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Issue Date: 12 February 2008

CASE №.: 2007-ERA-00007

In the Matter of:

JAMES F. NEWPORT,
Complainant,
vs.

CALPINE CORP.,
Respondent.

Order Denying Motion for Stipulated Protective Order

In this claim seeking relief under the employment protection provisions of § 211 of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, the parties have moved for the entry of a stipulated protective order. The order they propose overlooks longstanding governmental interests in transparent adjudication rooted in common law, the First Amendment, applicable statues and regulations. Because their order would:

- seal materials submitted with a dispositive motion (such as a motion for summary decision),
- seal materials submitted as trial evidence, and
- make portions the trial transcript itself confidential,

without making the requisite (and burdensome) showings that sealing requires, and place no redacted copies of the allegedly confidential materials in the public file, the proposed order cannot be entered.

The Proposed Order

As the parties exchange materials in discovery, they seek to protect

> "all financial, proprietary, trade secret and private personal information of the parties, or of their current or former employees, or of any third party, that is produced in this action"

from public disclosure and to prevent uses of the information that are unconnected with this litigation. Proposed Stipulated Protective Order (Proposed Order) at pg. 1 and ¶ 2. Their proposal permits one party to designate material as confidential if it believes in good faith that a document or information is legally privileged, or its disclosure "would violate a personal, financial or other interest protected by law." Id., at ¶ (1)(d). The opponent's acquiescence "is not a consent or admission as to the actual confidentiality of any material." Id., at ¶ 16.

The Proposed Order reaches beyond discovery disclosures into the proceedings themselves. If information a party designates as confidential later is incorporated into or appended to pleadings, memoranda, briefs or exhibits, it is to be filed in a sealed envelope and withheld from the public. Id. at ¶ (8). The proposal does not provide that a redacted copy be placed in the public file. Data designated as confidential retains that status even when offered in evidence at trial. Id., at ¶ 10. When offered at any hearing (which appears to include the trial) the parties are to ensure that only "qualified persons" are present when confidential matters are discussed. Id., at ¶ 9. The court reporter is expected to specially label confidential materials admitted in evidence, bind them separately, and segregate the portions of the transcript dealing with them. Id., at ¶ 11.

The Proposed Order raises distinct issues: the confidentiality of materials disclosed to a litigation opponent but never filed here, and the confidentiality of filings, evidence and transcripts of proceedings that, when filed, become subject to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as records of the Secretary of Labor. *Cf.*, *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988) (drawing distinctions between protections available for documents delivered to a litigation adversary "as raw fruits of discovery" and those filed in connection with a dispositive summary judgment motion) and *Anderson v. Cryovac*, 805 F.2d 1, 13 (1st Cir. 1986) (recognizing the long-standing presumption in the common law that the public may inspect judicial records, but denying public access to material merely exchanged in discovery). Pretrial depositions are not public events. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984); *Amato v. City of Richmond*, 157 F.R.D. 26, 27 (E.D. Va. 1994); *Kimberlin v. Quinlan*, 145 F.R.D. 1 (D.D.C. 1992). The first issue is easily determined—material a party receives in discovery, and discovery deposition transcripts may be treated as confidential until they become proof offered into the adjudicatory record. Thereafter common law traditions of access to adjudicatory proceedings and the First Amendment complicate matters, as do the Administrative Procedure Act and FOIA.

Applicable Statutes

The APA

This complaint for employment protection under the ERA is adjudicated "on the record after notice and opportunity for public hearing." 42 U.S.C.

§ 5851(b)(2)(A). These adjudications are governed by §§ 5 and 7(d) of the Administrative Procedure Act, so that all papers and requests that are filed, the exhibits and the transcript of testimony become the exclusive record for the Secretary's decision. 5 U.S.C. §§ 554(a) & 556(e).

FOIA

FOIA requires the Secretary of Labor to make her records promptly available to any person who makes a proper request for them. 29 C.F.R. §70.3,[1] *et seq.*, implementing 5 U.S.C. § 552(a)(3)(A). Final opinions and orders made in adjudications are specifically included. 5 U.S.C.§ 552(a)(2)(A). Executive agencies may only withhold information that falls within that Act's nine exemptions or three exclusions. No exemption or exclusion applies to pleadings, motions, evidence or transcripts that constitute the record of agency adjudications. Article III courts pretermit FOIA analyses because the Act exempts them. 5 U.S.C. § 551(1)(B), *Brown & Williamson Tobacco Co. v. Federal Trade Commission*, 710 F.2d 1165, 1177 (6th Cir. 1983); *Warth v. Dep't of Justice*, 595 F.2d 521, 523 (9th Cir. 1979); *see also Andrade v. United States Sentencing Comm'n.*, 989 F.2d 308, 309-10 (9th Cir. 1993) (finding the Sentencing Commission, as independent body within judicial branch, not subject to FOIA). Decisions of Article III courts sealing materials therefore are not direct authority in agency adjudications, which require additional FOIA analysis.

Materials Filed with Motions

Public Access based on Common Law and the First Amendment

In Article III courts, pleadings, motions and decisions are available to the public.. *Providence Journal Co., Inc.*, 293 F.3d 1, 11-13 (1st Cir. 2002) (finding the public and the press enjoy a First Amendment right of access to legal memoranda filed in district court); *Brown & Williamson Tobacco Co., supra*, 710 F.2d 1165 (unsealing documents based on common law rights of access to court records and the First Amendment, even though the records originally had been turned over to the administrative agency under a confidentiality agreement); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987) (granting public access to financial statements the defendants submitted to induce the agency to seek court approval of a consent decree that would limit their personal liability); *In re Bank One Securities Litigation, First Chicago Shareholder Claims*, 222 F.R.D. 582, 589 (N.D. Ill. 2004) (refusing to keep pleadings, motions, and attached exhibits confidential where the

[1] "All agency records, except those exempt from mandatory disclosure by one or more provisions of 5 U.S.C. 552(b), will be made promptly available to any person submitting a written request in accordance with the procedures of this part." 29 C.F.R. §70.3.

party seeking protection did not explain adequately how disclosing the information could harm it). A trial judge recently was the object of stinging criticism for sealing an opinion that contained neither trade secrets nor other types of confidential information. *Hicklin Engineering v. Bartell*, 439 F.3d 346 (7th Cir. 2006).

Similar rules apply to records of criminal prosecutions. *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989) (invalidating a Massachusetts statute that restricted access to records in criminal prosecutions that did not end in a conviction); *Associated Press v. U.S. (DeLorean)*, 705 F.2d 1143 (9th Cir. 1983) (overturning on First Amendment grounds a blanket sealing of pretrial filings in a criminal case). Orders that impede public access to court filings in order to protect a defendant's Sixth Amendment right to a fair trial must be tailored as narrowly as practicable. *Id.*, at 1146; *In re Providence Journal Co., Inc.*, *supra*, 293 F.3d at 14.

No particularized showings are required by the Proposed Order before matters are sealed; one party may assert a good faith belief that the information is protected, a proposition the opponent may not even agree with. Proposed Order at ¶16. Several appellate courts have highlighted the error of this approach. *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.,* 178 F.3d 943, 945 (7th Cir. 1999) (emphasizing that a court may not "rubber stamp a stipulation to seal the record"); *Procter & Gamble Co. v. Bankers Trust Co.,* 78 F.3d 219, 227 (6th Cir. 1996) (criticizing a confidentiality order that gave litigants unfettered right to file documents under seal); *see also, In re Krynicki*, 983 F.2d 74 (7th Cir. 1992) (Chambers opinion) (dealing with the related issue of sealing matters in appellate courts, and demonstrating why motions to seal entire appellate briefs and/or records are virtually certain to fail).

The Proposed Order, which would restrict access to materials filed with dispositive motions, could not be entered by an Article III court. It may not be entered in an agency adjudication either.

Trial Evidence

Trial evidence will not be sealed merely because the parties request it. Proof offered in adversary proceeding is presumptively available to the public. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 & n.7 (1978) (finding a common law right of access to judicial records, but finding statutory reasons not to permit reproduction of a presidential audiotape offered in evidence); *Republic of Phil. v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3d Cir. 1991) (affirming a district court decision to unseal documents that had been filed with a motion for summary judgment). *See also*, PROPRIETY AND SCOPE OF PROTECTIVE ORDER AGAINST DISCLOSURE OF MATERIAL ALREADY ENTERED INTO EVIDENCE IN FEDERAL COURT TRIAL, 138 A.L.R. Fed. 153 (1997).

The Ninth Circuit requires the trial judge to make specific findings before sealing evidence. *Pintos v. Pacific Creditors Ass'n*, 504 F.3d 792, 801-803 (9th Cir. 2007) (dealing with a litigant's application to seal evidence attached to an opponent's motion for summary judgment, materials the litigant regarded as confidential and proprietary); *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (rejecting the City's conclusory justifications for sealing material filed with a dispositive motion, and making that evidence available to the press); *Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1122, 1135-1136 (9th Cir. 2003) (treating summary judgment as equivalent to a trial, and stating that "the presumption of [public] access is not rebutted where documents which are the subject of a protective order are filed with the court as attachments to summary judgment motions," and that "to retain any protected status for documents attached to a summary judgment motion, the proponent must meet the 'compelling reasons' standard and not the lesser 'good cause' determination"). Attachments to non-dispositive motions may be sealed on the lesser showing of good cause. *Phillips v. General Motors Corp.,* 307 F.3d 1206, 1213 (9th Cir. 2002).

A Proposed Order that contemplates no demonstration of compelling reasons to restrict public access to trial evidence or a showing of good cause to restrict access to material appended to non-dispositive motions cannot be approved.

Public Access to the Courtroom and Trial Transcripts

"A trial is a public event. What happens in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Both criminal and civil trials in Article III federal courts traditionally are open to the public. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 580 & n. 17 (1980 (plurality opinion). Administrative proceedings also are typically public events. *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, *aff'd,* 303 F.3d 681 (6th Cir. 2002) (finding a First Amendment right of access to proceedings for removal/deportation of aliens); *Whiteland Woods, LP v. Township of West Whiteland*, 193 F. 3d 177 (3d Cir. 1999) (finding a First Amendment right of access to a municipal planning commission hearing, but no constitutional right to videotape it); *Society of Professional Journalists v. Sec. of Labor*, 616 F.Supp. 569 (D. Utah 1985), *vacated as moot,* 832 F.2d 1180 (10th Cir.1987) (district court holding that the press and public had a constitutional right of access to Mine Safety and Health Administration hearings conducted to investigate causes of a mine fire); *Herald Co. v. Weisenberg*, 452 N.E.2d 1190 (N.Y. 1983) (finding a right of public access to unemployment insurance hearings on non-constitutional grounds); 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 14:13 & 14:14 (2d ed. Davis Pub. Co. 1980). Some administrative hearings can be closed [see the types collected in *North Jersey Media Group, Inc. v. Ashcroft,* 308 F.3d 198, 210 (3rd Cir. 2002)], but these are the exception, not the rule.

Trials of whistleblower protection matters such as this are "open to the public." 29 C.F.R. § 18.43(a), made applicable by 29 C.F.R. § 24.107(a).[2] Parties cannot stipulate to close portions of trials because documents or information one party regards as confidential may be discussed. Proposed Order at ¶ 9.

Summary

The proposed Protective Order fails to address the public interest adequately. It assumes that if a litigation opponent does not challenge the assertion that a document constitutes, contains or reveals confidential or proprietary financial, personnel or business information, it may be sealed. This assumption cannot overcome the public's right of access under

- the common law,
- the First Amendment,
- the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.,*
- the Freedom of Information Act, as amended, 5 U.S.C. § 552, *et seq.*,
- the Secretary of Labor's FOIA regulations published at 29 C.F.R. part 70, and
- this forum's procedural rules published at 29 C.F.R. § 18.43

to materials filed or proceedings conducted here. Particularized affidavits or declarations are required to demonstrate that a disclosure exemption applies, *e.g.,* FOIA Exemption 4, for "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential," or Exemption 6, for clearly unwarranted invasions of personal privacy. 5 U.S.C. § 552(b)(4) & (6). The public could be excluded from a hearing or trial, if at all, only for compelling reasons. A party would have to file a particularized motion well before trial seeking that extraordinary action.

[2] That portion of the regulations governing whistleblower protection proceedings under the ERA reads:

> "(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, 29 C.F.R. part 18."

Procedures to Protect Obviously Sensitive Matters

Narrow classes of data are sufficiently sensitive that courts protect them from disclosure. *See generally*, *Kamakana*, 447 F.3d at 1184 (approving a magistrate judge's finding that unsealing police officers' home address and social security numbers risked exposing them and their families to harm or identity theft); and Rule 25-5 of the U.S. Court of Appeals for the 11th Cir. These things also fall under FOIA exemption 6: matters that, if disclosed, "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). They may be protected without the necessity of a motion to seal. They encompass:

a. *Social Security numbers*.[3] If an individual's social security number appears in a pleading, only the last four digits of that number should be used.

b. *Names of minor children*. If the involvement of a minor child must be mentioned (something that seems unlikely here), only the child's initials should be used. A minor child is any person under the age of eighteen years at the time the material is filed.

c. *Dates of birth*.[4] If an individual's date of birth must be included in a pleading, only the year should be used.

d. *Financial account numbers*.[5] Whenever financial account numbers are relevant, only their last four digits should be used.

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[3] *Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 365-366 (5th Cir. 2001); *Norwood v. FAA*, 993 F.2d 570, 575 (6th Cir. 1993); *Peay v. Dep't of Justice*, No. 04-1859, 2006 WL 1805616, at *2 (D.D.C. June 29, 2006) ("The IRS properly applied exemption 6 to the social security numbers of IRS personnel.").

[4] *Hardison v. Sec'y of VA*, 159 F. App'x 93 (11th Cir. 2005); *Judicial Watch, Inc. v. U.S. Dep't of Commerce,* 83 F. Supp. 2d 105, 112 (D.D.C. 1999), *appeal dismissed voluntarily*, No. 99-5054 (D.C. Cir. Sept. 10, 1999).

[5] *Sherman*, *supra*, 244 F.3d at 366 (recognizing the prevalence and risk of identity theft, although that case did not involve account numbers); *Painting and Drywall Work Preservation Fund, Inc. v. Dep't of Hous. and Urban Dev.,* 936 F.2d 1300, 1303 (D.C. Cir. 1991) (holding that Exemption 6 protects personal information contained in payroll records); *Stabasefski v. United States*, 919 F. Supp. 1570, 1574-1575 (M.D. Ga. 1996) (approving redaction under FOIA Exemption 6 of information about vouchers containing the names, addresses, social security numbers, and financial information of FAA employees).

e. *Home addresses*.[6] When a home address must be included, only the city and state should be used.

A party filing a document containing any of the five types of data listed above shall file (1) a redacted document for the public file and (2) a reference list under seal. No motion to file the reference list under seal is required for that data. The reference list shall contain the complete data and the redacted identifier used in its place in the public filing. All references to the redacted public filing will be construed to refer to the sealed personal data. The reference list filed under seal may be amended as of right; it shall be retained in the adjudicatory record.

Procedure to Protect Other Materials From Disclosure

A motion to file a document under seal must specify the type of confidential data the document includes, and for briefs or memoranda (as opposed to evidence), why it was necessary and relevant to include confidential information in the argument at all. A redacted copy must be filed in the public record. If a sealed filing is permitted, both the redacted and unredacted documents shall be retained as part of the adjudicatory record. Each page of the public copy shall be redacted to the *least* extent necessary to protect the type of confidentiality involved.

Order

It is ordered that:

1. The motion to adopt the Proposed Order is denied, and

2. The parties are granted 14 days in which to submit an amended Proposed Order dealing with confidential information.

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William Dorsey
Administrative Law Judge

[6] *Bibles v Or. Natural Desert Ass'n.*, 519 U.S. 355-56 (1997) (per curiam) (withholding mailing list of the recipients of a Bureau of Land Management publication); *DOD v. FLRA*, 510 U.S. 487, 494-502 (1994) (withholding names and home addresses of federal employees in union bargaining units); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173-79 (1991) (withholding from interview summaries names and addresses of Haitian refugees interviewed by State Department about their treatment upon return to Haiti).