

Bulletin 168

Pre-effective date confidentiality of certain form and rate filings

December 1, 1989

The Bureau of Insurance has received inquiries regarding the pre-effective date confidentiality of rate filings proposed by commercial health insurance companies, nonprofit hospitals and medical service organizations. Inquiries have also been received relative to the pre-effective date confidentiality of form filings proposed by nonprofit hospital, and medical service organizations, commercial health insurance companies and property and casualty insurance companies. BULLETIN 168 clarifies the Bureau's position on this issue.

RATE FILINGS

Title 24 M.R.S.A. Section 2321(2) provides that a nonprofit hospital and medical service organization's rate "filing and supporting information shall be a public record within the meaning of Title 1, Section 402, subsection 3. . . ." Commercial individual health rate filings and supporting information are also public records. See 24-A M.R.S.A. Section 2736(2). The Insurance Code does not address the confidentiality of commercial group health manual rates filed with the Superintendent. See 24-A M.R.S.A. Section 2839. Absent an express exemption such as that provided in 24-A M.R.S.A. Sections 2302(1) and 2304(2), (4) (according confidential status to property and casualty rate filings prior to their effective dates), the terms of the Freedom of Access Law are controlling.

The "Freedom of Access Law," 1 M.R.S.A. Section 402(3)(B), provides:

The term "public records" shall mean any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this state or any of its political subdivisions and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business except: (B) Records that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding[.]

One applicable privilege concerns trade secrets. See M.R. Evid. 507. Maine has statutorily adopted a definition of "trade secret." A "trade secret" is defined as:

information, including, but not limited to, a formula, pattern, compilation, program, device, method, technique or process, that:

(A) 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; and (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. 10 M.R.S.A. Section 1542(4).

The trade secret privilege is only one of the evidentiary privileges. This bulletin should not be read to exclude consideration of other applicable privileges or other applicable exceptions under the Freedom of Access Law.

Nonprofit hospital and medical service organizations or commercial health companies may wish to invoke the trade secret privilege (or any other applicable privilege). If they do so, they must prove, to the satisfaction of the Superintendent, that the relevant proposed rate filings and "privileged" within the meaning of 1 M.R.S.A. Section 402(3)(B).

FORM FILINGS

The Legislature has not afforded confidential treatment to unexecuted contract, certificate or application forms submitted to the Superintendent for approval. Therefore, by its terms the Freedom of Access Law requires disclosure unless a specific exception applies. One exception regards evidentiary privilege; and one privilege regards trade secrets.

As mentioned, there is no specific confidentiality exception for property and casualty insurance forms. Therefore, if property and casualty insurers wish to assert pre-effective date confidentiality relative to their forms, they must comply with this bulletin.

It is incumbent upon the party requesting confidential treatment on that ground to prove, to the satisfaction of the Superintendent, that the unexecuted forms are trade secrets, in and of themselves. Again, this is not intended to preclude consideration of other relevant exceptions to the rule requiring disclosure.

CONCLUSION

The proposed rate and form filings of commercial health insurance companies, nonprofit hospitals and medical service organizations are public records as defined by the Freedom of Access Law. If a filing entity requests confidential treatment, it must provide the Superintendent with a written legal argument supporting the entity's contention of confidentiality. The request for confidential treatment and the required legal argument must be provided at the time the entity files its rates or forms. Unless the entity can show that the proposed rate and/or form filings are privileged and therefore excepted from the definition of public records, these filings are available for public inspection to the extent permitted by the Freedom of Access Law.

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NOTE: This bulletin is intended solely for informational purposes. It is not intended to set forth legal rights, duties or privileges nor is it intended to provide legal advice. Readers are encouraged to consult applicable statutes and regulations and to contact the Bureau of Insurance if additional information is needed.