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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 23-IB07**

**February 8, 2023**

**VIA EMAIL**

Steven LePage  
[Slepage58@gmail.com](mailto:Slepage58@gmail.com)

**RE: FOIA Petition Regarding the State Employee Benefits Committee, Delaware Department of Human Resources**

Dear Mr. LePage:

We write regarding your correspondence alleging that the State Employee Benefits Committee, Delaware Department of Human Resources violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”).<sup>1</sup> 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. For the reasons set forth below, we find that the Committee satisfied its burden of demonstrating that requested records were appropriately withheld under the pending litigation exemption.

**BACKGROUND**

RiseDelaware, Inc. and other plaintiffs filed suit against the Committee, the Delaware Department of Human Resources, and other parties regarding the change from the current

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<sup>1</sup> The Statewide Benefits Office of the Department of Human Resources acts as the administrative support for the Committee and handles its FOIA requests. The Response in this matter was submitted by the counsel to the Committee, so the term “Committee” is used for purposes of this Opinion.

Medicfill contract<sup>2</sup> to a new Medicare Advantage Plan. On October 7, 2022, you submitted a request for “the current Special Medicfill contract and all of the contract extensions for this plan.”<sup>3</sup> After initially denying this request, the Committee decided to provide the redacted contract documents and the amendments. You then filed this Petition, alleging that the Committee failed to justify its denial of access to the redacted materials as required by FOIA. You contend that the contract is the sole source for determination of participants’ rights, and the redactions prevent you from understanding the final determination of benefits and rules of your plan. Additionally, you argue that some redactions appear to have no possible justification, such as statements of work, certain fees, and performance guarantees. Finally, you argue that many of the paragraph descriptors have been redacted, so you cannot discern what has been redacted. In sum, you believe that public monies and participant premiums are being used for this contract, and the public should have access to the redacted information.

The Committee’s counsel responded to the Petition on its behalf (“Response”) and included an affidavit from the Director of the Statewide Benefits Office, which serves as the administrative arm to the Committee and responds to FOIA requests on the Committee’s behalf. The Committee also produced another copy of the requested documents with some previous redactions removed, including paragraph headings. The Committee argues that the records are exempt under 29 *Del. C.* § 10002(o)(9) as they pertain to pending litigation. Despite this exemption, the Committee states that in the interest of transparency, it voluntarily released these contracts to you in their redacted form. Additionally, the Committee contends that its redactions are proper under 29 *Del. C.* § 10002(o)(2) which exempts “[t]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature.” The Director states the Committee has consulted with Highmark who has supported its position that the remaining redacted information qualifies as trade secrets or confidential commercial information. The Director’s affidavit describes its basis for asserting this exemption, including the competitive harm that Highmark would sustain if the redacted information was released. The Director states under oath that she has “independently reviewed the remaining redacted material and concur with Highmark’s position that it is the type of information customarily kept confidential in the industry and would cause Highmark substantial competitive harm if released.”<sup>4</sup> Finally, she notes that this contract is not determinative of any member’s benefits, as those benefits are provided in the Highmark plan benefits booklet.

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<sup>2</sup> For purposes of this Opinion, we use the term “Medicfill contract” to describe the “2017 Master Health Agreement pertaining to the Special Medicfill Medicare Supplement Plan.” Response, p. 1.

<sup>3</sup> Petition.

<sup>4</sup> Response, Aff. of Statewide Benefits Office Director dated Jan. 10, 2023.

## DISCUSSION

FOIA requires a public body to provide citizens with reasonable access to public records in accordance with the statute.<sup>5</sup> In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.<sup>6</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>7</sup> As a preliminary matter, we note that this Office's authority is limited to determining whether violations of Delaware's FOIA law occurred; the allegation that you are entitled to records based on your status as a plan participant are not appropriately considered in this Opinion.<sup>8</sup>

The Committee asserts that these contractual records, including these redactions, may be withheld pursuant to 29 Del. C. § 10002(o)(9) which exempts "records pertaining to pending or potential litigation which are not records of any court." To determine if the pending litigation exemption applies, we must consider the following two factors: 1) whether litigation is pending; and 2) whether the records that the requesting party seeks pertain to that pending litigation.<sup>9</sup> For the first prong, the Committee submitted a copy of the pending complaint filed against it by RiseDelaware, Inc. and other parties. Thus, the first prong is satisfied.

The second prong of this test requires that the requested records pertain to the pending litigation. To evaluate this prong, we consider the relation of these requested records to this litigation, including the timing and nature of your request with respect to the pending litigation.<sup>10</sup> This request seeks the contractual records that comprise the remedy that the plaintiffs requested.<sup>11</sup>

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<sup>5</sup> 29 Del. C. § 10003.

<sup>6</sup> 29 Del. C. § 10005(c); *see also Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1012 (Del. 2021) ("[U]nless it is clear on the face of the request that the demanded records are not subject to FOIA, to meet the burden of proof under Section 10005(c), a public body must state, under oath, the efforts taken to determine whether there are responsive records and the results of those efforts.").

<sup>7</sup> *Judicial Watch, Inc.*, 267 A.3d 996 (Del. 2021).

<sup>8</sup> 29 Del. C. § 10005(e).

<sup>9</sup> *Del. Op. Att'y Gen.* 21-IB02, 2021 WL 559557, at \*2 (Jan. 21, 2021) ("[W]e believe that the application of this exemption should be limited to determining whether litigation is pending and whether the records that the requesting party seeks pertain to that pending litigation."); *see also Del. Op. Att'y Gen.* 21-IB20, 2021 WL 4351857, at \*2-3 (Sept. 14, 2021).

<sup>10</sup> *Del. Op. Att'y Gen.* 03-IB10, 2003 WL 22931612, at \*5 (May 6, 2003) ("We determine that there is a sufficient nexus based both on the timing of your FOIA request and the nature of the documents requested.").

<sup>11</sup> Response, Ex. A. This request was filed less than two weeks after the complaint was filed. *See also id.*, Ex. B (email from Mr. LePage stating "I just put this together last night for the RISE

Further, the complaint references the Medicfill plan multiple times, as the crux of the complaint relies on comparing the fundamental change from the current Medicfill contract to the new Medicare Advantage Plan.<sup>12</sup> For example, the complaint's first count alleges that the State's action qualifies as a "regulation" under the Administrative Procedures Act as the State has enacted new rules, standards, procedures, requirements, and a "drastic new healthcare 'policy,'" which the plaintiffs argue should have triggered procedural requirements before adopting the new plan.<sup>13</sup> In these circumstances, we find that the Committee adequately demonstrated that this request pertains to this pending litigation, and both prongs of the test for the pending litigation exemption have been satisfied.

### CONCLUSION

For the foregoing reasons, we determine that in these circumstances, the Committee met its burden to demonstrate that the requested records may be appropriately withheld under the pending litigation exemption.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Adria B. Martinelli, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General

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Delaware Group. They can now follow and keep track of the legislation affecting State Employees/Retirees.”).

<sup>12</sup> Response, Ex. A.

<sup>13</sup> *Id.*