UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER: July 10, 2015

CBCA 3350, 3672, 4658, 4659

YATES-DESBUILD JOINT VENTURE,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Douglas L. Patin and Thomas Lynch of Bradley Arant Boult Cummings LLP, Washington, DC, counsel for Appellant.

Thomas D. Dinackus, Office of the Legal Adviser, Department of State, Rosslyn, VA, counsel for Respondent.

Laura A. Otenti of Posternak Blankstein & Lund LLP, Boston, MA, counsel for AES International Corporation.

LESTER, Board Judge.

This order relates to the designation by a third party, AES International Corporation (AES), of documents as subject to the protective order in these appeals.

Background

The protective order, which the Board issued on February 28, 2014, provides that the parties to these appeals may designate information produced during discovery as "Protected

Information" by affixing a legend indicating that the information may be disclosed only in accordance with the terms of the protective order. Information designated as protected "may be used solely for the purposes of th[ese] Appeal[s] and may be provided only to the Board and to individuals admitted under this Protective Order." Protective Order ¶ 2.

On May 9, 2014, the Department of State (DOS) served a subpoena upon AES, in response to which AES produced documents. On May 30, 2014, AES produced approximately 190 scanned documents and approximately 200 e-mail messages in response to the subpoena. Subsequently, in response to DOS's request for a more thorough search, AES produced approximately 1300 e-mail messages. The Board understands that AES stamped every document that it produced as subject to the protective order.[1] DOS has represented that approximately 150 of the AES-produced documents (all of which are stamped with a protective order legend) are now a part of the appeal file that DOS filed with the Board in these appeals.

On June 20, 2014, AES, through its counsel, sought an order from the Board that would require DOS to reimburse AES for costs that it had incurred in responding to the subpoena. The Board issued an order granting that unopposed request on June 25, 2014.

A three-week hearing in these appeals – a hearing in which AES was not a participant – commenced on June 15, 2015. On June 16 and 17, 2015, counsel for DOS sought to elicit testimony from two different witnesses using five documents that AES had produced, which were labeled with the following Bates numbers: (1) AES_MUM_00000592 to AES_MUM_00000593; (2) AES_MUM_00002563 to AES_MUM_00002565; (3) AES_MUM_000002589 to AES_MUM_00002591; (4) AES_MUM_00002592 to AES_MUM_00002594; and (5) AES_MUM_00002598 to AES_MUM_00002600. Because AES had stamped the five documents as subject to the protective order, those portions of the hearing transcripts involving testimony about those five documents and their contents were temporarily made subject to the protective order.

Nevertheless, the Board was unable to see any basis for AES's decision to label the five documents as protected. Paragraph 1 of the Board's protective order only permits designation of documents as protected if the documents contain "sensitive information,"

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[1] The particular protective order at issue here, which was issued by a predecessor judge, does not appear to contain language expressly indicating that non-parties can invoke its protections. Nevertheless, DOS apparently indicated to counsel for AES that it could produce documents under the auspices of the protective order, and, in fairness to AES, we will apply it to AES.

which is defined in the protective order as "including but not limited to: (i) information that must be protected to safeguard the competitive process (including source selection information); and (ii) information with regard to the job performance of certain individuals." There was nothing that the Board could see in the five documents that appeared to fit within the meaning of "sensitive information." Accordingly, by order dated June 18, 2015, the Board requested that AES justify its decision to subject these documents to protection under the Board's protective order. In response, on June 24, 2015, AES conceded that the five documents "are not sensitive information, as defined by the Protective Order," but asserted that it wished to maintain protection over all other documents that it produced.

Subsequently, additional documents that AES produced were introduced at the hearing of these appeals. On June 25, 2015, an AES-produced protected document (Exhibit 15981, with Bates number AES_MUM_00001081) was used with a witness, and, even though the document did not appear on its face to contain sensitive or confidential information, the Board asked the parties to limit distribution of the hearing transcript addressing that document and its contents until after counsel for AES had opined on the need for confidentiality. Counsel for appellant subsequently informed the Board during the hearing that counsel for AES had represented that Exhibit 15981 did not need to be protected.

Then, on June 30, 2015, six more AES-produced documents containing protective order legends were introduced and discussed at the hearing: (1) AES_MUM_00000520 (Exhibit 12950); (2) AES_MUM_00000521-22 (Exhibit 14866); (3) AES_MUM_00000568 (Exhibit 12956); (4) AES_MUM_00000592-93 (Exhibit 12928); (5) AES_MUM_00003175 (Exhibit 14790); and (6) AES_MUM_00004146 (Exhibit 16345). From the Board's review, none of the documents appeared on their faces to contain confidential or competition sensitive information, but the Board has asked the parties temporarily to treat those portions of the transcripts discussing those six documents as subject to the protective order.

Discussion

Blanket protective orders, like the one at issue here, "are frequently employed," both by the Board and by courts, "to facilitate discovery in complex cases." *AmerGen Energy Co. v. United States*, 115 Fed. Cl. 132, 138 (2014).[2] Such orders give parties the ability to

[2] We are authorized to issue blanket protective orders pursuant to Board Rule 9(c), 48 CFR 6101.9(c) (2014). This rule is a corollary to Federal Rule of Civil Procedure 26(c), which addresses the issuance of protective orders in Federal courts. As such, we look to decisions interpreting the Federal rule as guidance in interpreting our own Board rule. *See Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, et

exchange confidential or sensitive documents in discovery, but, simultaneously, to limit distribution to only a narrow group of individuals (without the need for seeking any review by or further permission of the tribunal):

> Blanket protective orders place upon the parties themselves, or others from whom discovery is sought, the initial burden of determining what information is entitled to protection. Normally, a blanket protective order requires that counsel for a producing party review the information to be disclosed and designate the information it believes, in good faith, is confidential or otherwise entitled to protection. The designated information is thereafter entitled to the protections afforded by the blanket protective order unless the designation is objected to by an opposing party. Judicial review of a party's designation as confidential occurs only when there is such an objection which the parties cannot resolve by agreement.

Gillard v. Boulder Valley School District RE-2, 196 F.R.D. 382, 386 (D. Colo. 2000).[3] Such orders are "designed to encourage and simplify the exchanging of large numbers of documents, volumes of records and extensive files without concern of improper disclosure. After this sifting, material can be 'filed' for whatever purpose consistent with the issues being litigated whether by pretrial hearing or an actual trial." *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 356 (11th Cir. 1987). As such, these orders "serve the interests of a just, speedy, and less expensive determination of complex disputes by alleviating the need for and delay occasioned by extensive and repeated judicial intervention." *Gillard*, 196 F.R.D. at 386.

Nevertheless, the entry of a blanket protective order "do[es] not relieve the [producing entities] of their burden to consider vigilantly the need for protection of each document." *Minter v. Wells Fargo Bank, N.A.*, No. 07-3442, et al., 2010 WL 5418910, at *3 (D. Md. Dec. 23, 2010). To the contrary, the producing entity is permitted to designate as protected only "th[at] information [which] it believes, in good faith, is confidential or otherwise

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al., 07-2 BCA ¶ 33,685, at 166,758; 48 CFR 6101.1(c).

[3] A "blanket" protective order differs from an "umbrella" protective order, which automatically limits distribution of all documents produced in discovery to individuals admitted to the protective order. *Bayer AG & Miles, Inc. v. Barr Laboratories, Inc.*, 162 F.R.D. 456, 465 (S.D.N.Y. 1995). The blanket protective order at issue here, unlike an umbrella protective order, permits the parties to protect specific documents "that they in good faith believe contain trade secrets or other confidential commercial information." *Id.*

entitled to protection." *Mahavisno v. Compendia Bioscience, Inc.*, No. 13-12207, 2015 WL 248798, at *13 (E.D. Mich. Jan. 20, 2015) (quoting *Gillard*, 196 F.R.D. at 386). "Anything less than a document-by-document or very narrowly drawn category-by-category assessment fails to satisfy the initial good-faith review requirement." *Minter*, 2010 WL 5418910, at *2. Courts "have repeatedly condemned the improper use of confidentiality designations." *In re Violation of Rule 28(d)*, 635 F.3d 1352, 1358 (Fed. Cir. 2011).

Further, "[e]fficiency should never be allowed to deny public access to court files or material of record unless there has been an appropriate predicate established." *In re Alexander Grant*, 820 F.2d at 357. Regardless of whatever agreement litigating parties may reach to protect documents produced during discovery while they remain in the parties' hands, once such documents are filed with the tribunal, the access restrictions that the protective order creates can conflict with the general rule requiring openness of judicial proceedings:

> Accessibility of judicial documents and proceedings to the public is a centuries-old component of our legal system. *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) . . . . Openness of judicial workings is, among other things, crucial to the citizenry's ability to "keep a watchful eye on the workings of public agencies," *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978) . . . . Thus, while public access to court records and proceedings is not absolute, there has been a long-standing presumption in its favor and against sealing. *See id.*

Encyclopedia Brown Productions, Ltd. v. Home Box Office, Inc., 26 F. Supp. 2d 606, 610 (S.D.N.Y. 1998); *see Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F. Supp. 866, 896 (E.D. Pa. 1981) ("'openness, fairness, and the perception of fairness' are directly linked to one another") (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570 (1980) (plurality decision)); 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2035, at 150 (3d ed. 2010) ("At least as to material filed in court, . . . there is a limit to the power of courts to accede to the parties' agreement that these materials be held under seal."). "Documentary exhibits and trial testimony are . . . strongly presumed to be public, since they are a direct part of the process of adjudication." *Encyclopedia Brown*, 26 F. Supp. 2d at 612.

It is the burden of the entity seeking to protect documents in the appeal record and to limit their distribution under a "blanket" protective order to establish good cause for that protection. *See, e.g.*, *In re Violation of Rule 28(d)*, 635 F.3d at 1357; *Forest Products Northwest, Inc. v. United States*, 453 F.3d 1355, 1361 (Fed. Cir. 2006); *Miles v. Boeing Co.*, 154 F.R.D. 112, 114 (E.D. Pa. 1994). *See generally* 8A C. Wright, A. Miller & R. Marcus,

supra, § 2043, at 244 ("Besides showing that the information qualifies for protection, the moving party must also show good cause for restricting dissemination on the ground that it would be harmed by its disclosure."). If a protected information designation is questioned, "the party seeking the protection shoulders the burden of proof in justifying retaining the confidentiality designation." *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 268 (M.D.N.C. 1988). "To overcome the presumption" that documents filed with a tribunal should be publicly available and establish "good cause" for keeping documents under a protective order, "the party seeking the protective order must . . . demonstrat[e] a particular need for protection." *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," are insufficient. *Id.*; *see United States v. Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421, 425 (W.D.N.Y. 1981) (refusing to issue protective order based upon "conclusory" allegations of the harm of disclosure). Specifically, "the party seeking to limit the disclosure of discovery materials must show that 'specific prejudice or harm will result if no protective order is granted.'" *In re Violation of Rule 28(d)*, 635 F.3d at 1357-58 (quoting *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002)). "Moreover, harm must be significant, not a mere trifle." *Cipollone*, 785 F.2d at 1121. "Where good cause is shown, the presumption of public access 'dissipates, and the [tribunal] can exercise its sound discretion' to limit disclosure." *In re Violation of Rule 28(d)*, 635 F.3d at 1357 (quoting *Harris v. Amoco Production Co.*, 768 F.2d 669, 684 (5th Cir. 1985)).

AES's wholesale designation of every document that it produced as subject to the Board's protective order directly conflicts with the producing entity's obligation to make individualized determinations regarding the need for a document's protection and with the historically open nature of judicial documents and proceedings. "The utility of [the blanket protective order] approach is eviscerated when parties liberally over-designate in the first instance," *Minter*, 2010 WL 5418910, at *3, "undermining the utility" of the order. *Id.* at *7. It is counsel's "responsibility to ensure that the proper confidential designations are assigned to the documents produced." *TKH America, Inc. v. NSK Co.*, 157 F.R.D. 637, 644 (N.D. Ill. 1993). To the extent that an entity simply designates every document that it is producing as protected, it fails in that responsibility.

We can understand the desire of a non-party, like AES, to minimize the costs that it must incur and the time that it must expend in responding to a subpoena seeking the production of documents, given that the non-party most likely has no financial interest in the outcome of the litigation. That desire, however, does not eliminate or reduce the non-party's obligation to invoke the protections of the blanket protective order only for the purposes that the order was intended to serve and only with regard to those documents as to which the non-party, following an individualized review of its documents, believes in good faith meet

the standard for protection. Further, even though "subpoenaed parties can legitimately be required to absorb reasonable expenses of administrative subpoenas," *Heritage Reporting Corp.*, GSBCA 10396, 90-3 BCA ¶ 22,977, at 115,388 (quoting *Securities & Exchange Commission v. Arthur Young & Co.*, 584 F.2d 1018, 1033 (D.C. Cir. 1978)), AES, relying upon Board Rule 16(g), applied for (with the consent of DOS) and was granted recovery of the reasonable costs that it incurred in producing the subpoenaed documents, costs that it specified in its cost-reimbursement request. *See* 48 CFR 6101.16(g); *see also Cogefar-Impresit U.S.A., Inc.*, DOT BCA 2721, 94-3 BCA ¶ 27,117, at 135,156 ("If the non-party has no interest in the litigation, or if costs are unreasonable, generally the party seeking document production would be required to advance the costs of such production."). Had AES timely conducted an appropriate protected material review when producing those documents, it could have included those costs in its unopposed cost-reimbursement request. AES's ability to recover its original costs of complying with the subpoena weighs against any argument that AES might otherwise have had for reducing its burden of review or for an expansive view of its right to stamp documents as protected.

One proper remedy for the over-designation of documents is to require the producing entity to undertake the effort to re-classify the documents at issue. *Quotron Systems, Inc. v. Automatic Data Processing, Inc.*, 141 F.R.D. 37, 40 (S.D.N.Y. 1992). We exercise our discretion to require that here, but limit that requirement to those documents that are a part of the record before the Board. AES has already acknowledged that the Board can remove the protection originally assigned to the six documents addressed during the hearing on June 16, 17, and 24, 2015. With regard to the additional six documents about which a witness testified at the hearing on June 30, 2015, we will order AES to review and report upon those documents quickly so that, if no good cause for their protection exists, the transcript of the hearing, which is currently being prepared, will not have to be sealed upon its receipt by the Board.

There then remain approximately 150 documents in the appeal file, which the Government filed with the Board, that are stamped with AES's protective order legend and that the Board is expected to protect from public disclosure. For reasons discussed during the hearing, the Government may be reevaluating and resubmitting document protection designations for other documents in the appeal file unrelated to AES's production. That provides a good opportunity simultaneously to reconsider the AES designations. Understanding that AES is a stranger to this litigation, we will impose upon the party that submitted the documents to the Board in the first place – the Department of State – the initial burden of identifying to AES the specific documents from AES's production that are now in the record of these appeals (and, if necessary, providing AES with copies of those documents), and we will provide AES ample time to evaluate – at its own cost – the viability of its protective order designations, after which we will address whether to maintain

protection on any of the AES documents contained in the appeal file. We will not consider a new request for cost reimbursement from AES.

With regard to the remaining 1200 or so documents that AES produced to the Government but that were not submitted to the Board as part of the appeal file, we leave those designations to the parties' agreement, absent a challenge filed with the Board to those designations. No such challenge is pending.

Order

For the foregoing reasons, the Board hereby orders as follows:

(1) The AES-produced documents identified above as having been discussed by witnesses at the hearing of these appeals on June 16, 17, and 24, 2015, are removed from the protection of the February 28, 2014, protective order.

(2) On or before **July 21, 2015**, AES shall file with the Board a justification for continuing protection of the six AES-produced documents identified above that were discussed at the hearing on June 30, 2015. If no justification is filed, or if the Board finds the justification deficient, the Board will order those six documents removed from the protective order and will remove any restrictions on the distribution of those portions of the June 30, 2015, hearing transcript involving those AES documents.

(3) On or before **July 28, 2015**, the Government shall provide counsel for AES a list of all documents that AES produced in response to the Government's subpoena that are now contained in the appeal file. To the extent that counsel for AES subsequently requests copies of those documents, the Government shall provide them to AES.

(4) AES shall have until **September 14, 2015**, to provide the Board with a justification for maintaining protection over the AES-produced documents are in the appeal file. If no justification is filed, or if the Board finds the justification deficient, the Board will order those documents removed from the protective order.

HAROLD D. LESTER, JR.
Board Judge