

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Jackie Fastaia and Paula Schwartz,

Complainants

against

Docket #FIC 2020-0019

Administrator, Teachers' Retirement
Board; Teachers' Retirement Board;
Anthem Health Plans, Inc., and Anthem
Insurance Companies, Inc.; and United
Health Care Insurance Company,

Respondents

April 13, 2022

The above-captioned matter was heard as a contested case on January 12, 2021, March 2, 2021, April 6, 2021, August 12, 2021 and November 9, 2021, at which times the complainants and the respondents appeared and presented testimony, exhibits and argument on the complaint. Due to the COVID-19 pandemic and the state's response to it, the hearing was conducted telephonically¹ and remotely.²

Anthem Blue Cross and Blue Shield ("Anthem"), United Healthcare Insurance Company ("United"), and Brighton Health Plan Solutions ("Brighton"), filed motions to intervene in this matter on March 5, 2020, March 6, 2020, and October 22, 2020, respectively, pursuant to Regulations of Connecticut State Agencies §§1-21j-30, and 1-21j-31. Such motions were granted by the hearing officer on October 22, 2020, and Anthem, United, and Brighton were added as respondents. However, by letter dated February 2, 2021, the complainants withdrew their complaint against Brighton only. The Commission takes administrative notice of such withdrawal. The case caption has been amended accordingly.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondent Administrator ("Administrator") and the respondent Teachers' Retirement Board ("TRB") are public agencies, within the meaning of §1-200(1), G.S.

¹ On March 14, 2020, the Governor issued Executive Order 7B, which suspended the requirement to conduct public meetings in person.

² Section 149 of Public Act 21-2 (June Sp. Sess.), authorized remote meetings through April 30, 2022.

2. It is found that, in late 2017, the TRB issued a request for proposal (“RFP”) for a Medicare Advantage Plan, and in 2019, issued a RFP for a Medicare Supplement Plan. It is found that several insurance companies submitted responses to these RFPs, including Anthem and United. It is found that Anthem was awarded both contracts.

3. It is found that, by letter dated November 20, 2019, the complainants requested from the TRB a copy of: (a) the RFP for the Medicare Advantage plan; (b) the RFP for the Medicare Supplement plan; (c) the responses to each such RFP; (d) the contracts between the TRB and Anthem for the Medicare Advantage and Medicare Supplement plans; (e) the contract between Joseph Fields and the TRB; and (f) and certain emails.

4. It is found that, by letter dated November 27, 2019, the Administrator acknowledged the request, and informed the complainants that some of the requested records were exempt from disclosure pursuant to §1-210(b)(24), G.S. In addition, the Administrator informed the complainants that clarification of the request would be necessary before a search for certain responsive records could be conducted.

5. It is found that, by letter dated December 3, 2019, the complainants clarified and reiterated their November 20th request, and also requested certain additional records, including the “working papers” of Joseph Fields (“December 3rd letter”). It is found that the December 3rd letter of request encompassed the November 20th request and is the operative request in this case.

6. It is found that, by letter dated December 4, 2019, the Administrator acknowledged the December 3rd letter.

7. It is found that, upon receipt of the December 3rd letter, the Administrator, without confirming that the TRB maintained unredacted copies of all the responses to the RFPs, notified Anthem and United of the complainants’ request, thereby providing these companies with an opportunity to object to disclosure. Thereafter, Anthem and United each objected to disclosure of the unredacted responses to the RFPs, and Anthem additionally objected to disclosure of the contracts, on the ground that such records contain information that is confidential and proprietary. It is found that, at the TRB’s request, Anthem and United provided redacted copies of these records to the TRB, which the TRB then promptly provided to the complainants.³

8. It is found that, on several dates during the month of December 2019 and in early January 2020, the TRB provided to the complainants: a copy of the RFPs, redacted copies of certain RFP responses, a redacted copy of the Medicare Advantage contract, and the contract between the TRB and Joseph Fields. Certain other records responsive to the request also were provided. The TRB informed the complainants that it did not maintain any “working papers” for Joseph Fields. In addition, it is found that the TRB informed the complainants that they

³ Subsequently, Anthem conducted a review of the initial redactions and provided to the complainants a second redacted copy of the responses and the contracts which contained fewer redactions.

were withholding the requested Medicare Supplement contract in its entirety on the ground that the contract had not yet been finalized.

9. By letter dated January 10, 2020,⁴ the complainants appealed to this Commission, alleging that the TRB violated the Freedom of Information (“FOI”) Act by denying their request, described in paragraphs 3 and 5, above.

10. At the time of the request, §1-200(5), G.S., provided:

‘[p]ublic records or files’ means any recorded data or information relating to the conduct of the public’s business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.⁵

11. Section 1-210(a), G.S., provides in relevant part that:

[e]xcept as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to . . . (3) receive a copy of such records in accordance with section 1-212.

12. Section 1-212(a), G.S., provides in relevant part that “[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record.”

13. It is found that the requested records, described in paragraphs 3 and 5, above, to the extent they are maintained by the TRB, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

14. It is found that, on February 11, 2020, upon the finalization of the Medicare Supplement contract, the respondents promptly provided to the complainants a redacted copy of such contract.

⁴ On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of Conn. Gen. Stat. §1-206(b)(1), which requires the Freedom of Information Commission to hear and decide an appeal within one year after the filing of such appeal. Executive Order 7M is applicable to any appeal pending with the Commission on the issuance date and to any appeal filed on or after such date, through June 30, 2021. Consequently, the Commission retains jurisdiction over this matter.

⁵ Section 147 of Public Act 21-2 (June Sp. Sess.) amended the definition of “public records or files” to also include data or information that is “videotaped”.

15. By the date of the contested case hearings in this matter, it is found that the only outstanding issues concerned the redactions contained in the RFP responses and in the executed contracts, and the “working papers” of Joseph Fields.

16. During the contested case hearing held on January 12, 2021, the hearing officer ordered Anthem and United to submit the unredacted RFP responses and contracts to the Commission for in camera inspection, along with an in camera index indicating the exemptions claimed, on or before February 23, 2021.

17. By email dated February 19, 2021, counsel for the TRB represented to the Commission that, at the time of the request at issue, the TRB did not maintain an unredacted version of the records submitted by United in response to the RFP. Based upon such representation, on February 19, 2021, United filed with the Commission a “Notice of Withdrawal” from the matter. By email dated February 19, 2021, the complainants objected to United’s “withdrawal”.

18. By Notice dated February 22, 2021, the hearing officer informed the parties that counsel for the TRB would be permitted to offer evidence as to the representations made in her February 19, 2021 email, and further informed United that it may not “withdraw” from the case. However, the hearing officer stayed the order directed to United to submit the unredacted records for in camera inspection.

19. At the contested case hearing held on March 2, 2021, the Administrator testified, and it is found, that in June of 2018, approximately 18 months prior to the date of the request at issue in this case, the unredacted original and all paper and electronic copies of United’s response to the RFP were physically transferred from the offices of the TRB to the Office of the Comptroller, at the Comptroller’s request, in connection with an audit. It is found that, in April of 2019, the Administrator sought return of the records provided to the Comptroller in connection with the audit, and was informed that during the relocation of the Comptroller’s offices, the records likely were inadvertently destroyed. By email to the TRB dated February 18, 2021, an assistant comptroller confirmed that such records were destroyed. Based upon such evidence, it is found that the TRB did not maintain an unredacted copy of United’s RFP response on the date of the request at issue in this matter.

20. Because the TRB did not maintain the unredacted records submitted by United at the time of the request for such records, and because the state had no contractual relationship with United, an unsuccessful bidder, by which the TRB might have a right of access to such records, it is concluded that the TRB did not violate the FOI Act as alleged by the complainants with respect to United’s records.⁶

21. On February 23, 2021, Anthem submitted in camera records to the Commission along with an Index. It is found that such records consist of Anthem’s unredacted responses to the Medicare Advantage and Medicare Supplement RFPs, and the unredacted contracts between the TRB and Anthem for the Medicare Advantage and Medicare Supplement Plans. It is found

⁶ By Notice dated March 3, 2021, the hearing officer rescinded the in camera order directed to United.

that the in camera records also include System and Organization Controls (“SOC”) reports, which are independent audits of Anthem’s claim processing systems.⁷

22. The respondent TRB and Anthem claimed, at the contested case hearing in this matter, and on the Index, that portions of the unredacted responses to the Medicare Advantage and Medicare Supplement RFPs, and portions of the contracts between the TRB and Anthem for the Medicare Advantage and Medicare Supplement Plans, are exempt from disclosure pursuant to §1-210(b)(5)(A) and (B), G.S. The respondents also claimed that the SOC reports, referenced in paragraph 21, above, are entirely exempt from disclosure, pursuant to the same exemptions.

23. Section 1-210(b)(5)(A), G.S., provides that disclosure is not required of:

[t]rade secrets, which for purposes of the Freedom of Information Act, are defined as information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, customer lists, film or television scripts or detailed production budgets that (i) derive 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 their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy...

24. Section 1-210(b)(5)(B), G.S., provides that disclosure is not required of “[c]ommercial or financial information given in confidence, not required by statute”.

25. The exemption set forth in §1-210(b)(5)(A), G.S., is separate from the exemption set forth in §1-210(b)(5)(B), G.S., and the Commission need not determine whether the redacted information is exempt from disclosure under both. See Department of Public Utilities v. Freedom of Information Commission, judicial district of New Britain, Docket No, CV-990498510-S, 2001 WL 79833 (June 4, 2008). Because the Commission finds, for the reasons set forth below, that the redacted information constitutes “commercial or financial information given in confidence, not required by statute”, it declines to consider whether the redacted portions of the in camera records are “trade secrets”.

26. For the exemption at §1-210(b)(5)(B), G.S., to apply, all three elements must be proven, i.e., the information must be: (1) commercial or financial information; (2) given in confidence; and (3) not required by statute. See Dept. of Public Utilities v. FOI Comm’n, Superior Court, judicial district of New Britain, Docket #CV99-0498510 (Jan. 12, 2001), 2001 WL 79833.

⁷ The SOC reports were submitted to the TRB as part of Anthem’s response to the RFP for the Medicare Supplement Plan.

27. With regard to the first element of the exemption, Connecticut appellate courts have not had occasion to interpret the phrase “commercial or financial information”, as used in §1-210(b)(5)(B), G.S. Thus, the Commission has looked to Exemption 4 in the federal FOI Act, which protects “commercial or financial information obtained from a person [that is] privileged and confidential”. See e.g., John Scott v. Chief, Poquonock Bridge Fire District, et al., Docket #FIC 2015-727 (March 8, 2016); DatabaseUSA LLC v. Commissioner, State of Connecticut, Department of Administrative Services, Docket #FIC 2015-209 (February 10, 2016). The terms “commercial” and “financial” as used in the federal FOI Act, 5 U.S.C. 552, should be given their ordinary meanings. Public Citizen Health Research Group v. Food and Drug Admin., 704 F.2d 1280, 1290 (D.C. Cir. 1983). More recently, the federal courts have affirmed that “commercial information” as used in Exemption 4 means “records that actually reveal basic commercial operations such as sales statistics, profits and losses, and inventories, or relate to the income-producing aspects of a business.” See e.g., Judicial Watch, Inc. v. U.S. Department of Health and Human Services, 525 F.Supp.3d 90, 96, 2021 WL 930350 (D.C. Cir. 2021); New York Times Company and John T. Ewing, Jr. v. U.S. Department of Justice et al., (slip op.) 2021 WL 371784 (S.D.N.Y. 2021). The Commission adopts the federal courts’ interpretation of “commercial or financial information”.

28. At the hearing in this matter, several witnesses testified on behalf of Anthem as to the nature of the redacted information contained in the in camera records. Based upon careful in camera inspection, and the testimony offered at the hearing in this matter, it is found that the information redacted from such records consists of: financial information (including quoted and agreed upon rates, performance guarantees, allowances and stipulations); information about Anthem’s network size and accessibility; Anthem’s client lists and market share data; member services and corporate practices; implementation timelines; and reports regarding care management. As noted in paragraph 21, above, the SOC reports, which were entirely withheld, pertain to Anthem’s claims processing systems.

29. It is found that the information identified in paragraph 28, above, is “commercial or financial” information in the ordinary sense. It is also found that such information relates to the income-producing aspects of Anthem’s business. It is therefore found that all of the redacted information, identified in paragraph 28, above, is “commercial or financial information” within the meaning of §1-210(b)(5)(B), G.S.

30. With regard to the second element of the exemption, the Connecticut Appellate Court in Allco Renewable Energy Limited v. Freedom of Information Commission, 205 Conn. App. 144 (2021), affirmed the Commission’s interpretation of the phrase “given in confidence” as used in §1-210(b)(5)(B), G.S. In that case, the Commission concluded, and the court agreed, that “given in confidence” within the meaning of §1-210(b)(5)(B), G.S., requires an intent to give confidential information, based on context or inference, such as where there is an express or implied assurance of confidentiality, where the information is not available to the public from any other source or where the information is such that it would not customarily be disclosed by the person who provided it.

31. It is found that both the TRB and Anthem consider the redacted information, described in paragraph 28, above, to be confidential, proprietary information. It is further found

that the insurance industry is highly competitive, and that it is standard within the industry for each company to closely guard its commercial and financial information. It is found that the redacted information, described in paragraph 28, above, is not publicly available from any other source. It is found that disclosure of the redacted information, described in paragraph 28, above, would harm Anthem's ability to compete in the industry, and would be highly valuable to Anthem's competitors. It is found that Anthem has taken significant measures to ensure the confidentiality of the redacted information, described in paragraph 28, above, which measures include implementation of a Code of Conduct for its employees, setting forth practices for limiting disclosure of confidential, proprietary information; prohibiting disclosure of confidential information outside the company unless authorized; requiring encryption when sharing confidential information electronically; limiting building access and employee access to computer systems; requiring all of its vendors to sign confidentiality agreements; and training employees on what constitutes confidential information and requiring them to sign confidentiality agreements. It is found that Anthem spends millions of dollars each year to protect its confidential, proprietary information, including the redacted information, described in paragraph 28, above, and enters into contracts with public agencies only if such contracts contain confidentiality provisions similar to those set forth in the state's Standard Contract (see paragraph 33, below).

32. It is also found that the TRB ensures that there are security measures in place to limit access to the confidential information it maintains, including the redacted information, described in paragraph 28, above. For example, only key employees have access to such information. Such information is not maintained on the server, but rather only the Administrator maintains an electronic copy on her computer to which only she has access. Paper copies are kept in a locked storage room or locked filing cabinet. The TRB's offices are secured, meaning that members of the public and other state employees must register with security personnel and be escorted to the TRB by a TRB employee. It is found that the TRB works with a healthcare consultant in the RFP process, and that the TRB requires her employer, a consulting firm, to enter into a non-disclosure agreement by which the consultant agrees not to disclose any bidder's confidential, proprietary information. The consultant's files are "locked", and access thereto is limited to only those who "need to know".

33. It is found that the RFPs and the state Standard Contract contain language acknowledging that the RFP submissions, and any contract that may be signed with the state, may contain confidential, proprietary information. The RFPs and the standard contract provide that, although the records submitted in response to an RFP are subject to disclosure under the FOI Act, the TRB will promptly notify the contractor of any FOI request for such records in order to provide to the contractor the opportunity to object to disclosure. Robert Janes, Anthem's Sales Director for Public & Municipal Accounts, testified, and it is found, that it was his expectation, based on customary practice and past experience, that the TRB would treat the commercial and financial information contained in Anthem's documents as confidential and, prior to any public disclosure, would give Anthem the opportunity to provide redacted copies and assert its right to claim an exemption for such information. It is found that such procedure was followed in connection with the request at issue herein.

34. Based upon the foregoing, it is found that all of the information contained in the redacted portions of the in camera records, described in paragraph 28, above, and withheld entirely, in the case of the SOC reports, described in paragraph 28, above, were “given in confidence” by Anthem to the TRB.

35. With regard to the third element of the exemption, it is found that Anthem was not required by statute to provide the redacted information, described in paragraph 28, above, to the TRB.

36. Accordingly, it is found that the redacted information, and the SOC reports, described in paragraph 28, above, are exempt from disclosure pursuant to §1-210(b)(5)(B), G.S.

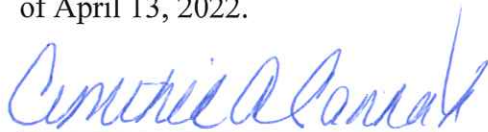
37. With regard to the complainant’s request for the “working papers” of Joseph Fields, it is found that the respondents do not maintain such records.

38. Based upon all of the foregoing, it is concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., as alleged in the complaint.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The complaint is dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of April 13, 2022.



Cynthia A. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

JACKIE FASTAIA AND PAULA SCHWARTZ, 44 Pilots Point Drive, Westbrook, CT. 06498, 26 Buckingham Road, Avon, CT. 06001

ADMINISTRATOR, TEACHERS' RETIREMENT BOARD; TEACHERS' RETIREMENT BOARD; ANTHEM HEALTH PLANS, INC. AND ANTHEM INSURANCE COMPANIES, INC.; BRIGHTON HEALTH PLAN SOLUTIONS, LLC; AND UNITED HEALTH CARE INSURANCE COMPANY, c/o Assistant Attorney General Krista D. O'Brien, State of Connecticut, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106

Intervenor(s) Attorney Michael G. Durham and Attorney Matthew H. Geelan for the Respondent(s) Anthem Health Plans, Inc. and Anthem Insurance Companies, Inc., c/o Donahue, Durham & Noonan, P.C., 741 Boston Post Road, Suite 306, Guilford, CT 06437

Intervenor(s) Attorney Joseph R. Brennan for the Respondent(s) Brighton Health Plan Solutions, LLC, c/o Brighton Health Plan Solutions, LLC, 2421 Atlantic Avenue, Suite 202, Wall Township, NJ 08736

Intervenor(s) Attorney John Aissis and Attorney Jack Skaggs, for the Respondent(s) United Health Care Insurance Company, c/o Jackson Walker LLP, 100 Congress Avenue, Suite 1100, Austin, TX 48701



Cynthia A. Cannata
Acting Clerk of the Commission