IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

AMERICAN CIVIL LIBERTIES UNION OF DELAWARE,	)	
Plaintiff,	)	C.A. No. 06C-08-67-JRS
v.	)	
CARL C. DANBERG, in his official capacity as the COMMISSIONER OF THE DELAWARE DEPARTMENT OF CORRECTION,	)	
Defendant,	)	
and,	)	
CORRECTIONAL MEDICAL SERVICES, INC.,	)	
Intervenor.	)	

ANSWERING BRIEF OF PLAINTIFF AMERICAN CIVIL LIBERTIES UNION OF DELAWARE IN RESPONSE TO DEFENDANT CARL DANBERG'S MOTION FOR SUMMARY JUDGMENT AND INTERVENOR CORRECTIONAL MEDICAL SERVICES, INC.'S BRIEF IN OPPOSITION TO DISCLOSURE OF DOCUMENTS

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April 30, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

INTRODUCTION

Plaintiff American Civil Liberties Union of Delaware ("ACLU") brought this case to compel defendant Carl C. Danberg, Commissioner of the Delaware Department of Correction ("DOC"), to comply with the Delaware Freedom of Information Act ("FOIA"), 29 Del. C. §§ 10001-05, and produce certain records related to the provision of health care in Delaware prisons. ACLU requested treatment protocols for eleven enumerated illnesses or conditions and operating procedures with respect to wellness visits, but DOC refused to produce the documents. *See* D.I. 1 ("Complaint") at ¶¶ 7-10. DOC has filed a motion for summary judgment, arguing that the requested records are exempt from FOIA under the "pending or potential litigation" exemption, § 10002(g)(9). D.I. 23 ("DOC Mtn."). DOC's contracted healthcare provider, intervenor Correctional Medical Services, Inc. ("CMS"), has filed a brief asserting that the records may be withheld under the exemption for "trade secrets and commercial or financial information obtained from a person which is of a privileged and confidential nature," § 10002(g)(2). D.I. 24 ("CMS Br."). DOC and CMS bear the burden of proving the applicability of the claimed exemptions. § 10005(c). Because DOC and CMS have failed to demonstrate that the requested documents are exempt from disclosure under FOIA, the Court should deny the motion for summary judgment and order DOC to produce the requested records.

ARGUMENT

As this Court recognized in its Memorandum Opinion on ACLU's motion for a protective order, "Delaware's FOIA law is intended 'to ensure government accountability, inform the electorate and acknowledge that public entities, as instruments of government, should not have the power to

decide what is good for the public to know.'" D.I. 25 ("Mem. Op.") at 7 (quoting *Mell v. New Castle County*, 835 A.2d 141, 146 (Del. Super. Ct. 2003)). Indeed, FOIA declares that

> [i]t is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic.

§ 10001. FOIA mandates the disclosure of information held by government agencies unless the requested records are subject to one of the "enumerated statutory exceptions to FOIA," and such exceptions must be "narrowly construed." Mem. Op. at 9 (citing *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus.*, No. 1216-K, 1994 WL 274295, at *12 (Del. Ch. May 19, 1994) (attached as Exh. 12)). DOC and CMS, as the parties opposing disclosure of the requested records, bear the burden of proving the applicability of the claimed exemptions. § 10005(c). "This allocation of the burden of proof underscores the basic public policy that disclosure, not secrecy, is the purpose behind the Act." *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 781 (Del. Super. Ct. 1995).

I. DOC Has Failed to Establish That the Requested Records Pertain to "Pending or Potential Litigation" Under 29 Del. C. § 10002(g)(9).

FOIA exempts from mandatory disclosure "[a]ny records pertaining to pending or potential litigation which are not records of any court." § 10002(g)(9). To come within the "pending litigation" prong of the exemption, the requested records must relate to unresolved litigation between the requester and the public body to whom the request is directed. *See* Mem. Op. at 9 (quoting *Mell*, 835 A.2d at 147). Where litigation is pending, "Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court's rules of procedure." *Id.*

With respect to the "potential litigation" prong of the exemption, this Court has adopted a two-part test to determine whether the requested documents may be withheld: "(1) litigation must be likely or reasonably foreseeable; and (2) there must be a 'clear nexus' between the requested documents and the subject matter of the litigation." Mem. Op. at 10 (adopting test set forth in *Del. Op. Atty. Gen.*, 02-IB30 at 2 (Dec. 2, 2002)). The standard is exacting. "[T]he public body must be able to point to a 'realistic and tangible threat of litigation . . . characterized with reference to objective factors' before it may avail itself of the 'potential litigation' exception to FOIA." Mem. Op. at 11 (quoting *Claxton Enter. v. Evans County Bd. of Comm'rs*, 549 S.E.2d 830, 834-35 (Ga. App. 2001)). Objective signs of imminent litigation include written demand letters, previous or ongoing litigation between the parties with respect to similar claims, or proof that counsel has been retained with respect to a particular claim and has expressed an intent to sue. Mem. Op. at 11 (citations omitted). No such signs are present here.

DOC has not articulated reasonable and objective grounds to support its invocation of the "potential litigation" exemption. First, DOC claims that ACLU represented DOC inmate Terri Lee Meyer in a lawsuit challenging the provision of medical care in Delaware prisons, and that ACLU might revive such claims on Ms. Meyer's behalf. As explained in detail below, ACLU's representation of Ms. Meyer has nothing to do with the records at issue in this case; thus, it cannot support DOC's invocation of the "pending or potential litigation" exemption.

Second, DOC asserts that form letters sent to DOC inmates who contact ACLU about inadequate medical treatment establish a likelihood of litigation sufficient to allow DOC to withhold the requested documents, even though ACLU has not been retained by any client to pursue such a claim. Absent such a relationship and an expressed intent to sue, ACLU's interest in collecting and

analyzing information about the provision of healthcare in Delaware prisons is insufficient to allow DOC to withhold the requested records under the "potential litigation" exemption.

A. ACLU Has Never Represented Terri Lee Meyer in Relation to Any Claim of Inadequate Medical Care, and it Is Not Likely or Reasonably Foreseeable That ACLU Will Do So in the Future.

1. DOC has misrepresented the facts concerning ACLU's representation of Ms. Meyer and the nature of Ms. Meyer's claims.

DOC claims that, during the November 27, 2006, hearing on ACLU's motion for protective order, "ACLU told the Court that it did not represent any inmate within the custody of the Department of Correction and that it had no inmate clients." DOC Mtn. at 5. DOC is wrong. During the hearing, ACLU told the Court that it did not represent any DOC inmates in connection with this case. Transcript of Motion Hearing, D.I. 26 (Nov. 27, 2006), at 10:21-22; *see also* Affidavit of Julia M. Graff (Apr. 12, 2007), ("Graff Aff. II") at ¶ 1, attached as Exh. 1. It is clear from the context that ACLU asserted only that it had no inmate clients *with regard to claims of inadequate medical care*. Given that ACLU does not have any such clients, its statement at the November 27 hearing was accurate. Moreover, the situation was further clarified during the chambers conference on January 9, 2007, when the Court stated that DOC was entitled to a verified statement regarding whether ACLU was representing a client with a claim against DOC "for inadequate medical care." Office Conference Transcript (Jan. 9, 2007), at 8:13-19, attached as Exh. 2. In an affidavit submitted on January 19, 2007, ACLU confirmed that

> 1. The American Civil Liberties Union/Foundation of Delaware currently has no formal or informal agreements with any prisoner or group of prisoners in the custody of the Delaware Department of Correction to bring a lawsuit challenging the provision of medical care in Delaware prisons.

2. The American Civil Liberties Union/Foundation of Delaware has not entered into any formal or informal agreements with a law firm to assist it in litigating against the Delaware Department of Correction regarding the provision of medical care in Delaware prisons.

Affidavit of Julia M. Graff (Jan. 9, 2007) ("Graff Aff. I"), attached to DOC Mtn. as Exh. B.

Nevertheless, DOC claims that ACLU's representation of previously *pro se* DOC inmate Terri Lee Meyer in *Meyer v. Ryan*, No. 06-117-SLR (D. Del.), is "in contrast" to ACLU's statements at the November 27, 2006 hearing. DOC Mtn. at 5. Similarly, DOC claims that "ACLU failed to disclose the representation of Ms. Meyer in the January 19, 2007 certification," as though ACLU had some obligation to do so. DOC Mtn. at 5. ACLU had no such obligation. The certification was to verify that ACLU "has not been engaged by any client for the purpose of investigating a potential claim against [DOC] or CMS *for inadequate medical care* in Delaware's correctional facilities." Mem. Op. at 2 (emphasis added).

DOC further errs by claiming that "[a]t least one of Ms. Meyer's [*pro se*] claims specified deliberate indifference to medical care against all defendants." DOC Mtn. at 5. In fact, Ms. Meyer's *pro se* complaint claimed that she was retaliated against for her involvement in drafting a civil rights class action complaint against certain DOC employees. *See Pro Se* Complaint (Feb. 23, 2006), attached to DOC Mtn. as Exh. C. Although Ms. Meyer's *pro se* complaint does include the phrase "deliberate indifference to the plaintiff's mental health and medical needs" (*id.* at 9), it cannot fairly be read as alleging a claim of substandard health care. Indeed, in April 2006, the defendants in *Meyer v. Ryan* characterized the *pro se* complaint as accusing prison officials of "retaliating against [Ms. Meyer] for exercising her First Amendment Right to seek redress from the Courts." State Defendants' Answer (Apr. 21, 2006) at 1, attached as Exh. 3. Similarly, the federal district court

reviewed the *pro se* complaint and determined that Ms. Meyer "alleges that to keep her from filing" a civil rights complaint, "she has been retaliated against in violation of her first amendment rights." Memorandum Order (May 23, 2006) at 2, attached as Exh. 4.

In any event, ACLU never agreed to represent Ms. Meyer in connection with any claim related to inadequate medical care. Graff Aff. II ¶ 2. Rather, the scope of ACLU's representation of Ms. Meyer has been limited to pursuing her claim that prison officials retaliated against her for exercising her constitutional right of access to the courts, and the amended complaint filed by ACLU after it agreed to represent Ms. Meyer is confined to that claim. *See* First Amended Complaint (Jan. 23, 2007), attached as Exh. 5.

2. The Meyer litigation cannot justify DOC's withholding of the requested documents under either prong of the "pending or potential litigation" exemption.

Meyer v. Ryan does not involve a claim of inadequate medical care. Thus, the requested records are unrelated to *Meyer v. Ryan* and cannot be withheld under the exemption for "records *pertaining* to pending . . . litigation." § 10002(g)(9) (emphasis added); *see also Mell*, 835 A.2d at 147 ("The pending litigation exception to FOIA" applies "when parties to pending litigation against a public body seek information from that public body *relating to the litigation*") (emphasis added). That ACLU has entered an appearance in a case involving DOC is insufficient to support the pending litigation exemption. Rather, "there must be a *sufficient nexus* between the records requested under FOIA and the subject matter of the litigation." *Del. Op. Atty Gen.*, 03-IB21 at *2 (Oct. 6, 2003) (emphasis added); *see also Del. Op. Atty Gen.*, 03-IB21 at *2 (explaining that if a public body could successfully move to quash a subpoena on the ground of relevance, then necessarily there is no nexus between the requested records and the subject matter of the lawsuit).

Similarly, *Meyer v. Ryan* cannot support DOC's assertion of the "potential litigation" prong of the exemption because there has been no showing that the requested documents have a clear nexus with litigation that is likely or reasonably foreseeable. *See* Mem. Op. at 10. First, Ms. Meyer has not previously sued DOC for inadequate medical care. Second, ACLU has not been retained by Ms. Meyer to pursue such a claim, nor has ACLU agreed to represent Ms. Meyer with regard to any such claim. Third, DOC has not shown that Ms. Meyer has made a written demand or otherwise expressed an intent to sue over such claims. Thus, DOC has not shown, with reference to objective factors, that ACLU's representation of Ms. Meyer presents a realistic and tangible threat of litigation over the adequacy of medical care in Delaware prisons. *See* Mem. Op. at 11.

DOC also argues that "there is a clear nexus between the requested documents and the likelihood of litigation by ACLU or ACLU's clients" because ACLU declined DOC's invitation to waive any medical claims that Ms. Meyer may want to bring in the future. DOC Mtn. at 9; *see also* Graff Aff. II ¶ 8. DOC's argument is unavailing. First, DOC has not identified any specific medical claim that Ms. Meyer has against DOC and has instead insisted that Ms. Meyer broadly waive all future medical claims. This lack of specificity shows that DOC has no basis to expect that Ms. Meyer will amend her complaint to allege claims having a nexus with the documents requested by ACLU under FOIA. Moreover, even if DOC could identify a specific medical claim that Ms. Meyer is likely to assert, ACLU has not agreed to represent Ms. Meyer with respect to such a claim, and no evidence suggests that ACLU made its FOIA request to advance Ms. Meyer's litigation.

Second, absent evidence suggesting that a FOIA request was made to advance the litigation of particular claims, allowing a public body to condition its FOIA compliance on the requester's willingness to affirmatively waive any future claims would run counter to FOIA's purpose. FOIA

is intended to "ensure government accountability" and provide "easy access to public records." Mem. Op. at 3 (citations omitted). The public body seeking to withhold requested documents bears the burden of demonstrating the applicability of one of FOIA's narrow exceptions. To allow a public body to extract a waiver of unknown or undeveloped future claims as the price of using FOIA would impermissibly shift the burden to the requester and would discourage FOIA requests. Not surprisingly, no state with a FOIA exemption similar to that at issue here has read it so broadly as to apply to unknown or undeveloped future claims. *See, e.g., Bd. of Educ. of Town of Ridgefield v. Freedom of Information Comm'n*, 585 A.2d 82, 86 (Conn. 1991) (applying "pending claims and litigation" exemption only to claims that are "already in existence and in progress"); *Claxton Enter.*, 549 S.E.2d at 834-35 .

B. Form Letters Sent to DOC Inmates Who Contact ACLU about Inadequate Medical Care Do Not Establish That Litigation of Such Claims Is Imminent, Where ACLU Has Not Been Retained by a Client to Investigate or Pursue Such Claims and Has Not Expressed an Intent to Sue.

DOC argues that two form letters sent to DOC inmates who contact ACLU about inadequate medical care are "objective indicia" that "litigation by ACLU in relation to the provision of medical care in Delaware's prisons is reasonably foreseeable." DOC Mtn. at 9. This Court already considered the form letters in the context of ACLU's motion for a protective order. Mem. Op. at 13 (citing D.I. 14, Exh. C). The Court found that "[a]lthough perhaps inadequate to carry DOC's ultimate burden to prove the 'potential litigation' defense, these letters suggest that there may be more in the works than 'unrealized or idle threats of litigation.'" *Id.* at 13-14. The Court recognized that DOC *might* be able to support its exemption claim *if* it could show either that ACLU "has been engaged by a client to investigate and/or pursue a potential claim . . . for alleged inadequate medical

care within the DOC's facilities," or "currently intends, in its own right, to pursue such a claim." *Id.* at 14. ACLU has verified that it does not have such clients or the present intention to pursue such litigation. *See* Graff Aff. I. That verification alone is sufficient to rebut DOC's assertion that the form letters provide objective evidence that litigation is imminent.

Nevertheless, DOC argues that the "potential litigation" exemption should bar ACLU's FOIA request because, by informing DOC inmates of the administrative grievance process that they must follow to preserve their legal claims, the "ACLU is giving legal advice to inmates with respect to claims that are likely to result in litigation." DOC Mtn. at 10. DOC's argument is flawed.

First, even if ACLU's form letters make it more likely that *an inmate* will sue DOC—presumably because the letters explain the administrative grievance procedure and thus allow inmates to preserve and successfully advance their legal rights—that would be irrelevant to whether the exemption applies to *ACLU's* request. To implicate the exemption, the potential litigation must involve the requester or the requester's client. *See Office of the Pub. Defender v. Del. State Police*, No. 01C-09-208, 2003 WL 1769758, at *3 (Del. Super. Ct. Mar. 31, 2003) ("[The pending litigation exemption] is exclusively about litigators and litigants looking for materials that might help them in court.") (attached as Exh. 13); *Del. Op. Atty Gen.*, 04-IB20 (Nov. 16, 2004) ("The County . . . cannot invoke the pending litigation exemption under FOIA to deny you public records that may have some nexus to the civil rights litigation because you are not a litigant[.]").

Second, DOC is mistaken to the extent that it argues that the form letters have created an attorney-client relationship between ACLU and the inmates who received them. Neither of the letters would lead a reasonable person to conclude that such a relationship has been established. *See Benchmark Capital Partners v. Vague*, No. 19719-NC, 2002 WL 31057462, at *3 (Del. Ch. Sept.

3, 2002) (holding that attorney-client relationship exists only if contacts between the potential client and lawyer suggest that it would have been reasonable for the client to believe that the attorney was acting as his counsel) (attached as Exh. 14). The "July 10, 2006 Letter" states explicitly that it "is not an offer of representation." D.I. 14, Exh. C. Although the letter does encourage its recipient to complete all levels of his administrative appeals, the letter does nothing more than provide information. Similarly, the "Dear Friend" letter simply sets forth the administrative grievance process and emphasizes that inmates must fully exhaust their administrative appeals to preserve their claims. No reasonable inmate would believe that form letters of this sort provide the basis for an attorney-client relationship.[1]

C. The Potential Litigation Exemption Does Not Apply Where There is Only a Possibility of Future Litigation.

This Court has recognized that the "potential litigation" exemption must be "narrowly construed." Mem. Op. at 9. "As the Attorney General has recognized, '[i]n our litigious society, a governmental agency always faces some threat of suit. To construe the term 'potential litigation' to include an unrealized or idle threat of litigation would seriously undermine the purpose of [FOIA].'" *Id.* at 10 (quoting *Del. Op. Atty. Gen.*, 02-IB12 at 4 (May 21, 2002) (citations omitted)). Despite this well-settled principle, DOC characterizes the form letters, which reference the *possibility* of future litigation regarding prisoner healthcare issues, as "correspondence threatening

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[1] The scope of the attorney-client relationship is narrower than the scope of the attorney-client privilege, which protects not only communications between attorneys and clients, but between attorneys and prospective clients. *See* Del. R. Prof. Resp. 1.18(b) ("Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation[.]"). Discussions between ACLU and inmates at Defendant's facilities regarding the preservation of legal claims are privileged, even though those communications have not given rise to an attorney-client relationship.

litigation." DOC Mtn. at 10. Contrary to DOC's claim, the form letters fall far short of "a formal demand letter or some comparable writing that represents the party's claim and manifests a solemn attempt to sue." *Del. Op. Atty Gen.*, 03-IB21 at *3.

To be sure, ACLU is interested in collecting and analyzing information about the provision of healthcare in Delaware prisons. Once ACLU has done so, it may decide to advocate on behalf of Delaware's inmate population, and that advocacy might involve litigation. But absent an attorney-client relationship and an expressed intent to litigate a particular claim, ACLU's interest in prisoner healthcare and ACLU's status as an advocacy organization is not sufficient to show that litigation is "likely or reasonably foreseeable."

Construing the "potential litigation" exemption so broadly that it thwarts the public's ability to use FOIA to investigate government wrongdoing leads to absurd results. FOIA is a tool that allows the public to "observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy." § 10001. Because the likelihood of future litigation increases when records made available under FOIA reveal government wrongdoing, a broad construction of the exemption would enable the government to pick and choose which documents could be released based on whether the documents are likely to disclose a viable cause of action. Such a result would be contrary to FOIA's purpose of ensuring government accountability. Similarly, such a construction would penalize watchdog groups—like ACLU—that can most effectively educate the public about government policies, just because such groups use litigation as one of many tools to redress government misconduct. The fact that litigation may follow the release of information under FOIA does not support a broad construction of the potential

litigation exemption. To the contrary, FOIA's purpose is served by allowing the public access to government records, even though litigation may follow where the request reveals unlawful conduct.[2]

II. CMS Has Failed to Establish That the Requested Records are Exempt From Disclosure Under 29 Del. C. § 10002(g)(2).

CMS argues that the documents requested by ACLU—treatment protocols for eleven conditions and operating procedures for wellness visits—are exempt from disclosure under FOIA because they are trade secrets or confidential commercial information. *See* 29 Del. C. § 10002(g)(2) (providing FOIA exemption for "trade secrets and commercial or financial information obtained from a person which is of a privileged and confidential nature"); *see also* 5 U.S.C. § 552(b)(4) (same exemption under federal FOIA). CMS has not established that the requested documents fall under either prong of the exemption. First, CMS relies on an overly broad definition of "trade secret" rather than the narrow definition that applies in FOIA cases. Second, CMS has not established that the requested records are "confidential" within the meaning of FOIA because CMS has offered nothing more than conclusory allegations to support its claim that disclosure would harm CMS in competition. Indeed, CMS admits that its treatment protocols are patterned on publicly-available standards, and ACLU has submitted affidavits from professionals in correctional medicine attesting that treatment protocols are drawn from common sources and adapted to the correctional setting in minor and predictable ways. One of ACLU's affiants has worked for both CMS and a CMS competitor and attests that there are no meaningful differences in the two companies' protocols.

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[2] Given that, over time, an investigation may ripen into litigation, the potential litigation exemption's applicability must be assessed against the objective factors existing "at the time the FOIA request was made." Mem. Op. at 4. *See also Lion Raisins v. Dep't of Agric.*, 354 F.3d 1072, 1082 (9th Cir. 2004) (applicability of exemption determined based on facts when FOIA request was made); *Times Pub. Co. v. Dep't of Commerce*, 236 F.3d 1286, 1290 (10th Cir. 2001) (same).

Further, although CMS claims that it has a "policy" of avoiding disclosure of the requested materials, ACLU has submitted evidence—including a CMS treatment protocol that is in the public domain—that CMS's policy has not been consistently enforced.

A. The Requested Records Are Derived From Publicly Available Sources and Do Not Differ in Substance Among Correctional Healthcare Providers.

ACLU requested treatment protocols for eleven specific illnesses or conditions and operating procedures with respect to wellness visits. As explained in the affidavits of Joseph Goldenson and William F. Joyce, treatment protocols are widely available and readily shared between medical service providers and are standard documents in the field of correctional medicine. Goldenson Aff. ¶¶ 6-11, attached as Exh. 6; Joyce Aff. ¶¶ 10-12, attached as Exh. 7.

Treatment protocols, also called "clinical pathways," are instructions for how to treat certain illnesses and conditions. Joyce Aff. ¶ 10.

> Treatment protocols are documents that help health professionals manage common diseases. Treatment protocols briefly identify, summarize, and evaluate the best evidence and most current data about the diagnosis and treatment of common illnesses in order to improve patient care outcomes. They define the most important questions related to clinical practice and identify possible decision options and their potential outcomes and cost effectiveness. Treatment protocols are based on the most current medical evidence, as compiled in the medical literature, and are generally adapted from guidelines published by national medical bodies such as the Centers for Disease Control, the National Institute of Health, the American Diabetes Association, the Joint National Committee on Prevention, Detection, Evaluation, and Treatment of High Blood Pressure, and the National Commission on Correctional Health Care.

Goldenson Aff. ¶ 6. Medical algorithms are common subparts of treatment protocols and reflect the "decision-tree" approach to treatment. Medical algorithms can be set forth in various formats, such as flowcharts or tables, but the substance is derived from the same source materials as the

protocols. *Id.* ¶ 10. The source materials for treatment protocols and medical algorithms are readily accessible to the public. *See* National Guideline Clearinghouse, http://www.guidelines.gov.[3]

Treatment protocols in the correctional setting are adapted from traditional treatment protocols in limited and predictable ways. Goldenson Aff. ¶¶ 8-11. Thus, Dr. Goldenson, who has reviewed numerous treatment protocols used in correctional facilities, has observed only minor differences among them. *Id.* ¶ 8. Further, Mr. Joyce, a board certified Physician Assistant who has worked for both CMS and one of its competitors, Prison Health Services (PHS), confirms that "there is nothing unique" about the pathways or algorithms employed by CMS, and that the clinical pathways of CMS and PHS "do not differ in significant ways." Joyce Aff. ¶¶ 12-13. Because correctional medical services providers compile their treatment protocols from the same substantive information and adapt them to the correctional setting in routine ways, revelation of CMS's treatment protocols would not harm CMS in competition. Goldenson Aff. ¶¶ 9, 11; Joyce Aff. ¶ 14.

CMS admits that its treatment protocols are "based on the most current and best evidence available in the medical literature on optimal treatment of diseases and conditions, with adaptation to the correctional environment." Perham Aff. ¶ 4, attached to CMS Br. as Exh. A. Indeed, in a

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[3] The National Guideline Clearinghouse collects and makes available numerous treatment protocols, including protocols modified for the correctional setting. *See, e.g.,* Center for Disease Control and Prevention, Prevention and control of infections with hepatitis viruses in correctional settings (2003), http://www.guideline.gov/summary/summary.aspx?doc_id=3596&nbr=2822; American Diabetes Association, Diabetes management in correctional institutions (2006), http://www.guideline.gov/summary/summary.aspx?doc_id=8625&nbr=004805&string=correctional; University of Texas Medical Branch Correctional Managed Care, Chronic congestive heart failure (2003), http://www.guideline.gov/summary/summary.aspx?doc_id=4390&nbr=003308&string=correctional; Centers for Disease Control and Prevention, Vaccine preventable STDs. Sexually transmitted diseases treatment guidelines 2006 (2006), http://www.guideline.gov/summary/summary.aspx?doc_id=9684&nbr=005193&string= correctional.

proposal to provide healthcare services to the Missouri Department of Corrections, CMS confirmed that its policies and procedures are patterned on the standards set forth by the National Commission on Correctional Health Care (NCCHC). CMS Proposal to State of Missiouri, RFP B3701111 (March 15, 2001), at http://www.imageweb.oa.mo.gov/acordeweb/Client/Framework.asp, attached as Exh. 8 ("Our site-specific policies and procedures are patterned after NCCHC standards, and we will continue to utilize these standards in the provision of future care."). Because CMS admits that it bases its pathways and algorithms on publicly available information, it cannot sustain its claim that the requested documents may be withheld under the FOIA exemption for trade secrets or confidential commercial information.

B. The Requested Records Are Not "Trade Secrets" Within the Meaning of FOIA.

CMS argues that the requested documents are trade secrets but does not rely on any *FOIA* authority. CMS Br. at 7-8. Instead, CMS argues that the documents fall within the definition of "trade secrets" used in the Uniform Trade Secret Act (CMS Br. at 8, citing *Savor, Inc. v. FMR Corp.*, 2004 WL 1965869, at *6 (Del Super. Ct. July 15, 2004)), or the standard for protecting trade secrets under Rule 26(c)(7) of the Federal Rules of Civil Procedure (CMS Br. at 8, citing *Tolson v. Barnett & Wilson Surgical Assoc., P.A.*, 2002 WL 234751 (Del. Super. Ct. Feb. 15, 2002)). Because "trade secrets" is construed narrowly in the FOIA context, the cases cited by CMS are inapposite.

As used in FOIA, "trade secret" means "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). Although *Public Citizen* interpreted "trade secrets" as used in the federal FOIA, the Delaware FOIA uses

identical language. *Compare* 5 U.S.C. § 552(b)(4) *with* 29 Del. C. § 10002(g)(2). *Public Citizen* recognized that the definition of trade secret derived from the *Restatement of Torts,* which is substantially the same as that used in the Uniform Trade Secret Act, has been "widely relied-upon" *outside* the FOIA context. 704 F.2d at 1286 (citations omitted). Nevertheless, *Public Citizen* rejected that definition as overly broad and inconsistent with the purpose and construction of FOIA. 704 F.2d at 1288; *see also Prince George's County v. Washington Post Co.*, 815 A.2d 859, 872 n.17 (Md. App. 2003) (adopting the *Public Citizen* definition of trade secret in state FOIA context); *United Steelworkers of Am., AFL-CIO-CLC v. Auchter*, 763 F.2d 728, 741 (3d Cir. 1985) (noting that the definition of trade secret for FOIA purposes is narrower than that used in the *Restatement of Torts*). The *Public Citizen* definition is consistent with the policy that FOIA exemptions must be "narrowly construed." Mem. Op. at 9 (citation omitted). Further, only a narrow reading of trade secrets is consistent with the two-prong construction of § 10002(g)(2). *See Public Citizen*, 704 F.2d at 1289 (noting that a broad definition of trade secrets "renders meaningless the second prong" of the exemption).

Given that CMS's pathways and algorithms involve the provision of services, as opposed to commodities, the "trade secret" prong of § 10002(g)(2) is inapplicable. *See Public Citizen*, 704 F.2d at 1288 (trade secret exemption applies only to information relating to "trade commodities"); *Dynalectron Corp. v. Dep't of Air Force*, 1984 WL 3289, at *3 (D.D.C. Oct. 30, 1984) ("As the information . . . does not concern production of trade commodities but rather the marketing and performance of services, this first prong of [the exemption] is not called into play.") (attached as Exh. 15). Further, CMS cannot show that the requested records are the end product of either innovation or substantial effort. *See* Goldenson ¶¶ 9, 11; *see also Pacific Sky Supply, Inc. v. Dep't*

of Air Force, No. 86-2044, 1987 WL 18214, at *3 (D.D.C. Sept. 29, 1987) (declining to protect drawings because the Air Force could not establish that they were the result of either innovation or substantial effort) (attached as Exh. 16). In any event, as discussed in the next section, even if a broad definition of trade secret applied in the FOIA context, the requested documents would not be subject to withholding as trade secrets for the same reasons that the requested information is not "confidential."

C. The Requested Records Are Not "Confidential" Under FOIA.

To justify withholding the requested records under the second prong of the exemption, CMS must show that the information is 1) commercial or financial, 2) obtained from a person, and 3) privileged or confidential. § 10002(g)(2). CMS makes no claim that the requested material is financial or subject to privilege, and ACLU does not dispute that the information was obtained from a person and is commercial. Thus, the exemption issue turns on whether CMS has shown that the information is "confidential" within the meaning of FOIA. CMS argues that disclosure would "'cause substantial harm to [CMS's] competitive position.'" CMS Br. at 10 (quoting *United Tech. Corp. v. Dep't of Health and Human Servs.*, 574 F. Supp. 86, 89 (D. Del. 1983)). CMS's argument fails for several reasons. First, CMS has not explained *how and why* it will lose a competitive advantage if the requested records are disclosed. Second, CMS has not shown that the requested information is not available to others in the correctional medical field. To the contrary, ACLU has submitted evidence showing that the requested information is ascertainable from publicly available sources and that the requested records do not differ in any substantial way from similar documents used by CMS's competitors. Third, although CMS claims that it has a "policy" of not disclosing the

requested records, ACLU has submitted evidence—including one of the requested records—demonstrating that CMS's policy is not consistently enforced.

1. CMS has presented no evidence to show that release of the requested documents would cause it competitive harm.

CMS acknowledges that the requested records are confidential under FOIA only if CMS can show a "likelihood of substantial competitive injury" if the documents are released. CMS Br. at 10. But in its brief, CMS devotes only a single sentence to the issue of competitive harm: "And as described in the Affidavit of Ann Perham, the disclosure of these documents would have a negative economic impact on CMS and would impair the ability of CMS to compete in the marketplace." CMS Br. at 10-11. The Perham affidavit is just as conclusory, asserting without explanation that a broad category of documents "provide CMS a significant competitive advantage over its competitors" and "have significant economic value to CMS," and, if disclosed, would result in a "loss of competitive advantage [that] would have a negative economic impact on CMS and would impair the ability of CMS to compete in the marketplace." Perham Aff. ¶ 5.

Such unexplained assertions are insufficient to prove that documents are confidential under FOIA. "Conclusory and generalized allegations of substantial competitive harm, of course, are unacceptable and cannot support an agency's decision to withhold requested documents." *Public Citizen*, 704 F.2d at 1291 (citations omitted); *see also Delta Ltd. v. Customs & Border Prot. Bureau*, 393 F. Supp. 2d 15, 19 (D.D.C. 2005) ("Conclusory statements that this information would result in substantial harm are insufficient to meet the burden."). Rather, the party invoking the exemption "must outline how and why release of the information would likely result in competitive harm." *Delta Ltd.*, 393 F. Supp. 2d at 18 (citation and internal quotations omitted). Even if the requested

documents contain "the type of information that a business entity would not otherwise release," CMS must "show how and why this particular information would damage [its] competitive position." *Id.* at 19. To do so, CMS must prove both that it owes its commercial success to the requested information and that its competitive advantage will be lost if the information is revealed. *See Greenberg v. FDA*, 803 F.2d 1213, 1217-18 (D.C. Cir. 1986). Because CMS has failed to explain how release of the requested records could cause it *any* competitive injury—much less a "substantial" one—the Court should reject CMS's exemption claim.

The Perham affidavit is also deficient because it addresses a category of documents—"the CMS pathways, policies and procedures"—that is broader than the eleven specific treatment protocols and one operating procedure requested by ACLU. Perham Aff. ¶¶ 4-5. An affidavit that is not tailored to the particular documents at issue "does no good" because "the court cannot tie the affidavit[] to the documents." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 150 (D.C. Cir. 2006). A party "may not claim exemptions too broadly, thereby sweeping unprotected information within the statute's reach," but must explain why the claimed exemption applies to the content of the particular documents at issue. *Id.* at 147; *see also id.* at 150 (noting that without a clear description of the withheld documents, the defendant had "failed to supply [the court] with even the minimal information necessary to make a determination").

2. CMS has not shown that the requested records contain information unknown and unavailable to its competitors.

Even if CMS had shown that its commercial success is attributable to the confidentiality of its treatment protocols and operating procedure for wellness visits, the requested records would not be exempt because disclosure under FOIA is not the sole means by which competitors can obtain the

requested information. *See Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981) ("If the information is freely or cheaply available from other sources, such as reverse engineering, it can hardly be called confidential and agency disclosure is unlikely to cause competitive harm."). Although CMS asserts that the requested records contain information "not generally known, and [] not readily ascertainable, to CMS's competitors" (CMS Br. at 2-3; Perham Aff. ¶ 5), the evidence shows that the requested information is compiled from publicly available sources.

CMS admits that its treatment protocols are compiled from the "medical literature . . . with adaptation to the correctional environment" (Perham Aff. ¶ 4), and that its "policies and procedures are patterned after NCCHC standards" (CMS Proposal to MDOC, Exh. 8, at 78). These sources of information are public and, as explained in the Goldenson affidavit, "all correctional medical service providers make basically the same adaptations to traditional treatment protocols," such that "CMS's treatment protocols would not be of unique use or value to other correctional medical service providers." Goldenson Aff. ¶ 9. This conclusion is confirmed by the affidavit from Mr. Joyce, a physician's assistant who has "worked with the clinical pathways of both CMS and PHS"—a CMS competitor—and found that "they do not differ in significant ways." Joyce Aff. ¶ 13. Indeed, based on his "extensive personal experience working with CMS's clinical pathways and algorithms," Mr. Joyce has concluded that "there is nothing unique about the pathways or algorithms employed by the company, as they are all based on the same community standards available to every other health care provider." *Id.* ¶ 12.[4]

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[4] Moreover, CMS is affiliated with the Correctional Medical Institute (CMI), a non-profit organization founded by doctors from CMS and Johns Hopkins University. *See* Correctional

Further, to the extent CMS claims that its "adaptation" of the information "available in the medical literature" (*id.* ¶ 4) is the part of the requested records that it considers confidential, it cannot justify withholding the portions of the documents that are drawn from information in the public domain. "Because '[t]he focus in the FOIA is information, not documents, [] an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.'" *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 907 (D.C. Cir. 1999) (quoting *Schiller v. NLRB*, 964 F.2d 1205, 1209-10 (D.C. Cir. 1992)). Rather, CMS must segregate and produce those portions of the requested records that are not confidential. *See Defenders of Wildlife v. Dep't of Interior*, 314 F. Supp. 2d 1, 17-18 (D.D.C. 2004); *see also State ex rel. Nat'l Broadcasting Co., Inc. v. City of Cleveland*, 526 N.E.2d 786, 792 (Ohio 1998) ("[F]act that excepted materials may be contained in records which also contain materials subject to disclosure does not relieve the government of its duty to disclose the nonexcepted material.").

3. CMS has failed to protect the confidentiality of the requested materials.

CMS claims that it "takes substantial steps to protect the confidentiality of its pathways and policies and procedures," including the use of a "Non-Disclosure Agreement" and a "policy on

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Medicine Institute, http://www.cm-institute.org/index.htm. CMI's website contains a variety of treatment protocols and other correctional medical information. *See* Courses and Materials, http://www.cm-institute.org/courses.htm. Dr. Louis Tripoli, one of CMI's three founding doctors, is CMS's Vice President of Medical Affairs and Chief Medical Officer, and one of only three doctors identified by CMS as involved in the "drafting, compiling, completion, and review of CMS's pathways, protocols, and policies." *See* CMS Answers to Interrogatories, No. 1, attached as Exh. 9; *see also* Perham Aff. ¶ 2 ("CMS's medical leadership [] has developed certain clinical pathways."). Given the overlap in the medical leadership of CMS and CMI, it is likely that there is significant overlap between the requested documents and the materials available from CMI.

confidentiality." CMS Br. at 3; Perham Aff. ¶¶ 6-7.[5] CMS has also indicated that it has a general policy of restricting access to those documents, and that it has a policy of seeking protective orders before producing the documents in discovery. CMS Answers to Interrogatories, Nos. 2 & 3. These assertions are inapposite. "[W]hether the information is of a type which would normally be made available to the public, or whether the government has promised to keep the information confidential is not dispositive under [the] Exemption" at issue. *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994). CMS cannot prove that the requested documents are confidential under FOIA because the evidence shows that at least some of the requested documents are in the public domain and that CMS has failed to enforce its nondisclosure policies.

ACLU has submitted with this brief one of the CMS treatment protocols it seeks under FOIA—the CMS protocol for treatment of Hepatitis C. *See* Correctional Medical Services, Chronic Hepatitis C Pathway, attached as Exh. 10. ACLU obtained CMS's Hepatitis C protocol from the publicly-available record in *Hamlin v. Prison Health Services*, No. Civ. 03-169-B-W (D. Me.). The protocol was attached as an exhibit to an affidavit submitted by *a CMS doctor*. CMS's Hepatitis C

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[5] Because the Perham affidavit addresses a category of documents far broader than the eleven specific treatment protocols and one operating procedure at issue, the "Non-Disclosure Agreement" and "policy on confidentiality" may not even be intended to cover the requested documents. *See* Perham Aff. ¶¶ 6-7. Neither the "Non-Compete, Non-Disclosure Agreement" (Tab 1 to Perham Aff.), nor the confidentiality clause of the "Employee Success Guide" (Tab 2 to Perham Aff.), even mention treatment protocols, clinical pathways, or algorithms. Indeed, the Perham affidavit focuses on CMS's "Policy and Procedures Manual" (Perham Aff. ¶¶ 3, 6, & 8), even though the treatment protocols (which CMS calls "clinical pathways") are "not located in the Policy and Procedures Manual." Joyce Aff. ¶ 17. Similarly, the confidentiality agreement between the U.S. Department of Justice (DOJ) and the State of Delaware, which provides that DOJ will consult the State before releasing "non-public documents obtained in the course of the investigation" (Tab 3 to Perham Aff. ¶ 3), is irrelevant here. ACLU has not sought the documents from DOJ and, for the reasons set forth in this brief, they are not "non-public documents."

protocol is available to the public from the court record, including the court's "Public Access to Court Electronic Records" (PACER) website. It is axiomatic that when a requested document is already publicly available its disclosure under FOIA cannot cause competitive harm and it cannot qualify for protection under the FOIA exemption for "confidential" commercial information. *Changzhou Laoson Group v. U.S. Customs & Border Prot. Bureau*, 374 F. Supp. 2d 129, 133 (D.D.C. 2005); *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 93 F. Supp. 2d 1, 10 (D.D.C. 2000) ("No competitive harm can result if the information is publicly available through other sources.") (citing *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir.1987)).

The *Hamlin* litigation is not unique. Notwithstanding CMS's claim that its "policy" is to only produce documents in discovery pursuant to a protective order, CMS's treatment protocols have been produced without a protective order in *West v. Nichols*, 2006 WL 2255706 (N.D. Ga. Aug. 3, 2006) (denying protective order) (attached as Exh. 17), and have been admitted in evidence in *Cassell v. Correctional Medical Services*, 2006 WL 794881 (E.D. Ark. March 27, 2006) (attached as Exh. 18). Documents admitted in evidence in litigation are presumptively public. *In Matter of Du Pont*, No. Crim. 8091-NC, 1997 WL 383008, at *2-3 (Del. Ch. June 20, 1997) (attached as Exh. 19). Because CMS is frequently sued—a Westlaw search produced 462 opinions that list CMS as a party—it is highly likely that the requested records have been produced and admitted in cases other than *Hamlin*, *Nichols*, and *Cassell*. Indeed, the Court should draw such an inference from CMS's refusal to answer ACLU's interrogatory asking CMS to identify the cases in which CMS's pathways, protocols, and procedures were produced in discovery. CMS objected to the interrogatory on the grounds that it is "overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence." CMS Answers to Interrogatories, No. 3. Had CMS

answered the interrogatory, ACLU would likely have been able to show more cases where the requested documents were produced without a protective order or were admitted in evidence. The fact that CMS believes that listing the relevant cases would be "unduly burdensome" shows that the requested documents have often been the subject of discovery.

Similarly, CMS's claim that it "requires its management employees, such as Health Service Administrators, . . . to sign a Non-Compete, Non-Disclosure Agreement" (Perham Aff. ¶ 6), is belied by Mr. Joyce's affidavit. During 2006, Mr. Joyce worked as a Health Service Administrator for CMS at a prison in Delaware, and he never signed a Non-Disclosure Agreement. Joyce Aff. ¶¶ 2, 15. Further, during his employment with CMS, Mr. Joyce was never told that the requested documents were among those considered confidential, and CMS staff often took the requested records home to review them outside of work hours. *Id*. ¶¶ 16-17. Given that "CMS provides services and staffing in approximately 274 facilities in 24 states" (Perham Aff. ¶ 3), it is unlikely that the Delaware facility where Mr. Joyce worked is the only facility where CMS failed to enforce its confidentiality policy. Moreover, the Court should draw such an inference from CMS's refusal to answer ACLU's interrogatory seeking the names of such facilities. CMS objected to the interrogatory on the grounds that it is "overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence" (CMS Answers to Interrogatories, No. 4), even though CMS was able to produce such a list—now publicly available—as part of a proposal it submitted to MDOC. *See* CMS Contract Site List, attached as Exh. 11. Similarly, CMS invoked the same grounds in refusing to answer ACLU's interrogatory seeking the number of individuals in various categories other than CMS staff who have had access to the requested documents. Instead, CMS asserted that its policy is that such access is "limited," "on an as needed basis," or "subject to confidentiality." CMS

Answers to Interrogatories, No. 3. Because ACLU has shown that CMS's claimed "policy" of restricting access to the requested documents has not been consistently enforced and unrestricted disclosure has occurred, CMS cannot establish that the information at issue is "confidential" under FOIA.

CONCLUSION

Because DOC and CMS have not met their burden of demonstrating that the requested records are exempt from disclosure under FOIA, the Court should deny the motion for summary judgment and order DOC to produce the requested records.

April 30, 2007

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