

UnitedHealthcare Insurance Company
185 Asylum St City Place I
Mail Route CT039-020B
Hartford, CT 06103
Tel 860-702-6226

February 15, 2019

Karynlee Harrington
Executive Director
Maine Health Data Organization
151 Capitol Street
102 State House Station
Augusta, Maine 04333-0102

VIA E-mail

MHDO Board of Directors
Maine Health Data Organization
151 Capitol Street
102 State House Station
Augusta, Maine 04333-0102

Re: MaineGeneral Health ME Data Request Number 2018083001

Dear Ms. Harrington,

On behalf of UnitedHealthcare and its affiliated companies, hereinafter referred to as UnitedHealth Group, we submit the following appeal, and memorandum in support of appeal, of the decision made by the Maine Health Data Organization (“MHDO”) Data Release Subcommittee in the above captioned data request. In accordance with CMR 90-590-120, Section 11(2), UnitedHealth Group hereby appeals the decision issued on February 4, 2019 to the MHDO Board of Directors.

UnitedHealth Group objects to the release of the requested data to MaineGeneral Health (“MaineGeneral”) because the release will result in the disclosure of UnitedHealth Group confidential and proprietary information, including competitive financial information to which MaineGeneral is not entitled. Furthermore, because MHDO data contains the competitive financial information of UnitedHealth Group, including reimbursement information paid to competitor providers of MaineGeneral, the release of such information has the potential to facilitate collusion or anticompetitive behaviors, thereby increasing prices and reducing competition and availability of health care services in the Maine healthcare market. Even when payer cost data is de-identified and/or payer-masked, the disclosure of the requested data could nonetheless facilitate collusion and anticompetitive behaviors in Maine since MaineGeneral would be granted access to competitor confidential and proprietary financial information. For these reasons we request that the MHDO Board of Directors either (1) deny the data release altogether, or (2) withhold any and all payer and competitor provider competitive financial information, as well as provider identifiers from the data release.

While MHDO’s enabling statute allows it to make the database “publicly accessible” and directs MHDO to “report clinical, financial, quality and restructuring data”, the Maine legislature nonetheless clearly intended that MHDO balance disclosures for transparency projects against the confidentiality

protections it outlined in the law.¹ Specifically, the enabling statute states that the MHDO Board of Directors “may determine financial data submitted to [MHDO]... to be confidential information if the public disclosure of the data will directly result in the provider of the data being placed in a competitive economic disadvantage.”² Furthermore, MHDO’s own regulations contemplate balancing protection of “proprietary information” of data submitters against MHDO’s transparency activities, noting that the “MHDO will make data publically available and accessible to the broadest extent **consistent with the laws protecting individual privacy and proprietary information.**”³ Thus, the simple fact that some of the data submitted to MHDO is publicly reported on the CompareMaine website does not mean all such data is no longer proprietary.

The information submitted to MHDO unquestionably meets the regulation’s definition of “Proprietary Data” because the information is not publicly available and provides UnitedHealth Group a competitive economic advantage with its secrecy.⁴ This type of data release allows the data recipient to access competitive financial and reimbursement information paid to other provider groups that is held by payers and providers as confidential and proprietary. Its release would place UnitedHealth Group, and other payers, at a competitive economic disadvantage. As such, MHDO should set a particularly high bar for the release of such data.

UnitedHealth Group considers data submitted to MHDO to be confidential and proprietary information. It is the type of information that we would not normally disclose to outside third parties, but have done so in compliance with the State’s law and in trusting that the State will continue to protect the confidentiality of such information from improper disclosure to third parties. Regardless of historical action taken by MHDO, the information submitted is still considered by UnitedHealth Group to be confidential and proprietary; a position UnitedHealth Group has reiterated to MHDO in comments to many other prior data release applications. In addition, this type of information qualifies as a trade secret subject to protection under Maine’s Uniform Trade Secrets Act because it derives independent economic value for UnitedHealth Group from not being generally known and not being readily ascertainable by proper means by other persons; and UnitedHealth Group endeavors to maintain its secrecy.⁵

The release of this information has the potential to not only undermine UnitedHealth Group’s competitive economic advantage in its confidential, proprietary, and trade secret information, but also to cause anticompetitive harm within the Maine healthcare marketplace. For example, this type of information could be used against payers to undermine any competitive economic advantage and determine whether the healthcare provider’s pricing is above or below their competitors’ prices, to monitor the service offerings and output of current or potential competitors, and to increase their leverage in future contract negotiations with payers to extract higher prices (and thus higher health care costs for consumers).

Concerns about such anticompetitive behavior have been outlined in the Department of Justice (DOJ)/Federal Trade Commission (FTC) Statement of Antitrust Enforcement Policy in Health Care (“Statement 6”). In fact, the FTC has unambiguously opined on this very type of data disclosure, advising that the release of payer reimbursement information “may promote a level of transparency that creates

¹ 22 M.R.S. §8703(1).

² 22 M.R.S. §8707(4).

³ CMR 90-590-120(1)(1) (emphasis added).

⁴ CMR 90-590-120(2)(33).

⁵ 10 M.R.S. § 1542(4).

a significant risk of anticompetitive harm.”⁶ Similarly, the FTC has noted that “[t]here is a substantial risk that greater price transparency in contracted health care markets may impede, rather than enhance, the ability of [health plans] to selectively contract with health care providers and to negotiate lower reimbursement rates.”⁷

Merely because MHDO is not aware of anticompetitive effects from such data releases, does not mean that anticompetitive effects have not occurred in the Maine marketplace or that such effects could not happen. In fact, a recent study by the Health Affairs Journal found that hospital prices have grown at a much faster rate than physician prices since 2007, likely due to the increased bargaining leverage of hospitals as compared to physicians.⁸ Furthermore, Statement 6 does not absolve a party releasing data from weighing potential anticompetitive effects simply because the releasing party believes that there is no evidence that the release the data has resulted in an anticompetitive market. Rather, the FTC/DOJ recommend a weighing of risks with every release. As noted by the FTC, the release of payers’ competitive and trade secret information could allow competitors to determine whether their pricing is above or below their competitors’ prices, to monitor the service offerings and output of current or potential competitors, and to increase their leverage in future contract negotiations (potentially leading to higher prices across the market).⁹

Ultimately, the Executive Director’s reliance on the opinions and comments of the data requester to conclude that the release would not have anticompetitive effects is misplaced. The information sought in the data release is the confidential, proprietary, and trade secret information of UnitedHealth Group and is entitled to protection as such. Further, the disclosure of such information falls squarely within the DOJ/FTC antitrust enforcement guidelines of Statement 6 and creates the risk of anticompetitive harm. For these reasons we request that the MHDO Board of Directors either (1) deny the data release altogether, or (2) withhold any and all payer and competitor provider competitive financial information, as well as provider identifiers from the data release.

Sincerely,



Katarina Horyn
Associate General Counsel

⁶ See FTC STAFF COMMENT TO THE HON. JOE HOPPE AND HON. MELISSA HORTMAN CONCERNING AMENDMENTS TO THE MINNESOTA GOVERNMENT DATA PRACTICES ACT REGARDING HEALTH CARE CONTRACT DATA (June 29, 2015).

⁷ *Id.*

⁸ Zack Cooper *et. al.*, *Hospital Prices Grew Faster than Physician Prices*, Health Affairs Journal (Feb. 2019), available at: <https://www.healthaffairs.org/doi/10.1377/hlthaff.2018.05424>; see also, Jacqueline LaPointe, *Hospital Prices Increased Faster than Physician Prices, Study Finds*, Recycle Intelligence (Feb 2019), available at: <https://revcycleintelligence.com/news/hospital-prices-increased-faster-than-physician-prices-study-finds> (noting the Health Affairs study and the recommendations from the study’s authors that policymakers should address the price growth through various options, including antitrust enforcement).

⁹ FTC, *supra* note 6.