,” while Exhibits 104, 144, 145, and 146 are designated “highly confidential.” North Memorial offered Exhibit 200, also marked as “highly confidential.” All of these exhibits were received into evidence at the hearing and, at that time, the Administrative Law Judge heard argument regarding the basis for sealing the exhibits. The Administrative Law Judge determines that Exhibits 104, 124, 130, 144, 145 146, and 200 contain confidential, trade secret information and should be sealed.

Based on the hearing record in this case, pursuant to Minn. Stat. §§ 13.37, 14.60, subd. 2 (2018); Minn. R. 1400.6700, subp. 4, and for the reasons stated in the accompanying Memorandum, the Administrative Law Judge issues the following:

ORDER

1. Exhibits 104, 124, 130, 144, 145, 146, and 200 are **SEALED**.
2. The Amended Protective Order, dated September 14, 2018, remains in effect.

Dated: November 16, 2018


JESSICA A. PALMER-DENIG
Administrative Law Judge

MEMORANDUM

This contested case concerns whether Applicant should be granted an ambulance service license under Minn. Stat. § 144E.11 (2018), allowing it to provide statewide neonatal and pediatric interfacility transport services. The statute requires an analysis of several factors, including determining the deleterious effects on the public health from duplication, if any, of ambulance services that would result from granting the license; the estimated effect of the proposed service on the public health; and whether any benefit accruing to the public health would outweigh the costs associated with the proposed service.³

³ Minn. Stat. § 144E.11, subd. 6.

During these proceedings, the Administrative Law Judge issued subpoenas directing the production of documents by ambulance services that had objected to Applicant's license application. These entities were required to produce information to Applicant regarding the number and types of transports they provide, as well as financial information about their operations.⁴ The Amended Protective Order permitted parties and non-parties to designate confidential or proprietary information as "confidential" or "highly confidential - outside counsel's eyes only." The Amended Protective Order further established that a party seeking to offer documents designated with either designation was required to request that the documents be sealed, and that with respect to highly confidential documents, that the hearing be closed.

Under Minn. Stat. § 14.60, subd. 2, "[w]hen the hearing record contains information which is not public, the administrative law judge or the agency may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record." Minnesota Rule 1400.6700, subp. 4, further provides that

The judge may issue a protective order as justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense due to a discovery request. When a party is asked to reveal material considered to be proprietary information or trade secrets, or not public data, that party may bring the matter to the attention of the judge, who shall make such protective orders as are reasonable and necessary or as otherwise provided by law.

Additionally, the term "Trade Secret Information" is defined by Minn. Stat. § 13.37, subd. 1(b) to include:

government data, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

Exhibit 104 is an agreement between Applicant and Allina Health Emergency Medical Services (Allina), under which Applicant and Allina collaborate to provide neonatal and pediatric intensive care transport services. The agreement contains terms governing the relationship between these two entities, one of which is not a party to or participant in this case. In the event that this agreement is terminated, and these entities are required to seek other parties with which to contract, public disclosure of the agreement's terms could disadvantage Applicant and Allina in negotiating such future contracts. Applicant has taken reasonable steps to maintain the confidentiality of this

⁴ See Order Denying Requests to Cancel or Modify Subpoenas (Aug. 31, 2018); see also *Matter of Rochester Ambulance Serv.*, 500 N.W.2d 495, 498 (Minn. Ct. App. 1993).

document. The Administrative Law Judge determines Exhibit 104 contains proprietary, trade secret information.

Exhibits 124 and 130 are compilations of transport statistics prepared by Gold Cross and North Memorial, respectively. Ambulance services report transport data to the Board, which may be made public upon request, with redaction of information that identifies patients. Although the data underlying the transport statistics may be publicly available, the compilations created by Gold Cross and North Memorial are not. This data, if it became public, could confer an economic advantage upon other ambulance services by presenting detailed statistics about Gold Cross and North Memorial's operations. Additionally, the Administrative Law Judge notes that, while North Memorial and Gold Cross are participating in the hearing as interested persons, neither of them is a party to this proceeding, the data production was compelled over their objection, and they have taken reasonable steps to protect the confidentiality of the information. The Administrative Law Judge concludes that the transport data compilations in Exhibits 124 and 130 are proprietary, trade secret information.

Exhibits 144, 145, and 146 contain financial and transport data from non-party ambulance services responsive to the subpoena served upon them by Applicant.⁵ These documents include detailed financial balance sheets and audit reports, as well as transport statistics that have been compiled and broken down in detail. Specifically, Exhibit 146 contains North Memorial's consolidated financial statements for several years for its entire operation, not just its ambulance services. According to North Memorial, though some of this information could be gleaned by the public from an examination of North Memorial's tax filings, the financial statements in their entirety are not generally available to the public. The non-parties providing this information were compelled to do so over their objection and have taken reasonable steps to protect the information. The Administrative Law Judge concludes that these exhibits are proprietary, trade secret information regarding these non-parties.

Exhibit 200 contains Applicant's compiled transport statistics. It also contains Applicant's internal financial calculations and business projections related to the provision of ambulance services. This information has economic value to Applicant and derives independent economic value from not being generally known to other persons. Applicant has taken reasonable measures to protect this information from disclosure. The Administrative Law Judge determines that Exhibit 200 is Applicant's proprietary, trade secret information.

The Administrative Law Judge concludes that these exhibits should be subject to further protection and by this order they are **SEALED**.

J. P. D.

⁵ Exhibit 144 contains Gold Cross's supplemental responses to the subpoena; Exhibit 145 contains the subpoena responses of eight entities (F-M Ambulance, Sanford AirMed, Sanford Canby, Sanford Bagley, and the ambulance services of Thief River Falls, Rock County, Wheaton, and Perham); Exhibit 146 contains North Memorial's supplemental responses to the subpoena.