

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 INS 738

BLUE CROSS AND BLUE)
SHIELD OF NORTH CAROLINA,)
)
Petitioner,)
)
v.)
)
NORTH CAROLINA STATE)
HEALTH PLAN FOR)
TEACHERS AND STATE)
EMPLOYEES,)
)
Respondent,)
)
and)
)
AETNA LIFE INSURANCE)
COMPANY,)
)
Respondent-Intervenor.)

**PETITIONER BLUE CROSS NC'S
MOTION TO UNSEAL
AND
MOTION FOR EXPEDITED
ADJUDICATION**

INTRODUCTION

1. Blue Cross NC asks that this Tribunal unseal certain materials that Blue Cross NC will offer at the merits hearing in this case. These materials are currently sealed because Aetna has designated them Attorneys' Eyes Only.

2. Because the hearing is imminent, Blue Cross NC also asks that the adjudication of this motion be expedited.¹

¹ As described below, Blue Cross NC's efforts to identify and resolve disputes about confidentiality designations date back to mid-December 2023. Blue Cross NC and Aetna have resolved a number of disputes. This motion is being filed promptly

3. The sealed materials at issue are documents and testimony that describe RFP-related communications between [REDACTED]

[REDACTED]

[REDACTED]. The documents that describe these communications were produced [REDACTED]

[REDACTED]

4. Aetna’s confidentiality designations have prevented Blue Cross NC’s outside counsel from telling their client about these relevant communications—even on the eve of trial.

5. Aetna’s designations will also prevent parts of this case from being tried in open court or with anyone from Blue Cross NC in attendance.

6. There is a presumption that civil proceedings should be open to the public. Aetna cannot overcome this presumption and show that the challenged designations meet the high bar that is required to close a courtroom, seal publicly filed pleadings, or withhold from a party information that the party needs in order to direct its representation.

7. None of the information at issue is commercially sensitive. Moreover, all of the information concerns past events and non-confidential [REDACTED] [REDACTED] regarding a public procurement. All of these

after final confirmation by Aetna that it will not withdraw the confidentiality designations that are the subject of this motion.

² Aetna initially refused to produce these documents, producing them only after this Tribunal granted Blue Cross NC’s motion to compel. *See* Order Granting Mot. to Compel (June 29, 2023).

communications occurred before the RFP was posted. None were made under the umbrella of any confidentiality protection.

8. Blue Cross NC asks that the documents and testimony at issue be unsealed, that Aetna's AEO designations for this evidence be struck, and that any part of the upcoming merits hearing that refers to this evidence be in open court with Blue Cross NC representatives in attendance.

BACKGROUND

9. To facilitate the exchange of information during discovery, the parties sought entry of a protective order on confidentiality. Under the Protective Order, a producing party could mark information either "Confidential" or "Highly Confidential—Attorneys' Eyes Only" (AEO). Protective Order § 1.1.

10. In mid-December 2023, when discovery was complete and summary-judgment proceedings were approaching, Blue Cross NC proposed to Aetna and the Plan that any evidence that was submitted to the Administrative Law Judge—whether in writing or at any hearing—be filed in the regular way, not filed under seal or presented in a closed courtroom. Aetna did not accept this proposal.

11. As a result, when the parties filed their summary-judgment and Rule 702 papers, they filed under seal all documents that included any information that Aetna had designated as Confidential or AEO.³ Protective Order § 7. Aetna then

³ Consistent with this requirement, Blue Cross NC is filing (1) a sealed, unredacted version of this motion and exhibits and (2) a public version of this motion that redacts the general descriptions of the documents and exhibits that are the subject of this motion. Blue Cross NC maintains that these descriptions should not be sealed or concealed.

specified the information that it maintained should remain under seal and be redacted from any public filing. *Id.* The parties filed public versions with Aetna's requested redactions.

12. Counsel for Blue Cross NC disagreed with Aetna's position that certain materials were properly designated AEO or should be sealed. Blue Cross NC's counsel requested to meet and confer with Aetna's counsel about these designations. Counsel for all parties have conferred multiple times in an effort to resolve these disputes. These conferences have included multiple video conferences and numerous email communications.

13. The Plan has participated in nearly all of these conferences. In general, the Plan has stated that it favors transparency while still respecting a private party's need to protect confidential proprietary information. In fact, the Plan has posted all unsealed filings in this case to a website to make them available to members of the public who are interested in this matter.

14. Through the meet-and-confer process, Aetna and Blue Cross NC have resolved their disputes over many of Aetna's designations. For instance, Blue Cross NC agreed not to challenge Aetna's AEO designations and sealing of detailed cost information and certain letters of intent that Aetna relied on for the repricing portion of its cost proposal. Aetna, for its part, has incrementally withdrawn its position that various other information should be sealed.

15. Aetna has, however, maintained its position that certain documents and testimony that describe [REDACTED] about

the RFP are AEO materials that should be sealed. These materials are the subject of this motion to unseal.

16. Specifically, Blue Cross NC challenges Aetna's AEO designation for all of the information outlined in red in Exhibits A through I that are attached to this motion. This information is described further below.

ARGUMENT

17. "All hearings under [the Administrative Procedure Act] shall be open to the public." N.C. Gen. Stat. § 150B-23(e).

18. The North Carolina Rules of Civil Procedure and the General Rules of Practice for the Superior and District Courts apply in contested cases. 26 NCAC 03 .0101(a); *see also* 26 NCAC 03 .0125 ("Hearings shall be conducted, as nearly as practical, in accordance with the practice in the Trial Division of the General Court of Justice.").

19. Those rules create a presumption that all case filings and court proceedings will be open to the public. Rule 27 of the General Rules of Practice requires that "[a] person who appears before the court should strive to file documents that are open to public inspection."⁴ Section 7A-109 of the North Carolina General Statutes likewise provides that documents that are filed with a court are open to public inspection.

⁴ Here, Aetna is before the Court because Aetna chose to intervene in this case. That voluntary choice to intervene clashes with Aetna's current stance that its relevant documents should be shielded from Blue Cross NC and from the public.

20. A party that tries to overcome this presumption of openness has a heavy burden. *Addison Whitney, LLC v. Cashion*, 2020 NCBC LEXIS 74, at *3-4 (N.C. Bus. Ct. June 10, 2020) (denying consent motions to seal). The party asking to seal a court filing must provide sufficient information for the judge to conclude that “the party’s private interest in keeping the matter secret outweighs the public’s interest in open courts.” *Id.* at *4.

21. A judge is not bound by any party’s designation of material as confidential under a protective order. *Id.* at *4-5. The mere fact that a document or information is private is not sufficient to justify sealing it. Instead, “the reason the court seals [private documents] is . . . because their disclosure would cause serious harm to one or both parties.” *Lovell v. Chesson*, 2019 NCBC LEXIS 76, at *5 (N.C. Bus. Ct. Oct. 28, 2019).

22. “Not all business information is truly sensitive, though. Companies (and individuals) keep a great deal of private information that would cause little or no harm if disclosed. Even competitively valuable information may grow stale over time. It is the party’s burden, not the Court’s, to show which is which.” *Addison Whitney, LLC*, 2020 NCBC LEXIS 74, at *5.

23. Aetna cannot meet its burden to show that its communications about the RFP with [REDACTED] should be sealed and that the courtroom should be closed during presentation of this evidence.

24. In the parties’ discussions, Aetna has stated that these communications should be sealed because they contain “commercially sensitive

strategic information.” Examination of the information at issue, however, reveals otherwise.

25. First, the information is not “commercially sensitive strategic information” at all. None of the descriptions of conversations at issue refers to financial information or any other information that could rise to the level of trade secret information.

26. Instead, much of the information at issue is [REDACTED], [REDACTED], not the other way around. Information [REDACTED] concerning the RFP is neither confidential nor commercially sensitive. And even if the information were commercially sensitive, any right to seek protection for this information would [REDACTED].

27. Second, all of the documents at issue describe past communications about a concluded RFP process. Thus, the content is outdated and has lost any commercial value that it might ever arguably have had.

28. Because the information concerns non-confidential, past communications with [REDACTED] about a public procurement, Aetna cannot meet its burden to demonstrate that there is “now-extant harm that would result from public disclosure.” *Howard v. IOMAXIS, LLC*, 2023 NCBC LEXIS 134, *5 (N.C. Bus. Ct. Oct. 30, 2023).

INFORMATION AND DOCUMENTS AT ISSUE

29. Blue Cross NC challenges Aetna’s AEO designation for all of the information outlined in red in Exhibits A through I that are attached to this motion.

30. First, Aetna claims as AEO a sentence in page 4 of Blue Cross NC’s summary-judgment brief that describes [REDACTED]

[REDACTED]

[REDACTED] Exhibit A.

Aetna makes the same AEO designation for two deposition exhibits that contain the quote referenced above, as well as other information that [REDACTED]

[REDACTED] regarding the forthcoming RFP. *See* Exhibits B & C.

31. However, this is [REDACTED]

[REDACTED]. These conversations were not confidential and are not proprietary information. Thus, this information should be open to the public and is not appropriately concealed.

32. Second, Aetna similarly claims as AEO certain parts of two additional deposition exhibits that describe RFP-related [REDACTED]

[REDACTED]. *See* Exhibits D & E.

33. Again, these documents do not contain commercially sensitive information that would affect Aetna’s ability to compete. Instead, they contain information about a past event: the Plan’s 2022 RFP. They also [REDACTED]

[REDACTED]

[REDACTED]. But the RFP is now concluded. Aetna’s proposal has long since

been submitted. Even if this information was ever competitively valuable, it is no longer valuable in 2024.

34. Third, Aetna has designated as AEO a part of a document and deposition testimony concerning [REDACTED]

[REDACTED] See Exhibits F & G. This discussion is a past event concerning [REDACTED]

[REDACTED]. The document does not describe [REDACTED]—it just describes the topic of the discussion. It has no competitive commercial value, and should not be sealed or concealed.

35. Finally, Aetna has designated as AEO various parts of deposition testimony from Aetna’s Rule 30(b)(6) witness and its lobbyist, Mr. Baum, that reflect testimony concerning the documents described above. See Exhibits H & I. This testimony should also be unsealed and open to the public at the merits hearing for the same reasons described above.

CONCLUSION

36. Blue Cross NC respectfully requests that the documents and testimony that are the subject of this motion be unsealed, that Aetna’s AEO designations for this evidence be struck, and that any part of the merits hearing of this matter that refers to this evidence should be in open court with Blue Cross NC representatives in attendance.

37. Blue Cross NC also respectfully requests that the Tribunal order an expedited response to this motion and resolve the motion before the hearing on the merits begins on February 13.

This 2nd day of February, 2024.

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CERTIFICATE OF SERVICE

I certify that today, I caused the foregoing document to be filed through this Tribunal's electronic-filing system. Under Rule 03.0501(4), the system will electronically serve the appendix on the following counsel:

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This 2nd day of February, 2024.

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**INDEX OF EXHIBITS TO
 BLUE CROSS NC'S MOTION TO
 UNSEAL AND MOTION FOR
 EXPEDITED ADJUDICATION**

Blue Cross and Blue Shield of North Carolina submits the following Index to
 Blue Cross NC's Motion to Unseal and Motion for Expedited Adjudication

Exhibit	Description
A	Blue Cross NC's Response in Opposition to Motions for Summary Judgment, page 4
B	Deposition Exhibit 242
C	Deposition Exhibit 277
D	Deposition Exhibit 238
E	Deposition Exhibit 239
F	Deposition Exhibit 243

Exhibit	Description
G	Excerpts from the 30(b)(6) Deposition of Aetna Life Insurance Company, taken September 21, 2023
H	Excerpts from the 30(b)(6) Deposition Designations of Aetna Life Insurance Company
I	Excerpts from the Daniel Baum Deposition Designations