



CONFIDENTIALITY DETERMINATION

RFP: YH24-0004 Fee for Service Pharmacy Benefit Management Services

In accordance with Arizona state rules and regulations, it is determined that the following records are confidential and exempt from public disclosure as requested by the Offeror listed above:

For the list of specific records to be kept confidential, see the detailed legal analysis contained in the Offeror's Proposal and attached here.

The Offeror has supplied acceptable documentation identifying the portions of the bid along with the specific harm or prejudice which may arise if disclosed.

DocuSigned by:

A handwritten signature in black ink, appearing to read "M. LaPorte", is positioned above a horizontal line.

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Date: 5/8/2024

Meggan LaPorte, MSW, CPPO

AHCCCS Chief Procurement Officer



Optum Rx

1600 McConnor Pkwy
Schaumburg, IL 60173

December 14, 2023

Arizona Health Care Cost Containment System
Procurement Division
801 E Jefferson St
Phoenix, AZ 85034
Attn: Toni Cota, Sr. Procurement Specialist

CONFIDENTIAL
Contains Confidential, Proprietary, and Trade Secret Information

Re: Confidential, Proprietary, and Trade Secret Information of OptumRx, Inc. ("Optum Rx") contained in Optum Rx's Proposal ("Proposal") in response to the Notice of Request For Proposal (RFP) Solicitation No. YH24-0004 for Fee-For-Service Pharmacy Benefit Management Services issued on October 20, 2023 ("RFP") by Arizona Health Care Cost Containment System ("AHCCCS").

Dear Toni Cota:

Optum Rx has identified certain portions of its Proposal as containing Confidential, Proprietary, and Trade Secret information ("Optum Rx Trade Secrets"). In compliance with the instructions of the RFP, Optum Rx has: (a) identified portions of our Proposal in which we believe to be Optum Rx Trade Secrets within both the Transmittal Letter and more specifically, herein; (b) included in this letter statements detailing the reasons for invoking the protections from non-disclosure and citing the specific applicable exempting law(s) reflecting these markings; and (c) included in the Proposal redactions protecting the confidential items. Optum Rx hereby requests that the AHCCCS specifically exempt the portions of the Proposal identified as confidential ("specified information") from public disclosure, on the grounds that such sections contain trade secret, commercial, or financial information under the Arizona Uniform Trade Secrets Act (UTSA), Ariz. Rev. Stat. § 44-401, *et seq.*, and exempt from public disclosure under the Arizona Public Records Law, Ariz. Rev. Stat. § 39-101, *et seq.*, and Arizona Procurement Code under Ariz. Rev. Stat. § 41-253(D). Such trade secrets or confidential information is sufficiently secret to derive economic value, actual or potential, from not being generally known. Optum Rx makes significant efforts to maintain the secrecy and confidentiality of this information. Optum Rx does not consent to disclosure of any information unless required to do so by law. Furthermore, release of the specified information also would harm the public interest.

To the extent any of Optum Rx's Trade Secrets are contained in any other records that the AHCCCS deems potentially responsive to a public access to records request, Optum Rx reserves the right to submit additional arguments setting forth its position that such information is exempt from disclosure under Arizona law or Federal law. Additionally, to the extent the AHCCCS disagrees with or rejects any of Optum Rx's arguments for nondisclosure, Optum Rx requests that it be given notice and an opportunity to seek appropriate relief from such public access.

Request for Exemption

The Proposal contains proprietary and confidential commercial, financial, and pricing terms that constitute trade secrets belonging to Optum Rx and that would cause substantial competitive disadvantage to Optum Rx if disclosed, and are thus exempt from disclosure under the confidentiality exemption of Arizona's Public Records Law, Ariz. Rev. Stat. § 39-101, *et seq.* See *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 348 (Ariz. App. 2001); moreover, the Arizona Supreme Court in *Carlson v. Pima County* held that, "[f]or purposes of inspection and access, all records required to be made and maintained by § 39-121.01(B) and preserved by (C) are to be available for inspection under §

39-121 and copying under § 39-121.01(D), subject to the official's *discretion to deny or restrict access* where recognition of the interests of privacy, confidentiality, or the *best interest of the state* in carrying out its legitimate activities outweigh the general policy of open access." *Carlson v. Pima County*, 141 Ariz. 487, 491 (Ariz. 1984) (emphasis added). This information constitutes protected trade secrets under the UTSA, Ariz. Rev. Stat. § 44-401, *et seq.*

The specified information is also specifically exempt from disclosure because it constitutes trade secret information under UTSA, Ariz. Rev. Stat. § 44-401, *et seq.* "Trade secrets" under the Act, "means information, including a formula, pattern, compilation, program, device, method, technique, or process, that both:

- (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.
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ariz. Rev. Stat. § 44-401(4). Specifically, to be protected as trade secret, so long as the information remains secret, "as well as the competitive advantage afforded by it... Because the hallmark of a trade secret obviously is its secrecy, not only must the subject-matter of the trade secret be secret, it must be of such a nature that it would not occur to persons in the trade or business." *Enter. Leasing Co. v. Ehmke*, 197 Ariz. 144, 149 (Ariz. App. 1999) quoting *Wright v. Palmer*, 464 P.2d at 366 (Ariz. App. 1970). The specified information meets each of the criteria set forth in the UTSA, and therefore constitutes trade secret information that if disclosed would cause harm to Optum Rx by way of competitive disadvantage. Exempting this confidential commercial and trade secret information is also sound policy, as release of the information would result in harm to the public interest. Therefore, the specified information should remain confidential and exempted from public disclosure under Arizona's Public Records Law.

I. **The Specified Information Is Exempt From Disclosure Because It Constitutes Trade Secret Information Under Arizona Law**

There is no doubt that the designated information included in the Proposal is a combination of formulas, specific contracts and terms, and other proprietary methods and strategies reflected in the Proposal and satisfies the two factors of the definition of trade secrets. Ariz. Rev. Stat. § 44-401(4).

With regard to factors set forth in subsection (a), the specified information is highly valuable to Optum Rx's competitors and Optum Rx has invested heavily to develop, compile, and manage the specified information. Ariz. Rev. Stat. § 44-401(4)(a). Optum Rx goes to great lengths to ensure that the public and its competitors do not gain access to the specified information. *Id.*; *Enterprise*. at 149, quoting the Uniform Trade Secrets Act § 1 comment ("Information is considered public knowledge if it is available in trade journals, reference books or published materials, or if it is known to principal trade persons who can obtain an economic benefit from the information and are aware that the information is not a trade secret."). Optum Rx has spent a significant amount of money to develop this information, and to use it effectively to customize its proposals to clients like the AHCCCS. See, e.g., *Am. Bldg. Maint. Co. v. Acme Prop.*, 515 F. Supp. 2d 298, 308 (N.D.N.Y. 2007) (information related to the customization of a business's services to meet its clients' needs eligible for trade secret protection). Disclosure of the specified information would deprive Optum Rx of the benefits of its investment and effort. Neither the public nor Optum Rx's competitors have access to the unique performance criteria, client-specific services, or performance guarantees contained within the Proposal. Internally, Optum Rx also treats this information as confidential. The information is known only to senior management, underwriting, the account manager, the accounting and finance departments, and select legal personnel. See *Enterprise* at 150 (indicating that trade secret protection is indefinite, so long as the information is kept confidential, even with respect to stale pricing); *Id.* (finding that the pricing "[w]orksheet as a whole is an original product containing an arrangement of factors that provides *Enterprise* with a competitive advantage," where only those commercial secrets where competitive disadvantage is shown will qualify as a trade secret.). Because this information is not publicly known or readily ascertained from other sources, it meets these trade secret factors.

With regard to subsection (b), Optum Rx takes great care to ensure that the specified information is kept secure. Ariz. Rev. Stat. § 44-401(4)(b). Optum Rx secures the computer systems on which the specified information is stored and requires its employees to sign confidentiality agreements to maintain the secrecy of that information. See, e.g., *Id.*; *Saunders v. Florence Enameling Co.*, 540 So. 2d 651, 654 (Ala. 1988) (finding an employment manual, instructing confidentiality, restrictions for newly hired employees, and protective measures taken when visitors came through the plant, sufficient to meet the requirement of a trade secret); *Field Maint. & Fabrication LLC v. Kilough*, No. 2:18-cv-581-GMB (M.D. Ala. Jan. 29, 2019) (holding that plaintiff had taken "reasonable measures" to protect trade secrets after examining overall protections the company took to protect its information); *PQ Labs, Inc. v. Qi*, No 12-0450-2014

U.S. Dist. LEXIS *11769, at *10 (N.D. Cal. Jan. 29, 2014) (security measures such as controlling access to information and requiring employees to sign confidentiality agreements were reasonable, supporting finding of trade secret nature of information); *USI Ins. Services LLC v. Miner*, 801 F. Supp. 2d 175, 196 (S.D.N.Y. 2011) (requiring employees to sign confidentiality agreements and securing electronically stored information are significant measures designed to ensure the confidentiality of trade secret information); *Norbrook Labs. v. G.C. Hanford Mfg. Co.*, 297 F. Supp. 2d 463, 488 (N.D.N.Y. 2003) (“need to know” access policy and employee confidentiality agreements supported finding that information was a trade secret). Further, Optum Rx require auditors and consultants retained by customers of Optum Rx to sign confidentiality agreements before being provided access to any such confidential information. Optum Rx also requires any third-party performing consulting or auditing functions to establish appropriate “firewalls” so that the auditing side of the business cannot secure such confidential information with the consulting side of the business. Finally, when Optum Rx receives notice that its confidential trade secret information is the subject of a records request, it routinely seeks to enforce its legal rights to protect the information, as it is doing here. In short, Optum Rx goes to great lengths to protect the information designated as Optum Rx Trade Secrets, as it is the lifeblood of Optum Rx’s business.

In sum, the specified information meets each of the factors in Arizona’s Uniform Trade Secrets Act, and constitutes trade secrets, that if disclosed would cause substantial competitive disadvantage to Optum Rx and is therefore exempt from disclosure under the confidentiality exemption of Arizona Public Records Law. Numerous courts nationwide have found that confidential commercial, financial and business information—similar to Optum Rx’s specified information—constitute trade secrets and/or is exempt from disclosure under various public records laws. See *Johnson Service Group, Inc. v. France*, 763 F. Supp. 2d 819, 830 (N.D. Tex. 2011) (information about a company’s bargaining positions protectable as trade secrets under Illinois law). In *Pharmacy Associates*, the Supreme Court of Arkansas found that it was appropriate for a state agency to redact certain rebate and other financial and confidential commercial information that the winning bidder, Medco, designated as proprietary before producing it in response to a freedom of information request. Numerous other courts have found that similar proprietary confidential commercial information constitute trade secrets exempt from disclosure under the law. The subsections below identify the categories of Optum Rx Trade Secret Information in the Proposal that, if disclosed, would create a likelihood of substantial competitive disadvantage to Optum Rx.

a. Pricing

Optum Rx provided detailed pricing in its Proposal. In these areas, knowledge of our pricing would allow competitors to undercut us and to know exactly what they need to bid to be competitive with us. As with other PBMs, Optum Rx’s pricing information includes pricing discounts for specific drug prices, rebate amounts, performance guarantee penalty amounts and pricing for other services that are provided as part of the Proposal. Details of the pricing package will also include criteria for applying MAC pricing to certain generic drugs, methods for developing MAC pricing and other pricing-related features of the proposal, such as return-on-investment (ROI) guarantees. In some cases, the way that certain terms are defined or limited also forms the basis for the pricing terms of the contract. All the individual pricing elements together form the basis of Optum Rx’s overall Proposal pricing. Disclosure of information regarding prices charged for additional services, such as ad-hoc reporting or plan setup would reveal our underlying pricing strategy and should be excluded from disclosure the same as any other pricing component. All pricing information related to the Proposal reflects pricing methodologies that are trade secrets of Optum Rx and these sections include confidential commercial and financial information. Within the Proposal, representative examples of this category of specified information include the following items indicated in the Transmittal Letter, but are not limited to:

- B3 Attachment 1 – Price (all Optum Rx responses, Att 1 Pricing Schedule Tab); B5 Attachment 3 – Performance Guarantees Matrix, (All Optum Rx amounts at risk, Part 1 Operational Tab); B5 Attachment 3 – Performance Guarantees Matrix, (All Optum Rx amounts at risk, Part 2 Implementation & Pricing Tab); B7 Attachment 5 – Offeror’s Maximum Allowable Cost List (entire list, Sheet 1); and B14 Arizona Health Pricing Summary (entire summary, Pg 1-5).

b. Proprietary Reports and Documentation, Including Operational Information

In general, Optum Rx regards the format and language of its proprietary reports and unique contract provisions to be confidential and trade secret expressions of the Optum Rx methodologies for performing its business. Specifically, the sample reports and performance guarantee requirements reflect business processes and practices developed by Optum Rx, that are expensive to develop and are kept confidential between Optum Rx and its customers. Viewing these report formats (even with sample information) and analyzing the ways in which Optum Rx guarantees its operational performance would cause substantial financial and competitive disadvantage to Optum Rx. Within the Proposal,

representative examples of this category of specified information include the following items indicated in the Transmittal Letter, but are not limited to:

- B5 Attachment 3 – Performance Guarantees Matrix, (All Optum Rx agreed to or modified metrics, Part 1 Operational Tab); B5 Attachment 3 – Performance Guarantees Matrix, (All Optum Rx agreed to or modified metrics, Part 2 Implementation & Pricing Tab); B11 Drug Monograph Samples (all samples, Pg 1-31); B12 Therapeutic Review Class Samples (all samples, Pg 1-132); B13 Reporting Samples (all samples, Pg 1-108); and B14 Arizona Health Pricing Summary (entire summary, Pg 1-5).

There are a variety of confidential operational statistics that constitute company trade secrets. Specifically, statistics about the performance of our retail network and our processes around developing generic and specialty drug pricing strategies would cause competitive disadvantage to Optum Rx if it were to be released. Furthermore, business processes related to payment timing, rebate payments and formulary development are essential components to Optum Rx's operational offerings. This would cause substantial competitive injury to Optum Rx if disclosed. Within the Proposal, representative examples of this category of specified information include the following items indicated in the Transmittal Letter, but are not limited to:

- B2 Narrative Proposal – Experience and Expertise, Organizational Chart (entire chart, Pg 5); B7 Attachment 5 – Offeror's Maximum Allowable Cost List, (entire list); and B8 Offeror's Organizational Chart (entire chart, Pg 1).

c. References/Customer Information

In addition to the above, Optum Rx provided the AHCCCS with contact information for other clients of Optum Rx for reference purposes. The names and contact information relating to Optum Rx's other customers constitutes a partial customer list of Optum Rx, which is a trade secret of Optum Rx. Optum Rx has spent a significant amount of time and money to market to its customers. Disclosure of Optum Rx's customers list would unfairly benefit Optum Rx's competitors by allowing those competitors to target offers specifically Optum Rx's customers without undertaking the efforts and related costs typically required to identify and market to potential customers. Within the Proposal, representative examples of this category of specified information include the following items indicated in the Transmittal Letter, but are not limited to:

- B2 Narrative Proposal – Experience and Expertise (References – Pg 2-3); B2 Narrative Proposal – Experience and Expertise (References – Pg 17-20); and B4 Offeror's Medicaid State References (Pg 1 - 14).

d. Detailed Personnel/Employee Information

Moreover, Optum Rx's Proposal provided identities and detailed biographical information regarding relevant employees. Optum Rx considers its personnel to be key assets of its business and keeps information about them confidential. Optum Rx is vigilant in protecting against raiding of its employees, including requiring employees to sign an employment agreement with a provision prohibiting the employee from soliciting other employees for outside work opportunities for a year after the employee leaves Optum Rx. Optum Rx believes disclosure of its employee information would deprive Optum Rx of the benefits of its time and expense invested to recruit employees and develop talent. Within the Proposal, representative examples of this category of specified information include the following items indicated in the Transmittal Letter, but are not limited to:

- B2 Narrative Proposal – Experience and Expertise (Key Personnel, Pg 6-16); and B9 Offeror's Resumes of Key Personnel (Pg 1-12).

II. The Specified Information Is Exempt From Disclosure Because Disclosure Is Detrimental To The Public Interest.

Nondisclosure of the specified information must also be determined by AHCCCS under Arizona's Public Records Law, Ariz. Rev. Stat. § 39-121, to be in the best interest of the public. See *Carlson, supra*, where the custodian of the public records has the authority to exempt record for matters of privacy or if in the best interest of the state. First, disclosure of the confidential pricing and other highly competitive commercial and financial information contained in the specified information would likely diminish the incentive for suppliers to offer rebates or price incentives to any particular PBM company, such as Optum Rx. Without these rebates or incentives, Optum Rx would be forced to increase charges

to its customers, including AHCCCS, who would in turn have to increase charges to its plan participants. See, e.g., February 11, 2005 Tex. Att’y Gen. decision No. OR2005-01293 (in response to public records request calling for similar PBM contract involving Teachers Retirement System (“TRS”) for the State of Texas, both TRS and the PBM sought to redact similar specified information. The Attorney General found that TRS “has demonstrated that public release of the information at issue would cause specific harm to [TRS’s] interests in particular competitive bidding situations.” Accordingly, the Attorney General found that the information was properly redacted.).

Second, the public interest at large would be further harmed because Optum Rx and its competitors would be reluctant (and perhaps unwilling) to offer its most favorable and aggressive pricing structures to customers in the State of Arizona if those price structures and other information were ultimately only going to be falling into its competitors’ hands. See, e.g., *Orion Research Inc. v. EPA*, 615 F.2d 551, 554 (1st Cir. 1980) (bidder’s confidential information properly protected under federal Freedom of Information Act; otherwise “competing firms would be less likely to include novel ideas in their responses to solicitations”).

CONCLUSION

Simply put, commercial Optum Rx Trade Secret information contained in the Proposal is the lifeblood of Optum Rx’s business, is not known to the public nor Optum Rx’s competitors, is kept under lock and key, and would cause substantial financial injury and competitive disadvantage to Optum Rx if disclosed. Accordingly, and under the authority of Arizona Law and case law from across the country, Optum Rx hereby requests that the AHCCCS specifically exempt the specified information of the Proposal identified as confidential from public disclosure, on the grounds that such sections constitute trade secret, commercial, or financial information which are proprietary or otherwise confidential, and produce only a redacted version of the Proposal in future response(s) to the Proposal public requests.

In sum, if the AHCCCS receives a request for a copy of the Proposal, including Optum Rx Trade Secrets, Optum Rx requests that the AHCCCS provide written notice of such request prior to making the material public so that Optum Rx may provide justification in support of its assertion that such information is exempt from disclosure pursuant to the confidentiality exemption of Arizona’s Public Records Law, Ariz. Rev. Stat. § 39-101, *et seq.*, and any other applicable law. Such written notice should be provided to: OptumRx, Inc., Attn: General Counsel, 1600 McConnor Parkway, Schaumburg, IL 60173. Please feel free to contact me should you have any questions regarding this letter at (952) 687-4084 or sharla.rosen@optum.com.

Regards,



Sharla R. Rosen
Associate General Counsel
OptumRx, Inc.