U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 03 November 2004

CASE NO. 2004-SWD -00003

In the Matter of:

Steve and Virginia Wallace,
Complainants,

vs.

CH2M Hill Group, Inc.,
Respondent.

Order Denying Motion for Protective Order

In this claim for relief under the whistleblower protection provisions of several acts, Respondent/Employer CH2M Hill Group moved for a protective order. No declarations or affidavits were offered in support of its motion, which Complainants oppose. I find the Employer's treatment of the issues too superficial, and deny the relief requested, but express no view on whether protection may be granted if the motion is supplemented and promptly renewed.

The motion alleges that Complainants sought confidential matters in the interrogatories and requests for production they propounded on September 20, 2004, and that a trial likely will require that "confidential investigative records, certain employee files, personnel records and other documents that contain confidential and personal information as well as documents that contain confidential business information" be offered in evidence. Motion at 2. Before it turns over the materials sought in discovery, Employer seeks an order protecting them from disclosure. The language of its proposed order deals with more than discovery disclosures. It would permit parties to designate "any pleading," or other "written or oral" information as confidential. This raises two issues, the confidentiality of materials made available to the opponents but never filed here, and the confidentiality of pleadings and evidence that become subject to the Freedom of Information Act (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 in discovery and those filed in connection with a dispositive motion).

Decisions of Article III courts sealing materials are not directly applicable to agency adjudications, for the Freedom of Information Act exempts the federal courts from its disclosure requirements. 5 U.S.C. § 551(1)(B), *Brown & Williamson Tobacco Co. v. Federal Trade Commission*, 710 F.2d 1165, 1177 (6th Cir. 1983).

Criminal and civil trials in Article III federal courts traditionally are open to the public, as are administrative hearings of Article I federal tribunals, and their state counterparts. *See, Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 580 & n. 17 (1980 (plurality opinion); *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, *aff'd,* 303 F.3d 681(6th Cir. 2002 (finding that INS proceedings for removal of aliens should be public); *Whiteland Woods, LLP 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) (holding by the district court that 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 (NY 1983) (finding a right of public access to unemployment insurance hearing on non-constitutional grounds). 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), cert. denied, 538 U.S. 1056 (2003)], but these are the exception rather than the rule.

The present dispute is not about whether the trial will be public, it will be. *See*, Kenneth Culp Davis, *Administrative Law Treatise*, vol. 3, §§ 14:13 & 14:14 (2d ed. Davis Pub. Co. 1980). The question is whether the proposed protective order would violate the closely related presumptive right of access to adjudicative filings. *See*, *e.g.*, *Nixon v. Warner Communications, Inc*., 435 U.S. 589 (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); *In re Providence Journal Co., Inc.*, 293 F.3d 1, 12-13 (1st Cir. 2002) (invalidating a district court's blanket rule forbidding public access to legal memoranda filed to support motions); *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); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989) (invalidating a Massachusetts statute that restricted access to state criminal trial records whenever the defendant was not found guilty); *FTC v. Standard Financial Management Corp.*, 830 F.2d 404, 408 (1st Cir. 1987) (granting the public access to financial statements defendants submitted to induce the agency to seek court approval of a consent decree that would limit their personal liability; the FTC had accused the defendants of defrauding purchasers by deceptive marketing of rare coins); *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); *Associated Press v. U.S. (DeLorean)*, 705 F.2d 1143 (9th Cir. 1983) (overturning a blanket rather than particularized sealing of documents in a criminal case on First Amendment grounds); *Brown & Williamson Tobacco Co. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983) (unsealing documents based on the First Amendment and common law rights of access to court records, despite the fact the records originally had been turned over to the administrative agency under a confidentiality agreement).

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 default procedure may be inadequate to overcome the public's right of access under the common law, the First Amendment and the Freedom of Information Act, as amended, 5 U.S.C. § 552 (2000), *et seq.*, and the implementing regulations of the Secretary of Labor published at 29 C.F.R. Parts 70 and 71. For materials filed in the proceeding, particularized

affidavits or declarations likely are required to demonstrate that an exemption to disclosure applies, *e.g.,* under the Freedom of Information Act exemption 4, for "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4) (2000).

Order

1. The motion to adopt the protective order Employer submitted is denied.

2. Employer is granted 14 days in which to submit additional evidence and argument showing (1) what authority I have to order that pleadings filed and evidence offered in this proceeding be withheld from public inspection, (2) what authority I have to order that the specific discovery materials to be delivered to the opponent but not filed be held in confidence, and (3) proposing a procedure for offering evidence supporting claims that materials (a) to be delivered in discovery or (b) offered in the record merit protection.

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William Dorsey
Administrative Law Judge