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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB09

April 22, 2021

VIA EMAIL

Mackenzie H. Wrobel
Duane Morris
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RE: FOIA Petition Regarding the Delaware Department of Insurance

Dear Ms. Wrobel:

We write in response to your correspondence, on behalf of your client, GEICO Corporation, alleging that the Delaware Department of Insurance (“Department”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with your request for records. We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. As discussed below, we find that no violation of FOIA occurred as alleged.

BACKGROUND

You submitted a FOIA request to the Department on behalf of GEICO Corporation¹ on March 19, 2020, seeking sixteen separate categories of records dated from January 1, 2017 to the present:

¹ The Response defines “GEICO,” and we adopt the same meaning here for purposes of this Opinion: “GEICO Corporation, a Delaware corporation, is the direct corporate parent of GEICO General Insurance Company, the defendant in the Green Litigation, as well as the direct parent of the seven GEICO entities involved in the Department Hearing. Neither the GEICO entity in the Green Litigation or the seven GEICO entities involved in the Department Hearing are Delaware

1. All Public Records relating to the communications between the DOI and the law firm of Cross & Simon, including any partner, associate, employee, representative, agent, or expert witness or consulting expert retained by, or purporting to work on behalf of, Cross & Simon or any of its clients relating to any litigation or regulatory matter involving GEICO.
2. All Public Records relating to compliance with Delaware Professional Code of Conduct Rule 1.11 concerning Michael Vild's employment with Cross & Simon beginning in 2019 following his previous employment as Director of Fraud and Consumer Protection of the Division of the Delaware Department of Justice and former Deputy Insurance Commissioner of the Delaware Department of Insurance.
3. All Public Records relating to the Re-Opened Market Conduct Examination Report as of March 31, 2018 for GEICO.
4. All Public Records relating to any regulatory investigation of GEICO.
5. All Public Records relating to any consumer complaint regarding GEICO relating to [Personal Injury Protection ("PIP")] coverage.
6. All Public Records relating to any health care provider complaint regarding GEICO relating to PIP coverage.
7. All Public Records relating to the DOI and Delaware Senate Bill 161 introduced on March 20, 2018.
8. All Public Records relating to health care cost containment measures proposed, adopted, evaluated, or considered by the DOI relating to workers' compensation insurance.
9. All Public Records relating to health care cost containment measures proposed, adopted, evaluated, or considered by the DOI relating to PIP coverage.
10. All Public Records relating to communications between the DOI or its employees, examiners, agents, representatives or appointees (including, but not limited to, Kathleen Patrice Makowski) and the Delaware Compensation Review Board and/or Optum.

entities. In addition to representing GEICO Corporation with respect to the FOIA Request, Duane Morris also represents all seven GEICO entities involved in the Department Hearing. The Department herein refers to GEICO Corporation and all GEICO entities involved in both the Green Litigation and the Department Hearing collectively as 'GEICO.'" Response, p. 1.

11. All Public Records relating to communications of the DOI or its employees, examiners, agents, representatives, or appointees (including, but not limited to, Kathleen P. Makowski), both internal and external, relating to any investigation of GEICO after March 31, 2018.
12. All Public Records relating to the DOI's interpretation of 18 Del. Code § 321.
13. All Public Records relating to communications between the DOI and Delaware attorney (and former judge) Joshua Martin.
14. All Public Records relating to Kathleen Makowski's e-mail dated February 24, 2020 to GEICO counsel Damon Vocke.
15. All Public Records relating to any one or more answers to the questions GEICO posed in writing relating to the Re-opened Market Conduct Examination Report, as set forth in its November 6, 2019 correspondence from GEICO counsel Oderah Nwaeze to Frank Pyle.
16. All Public Records sufficient to identify any administrative hearing ever set by the Delaware Department of Insurance pursuant to Title 18 Del. Code § 321 in the absence of a final, verified Examination Report under oath.²

The Department denied the request for records on March 2, 2021, noting it had no records responsive to items 2 and 16 and that the remaining records were exempt from FOIA's definition of "public record."³ The Department cited the pending or potential litigation exemption for every remaining item and claimed that requests 3 through 13 were overbroad. The Department also stated the attorney-client privilege applied to items 1 and 7 through 15 and the investigatory files exemption applied to items 4 through 6 and 11. Finally, the Department denied access to items 3, 4, 14, and 15 pursuant to 29 *Del. C.* § 10002(1)(6), as 18 *Del. C.* § 321(g) exempts examination work papers, and stated records for item 13 are also exempt from disclosure, as they are attorney work product. The Department prefaced its itemized response with an explanation of each exemption. This Petition followed.

The Petition alleges that the Department's response to your request was inadequate because the Department made boilerplate objections that failed to meet its burden of proof and cited improper exemptions. Regarding the two matters the Department relies on, you state that the *Yvonne Green, et. al. v. GEICO General Insurance Company*, C.A. No. N17C-03-242 (Del. Super.) ("Green Litigation") does not include the Department as a party, and the second case, an administrative hearing with the Department regarding the Department's examination of GEICO, has not been scheduled for over a year due to the COVID-19 pandemic. You state that this hearing concerns "GEICO's exercising of its right to challenge and rebut certain findings and conclusions

² Petition, Ex A.

³ *Id.*, Ex. B.

made by the Department within the Market Conduct Examination Report issued in draft form, and not under oath.”⁴ You contend that with the Department’s wholesale denial, “one cannot determine which requests the Department believes the Administrative Hearing is applicable,” and to meet its burden, the Department must at least designate which case applies to each of the requests in which the pending or potential litigation is asserted and demonstrate the clear nexus between the documents sought and the specific litigation.⁵

The Petition also maintains the Department improperly cited the overbreadth of a request as a means to deny access to records, noting that an undue administrative burden has been specifically rejected by this Office as a basis to deny a request. Relying on 18 *Del. C.* § 321(g) is also improper in your view, as the right of confidentiality for examination work papers belongs to the company who is the subject of the examination, and you believe the statute permits disclosure to GEICO with its prior written consent. The Petition also challenges the assertions of the investigatory files exemption because the exemption is inadequately explained; the Department failed to cite to an ongoing investigation; and it is “unclear how the existence of an incoming complaint is *per se* an investigatory file for law enforcement purposes.”⁶ Finally, the Petition alleges that the Department’s reliance on attorney-client privilege is inappropriate as the denial offered no reasons or explanation of its reliance on the exemption, and the exemption was asserted for communications involving the plaintiff’s counsel in the Green Litigation.

On April 5, 2021, the Department’s counsel replied to your Petition (“Response”). The Department argues that it satisfied its burden of proof under FOIA as it “need only provide a reason when it denies a FOIA request,” and the burden of proof cited in 29 *Del. C.* § 10005(c) is not triggered until the denial is challenged.⁷ For all items except items 2 and 16, the Department relies on the pending or potential litigation exemption to deny access to the records. The Department presents a detailed history of the events leading up to this FOIA request, response, and petition. The Green Litigation has been ongoing in Superior Court for the past several years, and in 2017, GEICO offered a Department report to the court regarding GEICO’s handling of PIP claims into evidence. To clarify alleged “misstatements,” the Department submitted a letter to court, indicating it would consider further examination of GEICO for these issues.⁸ In May 2018, the Department re-opened its PIP report on GEICO. The Department was provided with the copies of relevant documents in the Green Litigation to aid in its examination and agreed to maintain them as confidential under 18 *Del. C.* § 321(g). The Department re-issued its examination report, and GEICO then requested a hearing about this re-issued report under 18 *Del. C.* § 321(g), which is the very same hearing that Department cites to in order to assert the pending litigation exemption. Thereafter, GEICO filed suit against the Department in the Court of Chancery in *Government*

⁴ *Id.*, p. 4.

⁵ *Id.*, p. 5.

⁶ *Id.*, p. 7.

⁷ Response, p. 6.

⁸ *Id.*, p. 3.

Employees Ins. Co., et. al. v Trinidad Navarro, C.A. No. 2020-0187 (Del. Ch.) (“Chancery Court Case”) to stop the scheduling of the hearing. On March 19, 2020, the same day this request was filed, GEICO voluntarily dismissed its Chancery Court Case.

The Department explains that while these two matters focus on different statutory schemes, both the Green Litigation and the Department’s administrative hearing address the same overall topic – whether GEICO appropriately implements the “Rules,” or “two computer-based algorithms . . . which GEICO applies to PIP claims.”⁹ The Response cites court records from the Chancery Court Case, in which GEICO counsel conceded this point.¹⁰ The Department emphasizes that this FOIA request for records inappropriately end runs the discovery process available in the pending Green Litigation and the administrative hearing process associated with the Department’s hearing, seeking these records, not as a citizen observing the performance of its public officials, but solely to advance its litigation position.

Regarding the other exemptions, the Department also maintains that the 18 *Del. C.* § 321(g) does not allow disclosure of records responsive to items 3, 4, 14, and 15, as the statute specifically states records may only be released to “insurance departments of any state or country, or to law-enforcement officials of this or any other state or agency of the federal government at any time” under certain conditions. The Department contends that the investigatory files exemption applies to those requests for investigatory records, beginning with the first notice of an allegation and even after an investigation is closed. Finally, the Department notes that the attorney-client privilege is also applicable to items 1 and 7 through 15, as responsive records may include “communications between or among the Department’s counsel, examiners, or the former Deputy Insurance Commissioner.”¹¹

DISCUSSION

FOIA’s express purpose is to allow Delaware citizens to observe and monitor its public officials in order to hold its government accountable.¹² FOIA mandates that a public body provide citizens with access to its public records for inspection and copying, but certain records are exempt from the definition of “public record.”¹³ In this petition process, the public body has the burden

⁹ *Id.*, p. 2.

¹⁰ *Id.*, p. 2, 4.

¹¹ *Id.*, p. 9.

¹² 29 *Del. C.* § 10001.

¹³ *See* 29 *Del. C.* §§ 10002, 10003(a).

of proof to justify its denial of access to records.¹⁴ The representations of the public body's legal counsel may satisfy this burden.¹⁵

As a preliminary matter, the Petition argues that the Department fails to satisfy its burden by providing boilerplate objections without adequate explanation of its reasons for denying access to records. A public body is required to give a reason for its denial of the request.¹⁶ A public body is not required to cite a specific exemption in its response, but to deny access, the records must be excepted from the public's right of access.¹⁷ In this instance, the Department provided reasons for denying access to each of the sixteen items requested, citing applicable exemptions and other reasons for denial and prefacing this response with a more detailed explanation for each reason. Although we generally encourage public bodies to include as much detail as possible when denying a request, the Department in this case satisfied FOIA's requirement by citing to the basis or exemption serving as its reason for denying the request and as set forth below, we determine several of these exemptions are applicable.

The Petition does not contest the Department's assertions that it has no responsive records to items 2 and 16 but instead challenges the Department's remaining reasons for denial. We discuss each in turn below.

Overbreadth

The Department's response denies items 3 through 13 for being overly broad requests lacking sufficient specificity. The FOIA statute states that a request must "adequately describe the records sought in sufficient detail to enable the public body to locate such records with reasonable effort," and that "the requesting party shall be as specific as possible when requesting records."¹⁸ The statute permits the public body to request additional information in order to locate the records.¹⁹ While these items may be so broad as to require additional information from you for

¹⁴ 29 *Del. C.* § 10005(c).

¹⁵ *Judicial Watch, Inc. v. Del. Dep't of Justice*, 2021 WL 22550, at *5 (Del. Super. Jan. 4, 2021) (accepting the representations of the public body's attorney to meet the public body's burden of proof under FOIA).

¹⁶ 29 *Del. C.* § 10003(h)(2) ("If the public body denies a request in whole or in part, the public body's response shall indicate the reasons for the denial.").

¹⁷ *See, e.g., Del. Op. Att'y Gen.* 16-IB02, 2016 WL 1072888, at * 2 (Jan. 14, 2016) ("While section 10003(h)(2) does not require a public body to cite a specific exemption, Delaware courts have determined that records must be made available for public inspection unless FOIA provides an exception to the public right of access.").

¹⁸ 29 *Del. C.* § 10003(f)(2).

¹⁹ *Id.*

the Department to locate records responsive to these requests, as noted below, we find at least one exemption was appropriately invoked for all these items, so we need not address this issue further.

Pending or Potential Litigation Exemption

The Department asserts the pending or potential litigation exemption for items 1 and 3 through 15 to deny access to the requested documents. Pursuant to Section 10002(1)(9), any “records pertaining to pending or potential litigation which are not records of any court” are exempted from the definition of public record.²⁰ To maintain an even playing field, “Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court’s rules of procedure.”²¹ The exemption applies where litigants are seeking information that might help them in litigation.²² To determine whether the pending litigation exemption applies, we must determine first, whether the subject proceedings qualify as pending litigation and second, whether the records requested pertain to the litigation.²³

First, we consider whether the administrative hearing qualifies as pending litigation. This Office considers quasi-judicial proceedings “litigation” for the purposes of applying 29 *Del. C.* § 10002(1)(9),²⁴ including the “proceedings of administrative bodies that in essence determine legal rights outside the traditional court of law.”²⁵ This administrative hearing will be conducted by a hearing officer in accordance with the Delaware Administrative Procedures Act and the Delaware Insurance Code to consider the Department’s examination report of GEICO.²⁶ Consistent with our prior opinions on this issue, the Department’s administrative hearing is a quasi-judicial proceeding that qualifies as pending litigation.²⁷

²⁰ 29 *Del. C.* § 10002(1)(9).

²¹ *Mell v. New Castle Cnty.*, 835 A.2d 141, 147 (Del. Super. 2003) (citation omitted).

²² *Office of the Pub. Def. v. Del. State Police*, 2003 WL 1769758, at *3 (Del. Super. Mar. 31, 2003).

²³ *Grimaldi v. New Castle Cnty.*, 2016 WL 4411329, at *9-10 (Del. Super. Aug. 18, 2016) (citation omitted).

²⁴ *Del. Op. Att’y Gen.* 03-IB10, 2003 WL 22931612, at *4-5 (May 6, 2003).

²⁵ *Del. Op. Att’y Gen.* 03-IB26, 2003 WL 22931613, at *1-2 (Nov. 13, 2003) (citation omitted).

²⁶ Response, p. 2, 4.

²⁷ See, e.g., *Del. Op. Att’y Gen.* 19-IB65, 2019 WL 6839916 (Nov. 25, 2019) (personnel board); *Del. Op. Att’y Gen.* 19-IB16, 2019 WL 4538301 (Mar. 22, 2019) (FOIA petition process under 29 *Del. C.* § 10005); *Del. Op. Att’y Gen.* 18-IB52, 2018 WL 6591817 (Nov. 29, 2018) (environmental appeals board); *Del. Op. Att’y Gen.* 04-IB04, 2004 WL 335476 (Feb. 5, 2004) (arbitration); *Del. Op. Att’y Gen.* 03-IB10, 2003 WL 22931612 (planning board).

Second, with regard to the Green Litigation, the parties do not dispute that this litigation is pending and GEICO is a litigant in that case, but the Petition argues that the pending litigation exemption cannot be asserted unless the Department is also a party to the Green Litigation. A 2017 Attorney General Opinion addressed a similar scenario and found that FOIA was not the appropriate vehicle to seek discovery from a state entity; instead, the requesting party in that case must use the court's processes to obtain records through a subpoena or other appropriate discovery request.²⁸ This Office emphasized in its reasoning that the FOIA process is not intended to aid litigants in advancing their litigation and acknowledged its deference to the judiciary in monitoring this discovery process.²⁹ Here, the Green Litigation is a pending action to which your client is a party, and your client may issue subpoenas or other appropriate discovery requests to the Department for the records it seeks in that litigation, notifying all other parties as the Court rules require.³⁰ We find that these proceedings qualify as pending litigation for purposes of the pending or potential litigation exemption.

Having found that both the Green Litigation and the Department's administrative hearing qualify as pending litigation, we must determine whether the records sought pertain to this pending litigation. For the exemption to apply, "there must be a sufficient nexus between the records requested under FOIA and the subject matter of the litigation."³¹ In reviewing this nexus, we consider the timing and nature of the requests in regard to this pending litigation.³² A direct connection between the records and the specific claims is not necessary; even materials that are indirectly helpful to the litigation still pertain to the litigation and are considered exempt.³³ The Department's counsel states that the "issue central to both the Green Litigation and the Department hearing is whether GEICO's implementation of the Rules violates Delaware law," in relation to its PIP claims.³⁴ In the Response, the Department's counsel gives a detailed explanation of the Green

²⁸ *Del. Op. Att'y Gen.* 17-IB24, 2017 WL 3426264 at *2 (July 14, 2017).

²⁹ *Id.*; see also *Koyste v. Del. State Police*, 2001 WL 1198950, at *3 (Del. Super. Sept. 18, 2001) (allowing litigant to bypass the normal discovery channels "could interfere or render meaningless" discovery rules).

³⁰ Response, p. 2, 7.

³¹ *Del. Op. Att'y Gen.* 03-IB21, 2003 WL 22669566, at *2 (Oct. 6, 2003).

³² *Del. Op. Att'y Gen.* 03-IB10, 2003 WL 22931612, at *5 ("We determine that there is a sufficient nexus based both on the timing of your FOIA request and the nature of the documents requested.").

³³ *Office of the Pub. Def.*, 2003 WL 1769758, at *2 ("So whether the Public Defender needs the materials either to defend specific clients or train assistant public defenders, the Public Defender's motive is litigation related, and not a means of advancing the Act's purposes.").

³⁴ Response, p. 2.

Litigation, the Chancery Court Case that your client filed against the Department and recently dismissed, and these cases' connections to the Department's administrative hearing. Considering the timing, nature, and context of these requests, it is difficult to fathom that GEICO is making these requests for any purpose other than in aid of its litigation.³⁵ In the midst of the Green Litigation and upcoming administrative hearing, your request seeks records related to the same matters in consideration thereunder or information that may be indirectly helpful.³⁶ On this record, we find a sufficient basis to conclude that your FOIA request either directly or indirectly advances your client's litigation position and therefore, pertains to the both the Green Litigation and the upcoming administrative proceeding.

In sum, this request is not the "request of a typical citizen trying to know what the government is up to."³⁷ The factual record demonstrates these requests are aimed to advance your client's position in litigation, and it is well-settled in Delaware that using FOIA for this purpose is contrary to the objectives of FOIA, especially when your client has the opportunity to make these same requests using the proper discovery tools in the pending litigation.³⁸ Based on the foregoing, we find the Department appropriately denied access to the identified items pursuant to the pending or potential litigation exemption in 29 *Del. C.* § 10002(1)(9).

Statutory Exemption for Examination Work Papers

Section 10002(1)(6) exempts any records "specifically exempted from public disclosure by statute or common law." In this case, the Department points to 18 *Del. C.* § 321(g), which prohibits public disclosure of working papers, recorded information, and other documents produced by, obtained by, or disclosed to the Insurance Commissioner or any other person during an examination of an insurance company. The statute permits an exception to this nondisclosure requirement to allow access to the work papers to certain parties, including other state and national insurance departments or certain law enforcement agencies, if those entities agree to maintain the confidentiality of the records or if the subject company consents to waive that confidentiality. The Department's counsel affirms that records subject to this statute are the Department's work product

³⁵ Timing-wise, GEICO's actions pursuant to FOIA seem to have particular significance, often falling on dates in conjunction with a significant step in litigation. On the same day that GEICO dismissed its Chancery Court case against the Department, this request was filed. On the same day an order addressing motions for summary judgment is issued in the Green Litigation, this Petition was filed. Response, p. 5.

³⁶ Response, p. 2-7.

³⁷ *Office of the Pub. Def.*, 2003 WL 1769758, at *2.

³⁸ See, e.g., *Office of the Pub. Def.*, 2003 WL 1769758, at *2; *Koyste*, 2001 WL 1198950, at *3; *Del. Op. Att'y Gen.* 17-IB24, 2017 WL 3426264, at *2 ("What is well-settled, however, is the Delaware courts' strong opposition to allowing litigants to use FOIA as a means to advance their existing litigation position.").

and it is the Department's right to claim this privilege, as it did here, to preclude disclosure of the records.³⁹ Accordingly, we determine that the Department's assertion of this exemption for items 3, 4, 14, and 15 is appropriate.

Investigatory Files Exemption

The Department is vested with the law enforcement authority to regulate insurance companies.⁴⁰ The investigatory files exemption excludes from the definition of public records "[i]nvestigatory files compiled for civil or criminal law-enforcement purposes."⁴¹ The exemption applies to complaints, and the exemption continues to apply even after the investigation is closed.⁴² As such, we find that the Department counsel's assertion of this exemption for investigatory records in items 4, 5, 6 and 11 is appropriate pursuant to investigatory files exemption contained in 29 *Del. C.* § 10002(1)(3).⁴³

CONCLUSION

For the reasons set forth above, we find that the Department did not violate FOIA as alleged in the Petition.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

³⁹ Response, p. 8.

⁴⁰ 18 *Del. C.* ch. 3.

⁴¹ 29 *Del. C.* § 10002(1)(3).

⁴² *News-Journal Co. v. Billingsley*, 1980 WL 3043, at *3 (Del. Ch. Nov. 20, 1980) (determining that the investigatory files exemption attaches as soon as a public body is made aware of a potential issue and the exemption survives after the investigation is completed. *see also Del. Op. Att'y Gen.* 17-IB47, 2017 WL 4652343, at *1 (Sept. 22, 2017); *Del. Op. Att'y Gen.* 05-IB16, 2005 WL 2334345, at *2 (Jun. 22, 2005); *Del. Op. Att'y Gen.* 98-IB13, 1998 WL 910199, at *1 (Dec. 8, 1998).

⁴³ We need not address the remaining exemptions of attorney-client privilege or attorney work product, as we determine at least one other exemption is applicable to each request in which these exemptions are asserted.

cc: Kathleen P. Makowski, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General