



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

REDACTION REQUEST DENIED: August 13, 2020

CBCA 6049

TRANSWORLD SYSTEMS INC.,

Appellant,

v.

DEPARTMENT OF EDUCATION,

Respondent.

Paul A. Debolt and Chelsea B. Knudson of Venable LLP, Washington, DC; and James Y. Boland of Venable LLP, Tysons Corner, VA, counsel for Appellant.

Michael S. Taylor and Megan R. Nathan, Office of the General Counsel, Department of Education, Washington, DC, counsel for Respondent.

LESTER, Board Judge.

ORDER

On July 14, 2020, the Board issued a decision on the parties' cross-motions for summary judgment. The Board had previously issued a protective order in this appeal allowing the parties to exchange protected information and submit filings containing protected material to the Board under seal. Although neither party filed its summary judgment briefing under seal or cited any exhibits that had been filed under seal, the Board, in an abundance of caution, issued its summary judgment decision under seal to provide the parties an opportunity to ensure that the decision contained no protected material that needed to be redacted before the decision was made publicly available.

Appellant, Transworld Systems Inc. (TSI), subsequently notified the Board that it was not requesting any redactions, but the Department of Education's Office of Federal Student Aid (FSA), the respondent in this appeal, requested that the Board redact all dollar figures identified in the decision. That includes the dollar amounts that FSA calculated that it owed TSI as a result of FSA's review of the collections data in its automated databases; the amount of FSA's claim against TSI; and the appropriations data that FSA identified on the first page of bilateral modification 0052 (mod-52). In support, FSA asserted that another case filed by another contractor in the Court of Federal Claims involves the same overpayment issue that is pending in this appeal and that FSA does not want to release to the plaintiff in the Court of Federal Claims case any confidential and/or protected information that is not directly related to that contractor's complaint. FSA represented that "[t]he public dissemination of the dollar amounts related to TSI's claim will effectively diminish [FSA's] discovery position" in its Court of Federal Claims litigation. FSA stated that, "[o]utside of the protective order, the Agency has not released to any other [private collection agency] the dollar amounts the Agency paid, received, and/or believes it overpaid [TSI]." FSA acknowledges that, in the absence of the Court of Federal Claims litigation, FSA "would not have requested the dollar amounts be redacted."

Generally, records in appeals filed with the Board are open to the public for review unless there are reasons, consistent with the exemptions identified in the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2018), that particular information should be withheld. As one of the Board's predecessors, the General Services Board of Contract Appeals, explained in *ACE-Federal Reporters, Inc. v. General Services Administration*, GSBICA 13510-REM, et al., 02-2 BCA ¶ 31,912, "[t]ribunals are required to 'skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need'" (quoting *Encyclopedia Brown Productions v. Home Box Office*, 26 F. Supp. 2d 606, 611 (S.D.N.Y. 1998)), and "[t]hose seeking to maintain the confidentiality of judicial records have a heavy burden and must show a compelling interest." Typically, as discussed in *ACE-Federal Reporters*, "the factors to be applied in reviewing requests for confidentiality include the age of the information and whether there is evidence that disclosure of the confidential information will work a clearly defined and serious injury to the business or create a competitive disadvantage to the party resisting publication," and "[t]hose seeking to maintain the confidentiality of judicial records have a heavy burden and must show a compelling interest."

FSA's redaction request lacks any viable foundation, for the following reasons:

First, the FOIA exemption upon which FSA relies in requesting redaction is exemption 4, which protects against the public disclosure of "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

Although the FOIA does not expressly define the term “confidential,” the Supreme Court has held that the exemption is triggered “where commercial or financial information is both customarily and actually treated as private by its owner” and has left open the possibility that the information must also have been “provided to the government under an assurance of privacy.” *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019). Nevertheless, “only information originating from the companies themselves can be considered information that they customarily and actually treated as private during their ordinary course of business.” *American Small Business League v. United States Department of Defense*, 411 F. Supp. 3d 824, 830 (N.D. Cal. 2019). Nothing in exemption 4 permits an agency to protect its *own* financial information. The dollar amounts that FSA is seeking to protect largely come from FSA, not TSI. They include the commission amounts that FSA calculated in reviewing its own automated collections database, the amount that FSA is demanding that TSI repay FSA, and the dollar amount of the appropriation that FSA appears to have assigned to mod-52. That is not financial information to which exemption 4 applies.

Second, the information that an agency seeks to protect under exemption 4 must “actually [be] treated as private by its owner.” *Food Marketing Institute*, 139 S. Ct. at 2366. “[O]nce a submitter grants the government permission to loan or release the information to the public, there is no reason for Exemption 4 to apply because the submitter no longer intends the information to be ‘secret.’” *Herrick v. Garvey*, 298 F.3d 1184, 1193-94 (10th Cir. 2002). In response to the Board’s order seeking the parties’ positions on redactions, TSI notified us that it is not requesting any and that it does not currently view the dollar values identified in the decision as confidential particularly in light of the time that has passed since the financial activity at issue. “In such a situation, FOIA creates an obligation for the government to release the documents.” *Id.* at 1194; *see Taylor v. Babbitt*, 760 F. Supp. 2d 80, 87 (D.D.C. 2011) (“[O]nce [the submitter] authorized the [agency] to disclose the . . . materials to outside parties without any obligation to maintain the confidentiality of the information, the materials were no longer secret for purposes of Exemption 4.”). FSA’s unsupported assertion that, “[r]egardless of whether TSI articulated any concerns in releasing the information[,] the Agency still has a duty to protect TSI’s confidential financial information” conflicts with published case law.

Third, “[t]he government ‘waives’ protection under Exemption 4 when it releases purportedly confidential information to the public.” *Watkins v. United States Bureau of Customs & Border Protection*, 643 F.3d 1189, 1196 (9th Cir. 2011). The dollar figures cited in the Board’s summary judgment decision all came from exhibits in the Rule 4 appeal file and its supplements, which FSA and TSI filed with the Board. None of those exhibits were identified as “protected” when submitted to the Board. In fact, many of them were filed with the Board before the parties ever requested entry of a protective order. Even now, despite having claimed that the dollar figures should be protected, FSA has made no effort

retroactively to place the documents in the Rule 4 appeal file under seal or to apply the limited distribution requirements of the protective order to them. By submitting those documents to the Board other than under the procedures required by the protective order entered in this appeal, FSA voluntarily made them publicly available. FSA's concern that "the dollar amounts in the Rule 4 file are dispersed throughout the filing and not consolidated in the manner articulated in the Board's opinion" does not somehow change the public nature of FSA's public Rule 4 appeal file submission, from which anyone who wanted to take the time could identify the dollar figures set forth in the Board's summary judgment decision.

Fourth, pursuant to the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, "even if information falls within the scope of a discretionary exemption, it cannot be withheld from the public unless the agency also shows that disclosure will harm the interest protected by that exemption." *Center for Investigative Reporting v. United States Department of Labor*, 424 F. Supp. 3d 771, 780 (N.D. Cal. 2019). That is, FOIA now requires that "[a]n agency must release a record—even if it falls within a FOIA exemption—if releasing the record would not reasonably harm an exemption-protected interest and if its disclosure is not prohibited by law." *Rosenberg v. United States Department of Defense*, 342 F. Supp. 3d 62, 73 (D.D.C. 2018). In its redaction request, the only potential harm that FSA identifies from the public release of the cited dollar figures is that it might create discovery problems for FSA (not for TSI) in another case pending in another forum. FSA's fear of discovery problems is not "the interest protected by" exemption 4. That interest is in protecting a contractor or other entity that submits financial information to the Government.

Because FSA has identified no viable basis for redacting dollar figures from the Board's summary judgment decision, the Board **DENIES** that redaction request.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge