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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB05

March 4, 2022

VIA EMAIL

Michael L. Vild, Esq.
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RE: FOIA Petition Regarding the Delaware Department of Insurance

Dear Mr. Vild:

We write in response to your correspondence alleging that the Delaware Department of Insurance 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 the Department did not violate FOIA by denying access to the requested records.

BACKGROUND

On October 7, 2021, you submitted a FOIA request to the Department seeking the following records:

1. Financial statements for Brighthouse Reinsurance Company of Delaware ("BRCD") for the quarter ended June 30, 2021.
2. Annual financial statements for BRCD for the years ended December 31, 2020 and December 31, 2019.

3. Correspondence (including all attachments and exhibits) and documents related to all requests for, approval of and payment of any and all dividends by BRCD since January 1, 2017.¹

The Department denied your request in its entirety on December 9, 2021, asserting that these records are exempt. The Department indicated the first and second requests were confidential pursuant to 18 *Del. C.* § 6920 and the third category of records related to dividends was confidential pursuant to 18 *Del. C.* §§ 6920 and 321(g). In addition, because the request sought financial records about a private Delaware captive insurance company, the Department determined that this request was for a commercial or private purpose. The Department therefore also denied this request because it is not submitted for a proper purpose under FOIA. This Petition followed.

The Petition alleges that the Department's denial is improper under FOIA.² You argue that 18 *Del. C.* § 6920 does not shield the requested records as the Department contends. Section 6920 protects three categories: 1) license applications to the extent that they are reasonably designated as confidential; 2) "subchapter III" documents to the extent they are reasonably designated as confidential; and 3) examination reports and related materials. You contend that BRCD is required to file an annual report on its financial status by subchapter I, not subchapter III, so these annual financial records are not subject to the confidentiality provisions in Section 6920. You also claim that that quarterly financials are not covered by this statutory language. Even if these statements were included in Section 6920, you allege that they cannot be considered "reasonably designated as confidential" because BRCD's parent company, Brighthouse Life Insurance Company ("BLIC") and the parent company of BLIC, Brighthouse Financial, Inc., both make their annual and quarterly financial statements publicly available. "Because the Annual Financials and Quarterly Financials sought in the Request are of a kind that are regularly filed by insurance companies and readily available to the public, they are not reasonably designated as confidential simply because the filer is a captive insurance company."³ In addition, you maintain that the parent companies and the Department made public disclosures that involve BRCD, including the Department's public examination report of the parent company, BLIC. As such, you allege that the Department cannot cherry-pick information to make public while shielding some information, especially as you contend this information is needed to fully understand the disclosed information. You believe that FOIA exemptions can be waived by partial disclosure.

¹ Petition, Ex. B.

² The Petition includes a footnote requesting that the original request for records be expanded to include the most recently issued versions of the quarterly and annual financial statements that may become available since your original request. There is no basis in the statute to allow new additions to a request while a petition is under consideration, and your request to add items is respectfully declined. New requests for records under FOIA must be made directly to the Department in accordance with 29 *Del. C.* § 10003 and the Department's policy.

³ Petition, p. 3.

With respect to request for the dividend records, the Petition contends that the same reasoning applies. As some of the disclosures about the dividends are already public, including the fact that the Department approved a significant dividend, you argue that the shielding of the underlying dividend documents used to make the Department's decision is not reasonable under these circumstances, and it is inconsistent with FOIA's purpose of allowing scrutiny of the Department's acts. Finally, you assert that the purpose of your FOIA request is not relevant.

On February 14, 2022, the Department's counsel replied to your Petition ("Response"). The Department contends that it has properly denied access to the three items in your request. As 29 *Del. C.* § 10002(o)(6) exempts any records that are excluded from disclosure pursuant to a statute, the Department asserts that the requests were properly denied pursuant to the Title 18 provisions cited in its response. The Department explains that BRCD is licensed as a special purpose financial captive insurance company, and the Department has regulatory authority over this type of company. Section 6920 states, in part, that "all information and documents, and any copies of the foregoing, produced or obtained by or submitted or disclosed to the Commissioner pursuant to subchapter III of this chapter of this title that are reasonably designated as confidential by or on behalf of a special purpose financial captive insurance company. . . be given confidential treatment, . . . and may not be provided or disclosed to any other person," unless the company has given its prior written consent, or pursuant to the two exemptions for sharing records with other insurance departments or law enforcement officials. The Department claims that the requested records are confidential under 18 *Del. C.* § 6920, as they "were submitted pursuant to subchapter III of Chapter 69."⁴ The Department included the sworn statement of its Deputy Insurance Commissioner who verified that to the best of her knowledge, the Department has "never released financial related captive insurance company records without the consent of a captive owner or unless either of the two exceptions in Section 6920 (which are not applicable here) applied."⁵

The Department argues that the three items you seek constitute records submitted pursuant to subchapter III and are reasonably designated as confidential. In particular, the Department asserts that the annual financial statements are required for special purpose financial captive insurance companies through subchapter III, because Section 6953(a) of subchapter III states that "[e]xcept as otherwise provided herein, subchapters I, II, and IV of this chapter apply under this subchapter to special purpose financial captive insurance companies."⁶ Thus, the Department argues that subchapter I's annual statement requirement is incorporated into subchapter III. In addition, the Department argues that BRCD's certificate of authority issued under 18 *Del. C.* § 6955(a) in subchapter III requires BRCD to meet several conditions, including annual and quarterly financial statements, that were integrated pursuant to a separate order ("Captive Order").⁷

⁴ Response, p. 5.

⁵ *Id.*, Ex. A.

⁶ *Id.*, p. 5.

⁷ *Id.*, p. 4 ("BRCD was licensed by the Department in December 2016 pursuant to 18 *Del. C.* § 6955(a) which grants the Commissioner discretion to grant certificates of authority with 'conditions, limitations or other terms that the Commissioner considers appropriate.'").

Lastly, the Department asserts that the dividend records are submitted pursuant to 18 *Del. C.* § 6958 in subchapter III.

With respect to the requirement that these records be “reasonably designated as confidential,” the Department maintains that your arguments disregard that the parent company to BRCD is considered a traditional insurer and thus, not subject to the same statutory requirements pertaining to BRCD as a special purpose financial captive insurance company. The Department states that the requested records are reasonably designated as confidential because they are submitted by a privately held company and are proprietary private business records not otherwise required to be disclosed without the prior written consent of BRCD. The Department notes that as the traditional insurer parent company’s underlying dividend records are confidential despite the fact that the traditional insurer’s dividend amounts and other financial statements are public, it is reasonable to designate a captive insurance company’s underlying dividend records confidential.

Additionally, the Department asserts that 18 *Del. C.* § 321(g) protects the Department’s work papers related to the dividends, because that section not only applies to examination records, but also covers records produced or obtained by the Department “in the course of analysis by the Commissioner of the financial condition or market conduct of a company.” The Captive Order requires “additional submissions and the Department’s review and analysis of on-going financial operations of BRCD.”⁸ In addition, the Department asserts that it continues to perform on-going monitoring of BRCD due to the Insurance Commissioner’s order related to the change of control and ownership to the parent company, BLIC, in 2017, which featured credit-linked notes related to BRCD. The Department contends that its work papers related to the dividend records are protected by Section 321(g), as the Department analyzes the financial condition of BRCD and BLIC under these two orders (collectively, “Orders”). In sum, the Department contends that all the requested records cannot be released due to the Department’s statutory obligations and concludes that “[r]eleasing these documents without BRCD’s consent would require the Insurance Commissioner and the Department to violate its own statutes.”⁹

DISCUSSION

FOIA’s purpose is to allow Delaware citizens to observe and monitor its public officials in order to further the accountability of government to the citizens.¹⁰ Consistent with this purpose, FOIA mandates that a public body provide citizens with access to its public records for inspection and copying, but certain records and information are excluded from the definition of “public record.”¹¹ In the event a request for records is denied, the public body carries the burden of proof

⁸ *Id.*, p. 8.

⁹ *Id.*, p. 9.

¹⁰ 29 *Del. C.* § 10001.

¹¹ *See* 29 *Del. C.* §§ 10002, 10003(a).

to justify the denial of access to its records.¹² In certain circumstances, a sworn affidavit may be required to meet that burden.¹³

Under Section 10002(o)(6), “any records that are specifically exempted from public disclosure by statute or common law” are not considered public records under FOIA. The Department’s Deputy Insurance Commissioner attested that the Department possesses records responsive to your requests, but those records are confidential pursuant to 18 *Del. C.* §§ 6920 and 321(g).

The Department contends that the requested records are exempt pursuant to 18 *Del. C.* § 6920, as they constitute records submitted to the Insurance Commissioner “pursuant to subchapter III of this title that are reasonably designated as confidential by or on behalf of a special purpose financial captive insurance company.” Chapter 69 of Title 18 pertains to captive insurance companies, and subchapter III of this chapter pertains to a specific type of captive insurance company, the special purpose financial captive insurance company. The express intent of this subchapter is “to provide for an authorization process for special purpose financial captive insurance companies that is both thorough and swift, and for the ongoing regulation of such companies that recognizes and accommodates the special purpose nature of such entities.”¹⁴

We agree that the requested BRCD records are exempt as “subchapter III” records under Section 6920. Although BRCD’s requirement to file an annual financial statement appears in subchapter I, subchapter III’s Section 6953 states that all the requirements of subchapters I, II, and IV apply to special purpose financial captive insurance companies.¹⁵ The quarterly financial records are also considered a “subchapter III” record, as they were submitted pursuant to the Captive Order’s conditions, as authorized by section 6955(a) in subchapter III. In addition, BRCD’s dividend records are submitted to the Department consistent with 18 *Del. C.* § 6958, which explains the circumstances in which the dividends may be declared and paid. As all the BRCD records requested are tied to BRCD’s subchapter III obligations, they are considered records submitted pursuant to subchapter III as defined in Section 6920.

In addition, we determine that these records are “reasonably designated as confidential” within the meaning of Section 6920. The Department provided the Deputy Insurance Commissioner’s sworn statement that these records are proprietary financial and business records of a privately held company. The Department treats the financial-related captive insurance company records as confidential, as the Deputy Insurance Commissioner also attested that the

¹² 29 *Del. C.* § 10005(c).

¹³ *Judicial Watch, Inc. v. Univ. of Del.*, 2021 WL 5816692, at *12 (Del. Dec. 6, 2021).

¹⁴ 18 *Del. C.* § 6951.

¹⁵ 18 *Del. C.* § 6953(a) (“Except as otherwise provided, subchapters I, II, and IV of this chapter apply under this subchapter to special purpose financial captive insurance companies.”).

Department has not released financial-related captive insurance company records without the company's consent, except for the disclosures authorized in Section 6920 that are not applicable here.

We also find that the Department's work papers related to the dividend records are considered confidential pursuant to 18 *Del. C.* § 321(g). This section provides that "[a]ll working papers, recorded information, documents and copies thereof produced by, obtained by, or disclosed to the Commissioner or any other person in the course of an examination made under this chapter, *or in the course of analysis by the Commissioner of the financial condition or market conduct of a company*, shall be given confidential treatment and are not subject to subpoena and may not be made public by the Commissioner or any other person . . .," except for disclosures to other jurisdictions' insurance departments or certain law enforcement officials holding the records in confidence, unless the company gives its prior written consent.¹⁶ Pursuant to the above-referenced Orders, the Department continues monitoring and analyzing BRCD and its parent company's financial condition. Thus, the Department's dividend work papers and documents relating to the analysis of the financial condition of BRCD also fall under this confidentiality provision.

On this record, we determine that the requested records are excluded from disclosure under FOIA. As such, the Department's remaining bases for denying access to the requested records are not addressed in this Opinion.

CONCLUSION

For the reasons set forth above, we find that the Department did not violate FOIA by denying access to the requested records.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

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

¹⁶ 18 *Del. C.* § 321(g) (emphasis added).