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26-ORD-196

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In re: William Schreck/Department of Insurance

Summary: The Department of Insurance ("the Department") did not violate the Open Records Act ("the Act") when it withheld confidential or proprietary information under KRS 61.878(1)(c)1.

Open Records Decision

William Schreck ("Appellant") submitted a request to the Department seeking "all records of any type pertaining to" a particular case. The Department responded, granting the request in part and denying it in part.[1] Subsequently, the Appellant submitted a new request specifically seeking "communications that [the Department] received from the insurance company." In response, the Department denied the request under KRS 61.878(1)(c)1., explaining it was withholding "notes prepared by an insurer in connection with a loss incurred by its insured." This appeal followed.

KRS 61.878(1)(c)1. exempts from disclosure "[r]ecords confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records."

To start, the Department explains that it obtained the record in question from the insurer during its investigation into the insurer's conduct. The Department explains that the record was confidentially disclosed to it during its investigation and that the insurer applied a "'Confidential' watermark to each page." Under these circumstances, the Office agrees that the record was confidentially disclosed.

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[1] The Appellant did not provide a copy of the Department's response to his first request. Therefore, the Office lacks jurisdiction to consider the merits of that response. *See* KRS 61.880(2)(a).

Next, the Department explains that the withheld record contains information that is "generally recognized as confidential or proprietary." Specifically, the Department explains that "claim notes developed by a company are standard industry practice by insurance companies during the settlement of claims for both first-party and third-party claimants." The specific claim notes here detail the "internal procedures of the company's settlement process"; "the impressions and opinions of company employees, adjusters, and agents which often reflect preliminary thoughts which may not reflect the final settlement"; and "communication[s] between the insurer and their insured, repair facilities, and manufacturers to obtain estimates and calculate the costs associated with settling a claim."

Types of information found by the Office to be generally recognized as confidential or proprietary include "private financial affairs" (01-ORD-143); "trade secrets, investment strategies, economic status, or business structures" (17-ORD-198; 16-ORD-273; 07-ORD-166); "the method for determining [a] contract price" and "business risks assumed" (17-ORD-002); "costing and pricing strategy" (92-ORD-1134; OAG 89-44); and "corporate assets of a non-financial nature that have required the expenditure of time and money to develop and *concern the inner workings of the private entity*" (10-ORD-001 (emphasis added)). The common factor among all these types of information is the insight they provide into the internal operations of the entity making the disclosure to the public agency.

Here, the Department has established that the claim notes would give insight into the "inner workings" of the insurer it was investigating by revealing how that insurer resolves and settles the claims it receives.

Finally, "if it is established that a document is confidential or proprietary, and that disclosure to competitors would give them substantially more than a trivial unfair advantage, the document should be protected from disclosure." *Se. United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199 (Ky. 1997), *abrogated in part on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004). The Department explains that the claim notes would reveal "the way a company estimates claims payments and determines settlement offers"; "the way a company may reach a certain price estimate"; "from whom they obtain such information"; "and what weight is given to opinions by those involves in the process." Revealing this information would give the insurer's competitors, *i.e.*, other insurance companies, a tremendous advantage by revealing its "negotiating tactics and pricing calculations." The Department explains such an advantage would be sharply felt, especially when an insurer has initiated a civil action seeking subrogation from another insurer.

In light of the Department's explanation, there is little doubt that disclosure of the insurer's claim notes would create an "unfair commercial advantage" within the meaning of KRS 61.878(1)(c)1.

Thus, at bottom, the Department has demonstrated the withheld claim notes (1) were confidentially disclosed to it, (2) are generally recognized as confidential or proprietary, and (3) their disclosure would give the insurer's competitors an unfair commercial advantage. Accordingly, the Office concludes that the Department did not violate the Act when it withheld the claim notes under KRS 61.878(1)(c)(1).

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

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