



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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STRIKING PROTECTIVE ORDER DESIGNATIONS  
AND AMENDING THE PROTECTIVE ORDER:

June 18, 2019

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

The Board entered a protective order in this appeal on September 5, 2018, that permits either party to designate certain types of confidential information, “the disclosure of which might, with reasonable probability, adversely affect a party’s or non-party’s competitive business position and/or affect a party’s or non-party’s legally protected rights,” as “protected material.” Under the protective order, the parties and the Board have to limit distribution of information designated as “protected material” in accordance with procedures set forth in that

protective order. The order also provides, though, that “[n]o party shall designate any material as protected material absent a good faith basis for believing that such information falls within” one of the categories of confidential information identified in the protective order.

On May 1, 2019, appellant, Transworld Systems Inc. (Transworld), filed with the Board an unopposed motion for leave to file an amended answer, which was accompanied by a memorandum of legal authorities in support. Each page of the motion for leave and the accompanying memorandum of support was stamped with a legend indicating that it contained protected material that could be disclosed only in accordance with the Board’s previously issued protective order. The amended answer that Transworld proposed to file, which also accompanied the motion, was not stamped with that legend.

By order dated June 6, 2019, the Board granted Transworld’s unopposed motion for leave to file its amended answer. Nevertheless, because the Board could not identify any reason for treating the motion for leave and its supporting legal memorandum as confidential or protected, the Board directed Transworld to identify, no later than June 13, 2019, the basis for the protective order designation and to identify with specificity what aspects of the motion and memorandum Transworld had intended to require the Board and respondent to protect. Transworld did not file a formal response to the order with the Clerk of the Board. Nevertheless, it sent a private email message to the Board’s paralegal specialist indicating that it was willing to withdraw the protected designations from its motion for leave and supporting memorandum,<sup>1</sup> although it did not identify the basis upon which it had originally requested protection or indicate that the original designation was an inadvertent error.

“Under the common law, there is a long-standing presumption of public access to judicial records.” *In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2005). This presumption “applies with equal force to records of the boards of contract appeals.” *ACE-Federal Reporters, Inc. v. General Services Administration*, GSBCA 13298-REM, et al., 02-2 BCA ¶ 31,912, at 157,644. Although this right of access “is not absolute,” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978), it cannot be abrogated without good cause. “Only the most compelling reasons can justify non-disclosure of judicial records.” *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983).

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<sup>1</sup> Because Transworld did not submit its private message as an “efile” or in hard copy to the Clerk of the Board, it was not “filed” with the Board and is, therefore, not a part of the record of this appeal. *See* 48 CFR 6101.1 (2018) (defining documents as being filed “upon receipt by the Clerk”).

The burden of overcoming the presumption of public access “falls on the party opposing access,” *United States v. Beckham*, 789 F.2d 401, 420 (6th Cir. 1986), who must “establish good cause for that protection.” *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, et al., 15-1 BCA ¶ 36,027, at 175,981. That burden includes a need to make a “threshold showing of good cause to believe” that the documents or information at issue “involve confidential or protected information.” *Golden Key Group, LLC v. Department of Veterans Affairs*, CBCA 5092, 16-1 BCA ¶ 36,318, at 177,071 (quoting *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 268 (M.D.N.C. 1988)).

No basis for restricting access to the pages stamped with the protected legend was evident from our initial review of those pages, and, in response to our request for an explanation, Transworld did not identify any. The mere fact that a party marks pages as “protected” is insufficient to justify continued protection where that party has been directed to, but does not, justify its designation. We strike the protective order legend that Transworld placed on its motion for leave and accompanying memorandum. Those documents are now available for public access.

### Decision

The Board **STRIKES THE PROTECTIVE ORDER DESIGNATIONS** from Transworld’s motion for leave and accompanying memorandum, which were filed on May 1, 2019. Those documents in the Board’s files are subject to public access. The Board **AMENDS THE PROTECTIVE ORDER** issued on September 5, 2018, to require that any party submitting documentation to the Board upon which the protective order legend is stamped must provide with that submission a short written justification of the designation.

*Harold D. Lester, Jr.*

HAROLD D. LESTER, JR.  
Board Judge