



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER: March 28, 2016

CBCA 5092

GOLDEN KEY GROUP, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Olivia Fines of Golden Key Group, LLC, Reston, VA, counsel for Appellant.

Krishon Gill-Edmond, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

LESTER, Board Judge.

ORDER

As permitted by the Board's order dated December 23, 2015, appellant, Golden Key Group, LLC (Golden Key), submitted to the Board a supplemental appeal file on February 25, 2016, containing 284 documents (labeled Exhibits 119 through 403). On March 16, 2016, respondent, the Department of Veterans Affairs (VA), filed a motion to exclude fifty-five of those exhibits from the record of this appeal or, in the alternative, to place those documents under a protective order limiting their distribution.

The Parties' Positions

In its motion to exclude, the VA asserts that four of the exhibits that it has referenced contain privileged communications between the VA contracting officer whose decision is on appeal and the VA legal counsel; six of the exhibits contain confidential communications between the contracting officer and the VA Office of Inspector General (OIG) or involved a pending VA OIG investigation; and forty-five of the exhibits are pre-decisional communications between the contracting officer and VA personnel related to a contracting officer investigation that allowed her to issue the decision now on appeal. The VA asks that we exclude those privileged documents from the record of this appeal. In the alternative, the VA requests that “these supplemental exhibits and the information contained therein be placed under a CBCA Protective Order.” Respondent’s Motion to Exclude at 1.

Golden Key objects to the VA’s request. It asserts that “every document listed within the Government’s request was received by Appellant through a Freedom of Information Act (FOIA) request to the [VA].” Appellant’s Response at 2. Accordingly, it asserts, “the exhibits in question are all publicly available,” and “there exists no legal basis” for striking the documents or placing them under a protective order. *Id.* Having reviewed the fifty-five documents that the VA finds objectionable, it is clear that they were produced through FOIA, as virtually all of them contain redactions marked with a specific FOIA exemption number, “(b)(6),” indicating that the redacted information related to exempted “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6) (2012).

Discussion

I. The Claims of Privilege

The attorney-client privilege, the investigative files (or law enforcement) privilege, and the deliberative process privilege are all privileges available to government agencies in appropriate circumstances. *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2321 (2011) (attorney-client privilege is available to the Government); *Confidential Informant 59-05071 v. United States*, 108 Fed. Cl. 121, 131-32 (2012) (discussing the Government’s deliberative process and investigatory files privileges). Each of these privileges is waived, however, when an agency voluntarily and intentionally discloses to a third party the material covered by these privileges. *See, e.g., In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (“release of a document . . . waives [executive privilege (including the deliberative process privilege)] for the document or information specifically released”); *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) (“any voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and

therefore waives the privilege”); *Clark v. Powe*, No. 07-C-1616, et al., 2008 WL 4686151, at *4 (N.D. Ill. May 30, 2008) (discussing investigative files privilege waiver through disclosure to third parties).

Exemptions 5 and 7 of the FOIA, 5 U.S.C. §§ 552(b)(5), (7), are essentially coextensive with these privileges and permit agencies “to withhold from disclosure [in response to a FOIA request] documents that would be ‘privileged in the civil discovery process.’” *Mehl v. United States Environmental Protection Agency*, 797 F. Supp. 43, 47 (D.D.C. 1992) (quoting *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); see *Sears, Roebuck*, 421 U.S. at 150 (deliberative process privilege under Exemption 5); *Mead Data Central, Inc. v. United States Department of the Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977) (attorney-client privilege under Exemption 5); *Mehl*, 797 F. Supp. at 47 (investigative files privilege under Exemption 7). Nevertheless, “[t]he exemptions are permissive, and an agency may voluntarily release information that it would be permitted to withhold under the FOIA exemptions.” *Mobil Oil Corp. v. United States Environmental Protection Agency*, 879 F.2d 698, 700 (9th Cir. 1989) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 290-94 (1979)); see *Bartholdi Cable Co. v. Federal Communications Commission*, 114 F.3d 274, 282 (D.C. Cir. 1997) (“FOIA’s exemptions simply permit, but do not require, an agency to withhold exempted information”); Department of Justice Guide to the Freedom of Information Act 686 (2009) (“inasmuch as the FOIA’s exemptions are discretionary, not mandatory, agencies may make ‘discretionary disclosures’ of exempt information, as a matter of administrative discretion, where they are not otherwise prohibited from doing so”).

The VA exercised that discretion here: it elected to release the allegedly privileged documents at issue to Golden Key in response to a FOIA request. Releasing these documents to Golden Key pursuant to the FOIA had the effect of making them “available to the public.” 5 U.S.C. § 552(a). “Once records are released, nothing in FOIA prevents the requester from disclosing the information to anyone else. The statute contains no provisions requiring confidentiality agreements or similar conditions.” *Swan v. Securities & Exchange Commission*, 96 F.3d 498, 500 (D.C. Cir. 1996). Accordingly, after the VA provided Golden Key with these documents in response to its FOIA request, Golden Key was free, and remains free, to do with them what it wants, whether that be publicizing them on the Internet, giving them to third parties, or filing them with the Board in this appeal. Once it voluntarily made these documents available to the public through FOIA, the VA waived any attorney-client, deliberative process, or investigative files privilege claims that it had over the portions of the documents released. See, e.g., *Melendez-Colon v. United States*, 56 F. Supp. 2d 142, 145 (D.P.R. 1999) (“[T]he Report has already been produced by the Department of the Navy, in part, under the FOIA. The Court finds that the prior disclosure of the Report pursuant to the FOIA waives Defendant’s privilege argument regarding the use of the Report in the

instant case.”); *United States Student Association v. Central Intelligence Agency*, 620 F. Supp. 565, 570 (D.D.C. 1985) (document “cannot be withheld if it has been the subject of prior ‘official and documented disclosure’” (quoting *Afshar v. Department of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983))). The VA cannot seek to reverse its prior decision to release these documents to Golden Key through a motion to the Board.

II. The VA’s Protective Order Request

The VA requests that, as an alternative to exclusion, we place the fifty-five cited documents under a protective order. The Board has the authority to issue a protective order to allow parties “to exchange confidential or sensitive documents” while “limit[ing] distribution to only a narrow group of individuals.” *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, et al., 15-1 BCA ¶ 36,027, at 175,982. It can issue a blanket protective order, which gives parties the ability to self-identify and place within the protective order those documents that are entitled to protection, or, as the VA has requested here, it can issue a “particular protective order,” which “covers specific, identified information.” *Gillard v. Boulder Valley School District Re-2*, 196 F.R.D. 382, 385-86 (D. Colo. 2000). Under either type of protective order, “[i]t is the burden of the entity seeking to protect documents in the appeal record and to limit their distribution . . . to establish good cause for that protection.” *Yates-Desbuild*, 15-1 BCA at 175,983. The first requirement in meeting that burden is a “threshold showing of good cause to believe” that the documents at issue “involve confidential or protected information.” *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 268 (M.D.N.C. 1988). Because the VA already made these documents publicly available through its FOIA production, giving Golden Key free reign to handle the documents in whatever manner it chooses, *see Swan*, 96 F.3d at 500, the VA has no basis for asserting that these documents are confidential or protected. Further, the VA has made nothing other than a conclusory statement that harm would result without a protective order, which is insufficient to support such a request. *See Yates-Desbuild*, 15-1 BCA at 175,983.

Decision

The VA’s motion to exclude fifty-five identified documents from Golden Key’s supplemental appeal file and from the record of this appeal is denied. We similarly deny the VA’s motion to place the fifty-five documents under a protective order.

HAROLD D. LESTER, JR.
Board Judge