RECEIVED
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

2002 NOV -1 PM 7: 58

NANCY M.
MAYER-WHITTINGTON
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Special Master Balaran)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

INTERIOR DEFENDANTS' UNOPPOSED MOTION AND MEMORANDUM FOR MODIFICATION OF THE PROTECTIVE ORDER ENTERED ON MARCH 29, 2000 AND MODIFIED ON SEPTEMBER 17, 2002

The Secretary of the Interior ("Secretary") and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior") submit this Unopposed Motion and Memorandum for Modification of the Protective Order Entered on March 29, 2000 and Modified on September 17, 2002 ("Motion for Modification").[1]

Interior Defendants request that the Protective Order entered on March 29, 2000, and modified on September 17, 2002 ("the Protective Order"), be modified such that the portion pertaining to the Trade Secrets Act (1) shall direct Plaintiffs not to disclose or otherwise use information designated by Interior Defendants as protected by the Trade Secrets Act other than as strictly necessary for purposes of this litigation; and (2) shall now apply not only to formal

[1]Counsel for Defendants conferred with counsel for Plaintiffs, Dennis M. Gingold, about this Motion for Modification, and he stated that he does not oppose it.

discovery requests issued by Plaintiffs, but also to document requests issued by the Special Master.

(1) As currently drafted, the Protective Order directs Interior Defendants to produce to Plaintiffs materials "which would otherwise be prohibited from disclosure pursuant to the Trade Secrets Act, 18 U.S.C. § 1905." Order of Mar. 29, 2000, as modified Sept. 17., 2002. This Order provides insufficient protection to the third parties whose information the Trade Secrets Act seeks to protect, as it does not in any way limit Plaintiffs' use of such information. Interior Defendants therefore respectfully request that language be added to the Order directing Plaintiffs not to disclose or otherwise use information designated by Interior Defendants as protected by the Trade Secrets Act other than as strictly necessary for purposes of this litigation.

(2) As currently drafted, the Protective Order extends to "all materials responsive to proper formal discovery requests promulgated by plaintiffs' counsel." Order of Mar. 29, 2000, as modified Sept. 17., 2002. The Special Master, however, has requested (and may continue to request) documents from Interior Defendants that contain information protected by the Trade Secrets Act, 18 U.S.C. § 1905. As described below, the Special Master's September 9, 2002 request for documents relating to, inter alia, contracts entered into between the Office of the Special Trustee ("OST") and Iron Mountain and between OST and Chavarria, Dunne & Lamey, LLC ("CD&L") encompasses information regarding unit prices and hourly wages that is

protected by the Trade Secrets Act. Given that this information is protected by the Trade Secrets Act and that there may be other Special Master requests seeking similarly protected information, Interior Defendants respectfully request that the Protective Order be extended to apply not only to formal discovery requests issued by Plaintiffs, but also to document requests issued by the Special Master.

Among the documents responsive to the Special Master's September 9 request are numerous pages protected by the Trade Secrets Act. These include documents listing the prices for various items to be provided by Iron Mountain pursuant to its contract with OST, such as hourly rates for creating records inventories, verifying such inventories, and reboxing cartons, and unit prices for transferring, storing, and withdrawing boxes. Similarly, responsive materials concerning the OST-CD&L contract include many pages listing the hourly rates for various CD&L employees (principal, senior, staff, and paraprofessional) for both the duration of the contract and the first option year.

The Trade Secrets Act prohibits the government from disclosing "to any extent not authorized by law any information . . . which information concerns or relates to . . . [inter alia] the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association . . . ." 18 U.S.C. § 1905. Whether information is protected by the Trade Secrets Act turns on whether the government would be obligated to disclose this information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In particular, if the government is permitted to withhold information pursuant to FOIA's Exemption 4, which extends to "trade secrets and

commercial or financial information obtained from a person and privileged or confidential," § 552(b)(4), then the disclosure of that information is precluded by the Trade Secrets Act. See McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 305 (D.C. Cir. 1999) ("[W]hen a person can show that information falls within Exemption 4, then the government is precluded from releasing it under the Trade Secrets Act.") Whether information falls within Exemption 4 hinges, in part, on whether it was provided to the government voluntarily. If it was provided to the government voluntarily, as for example, in the context of a contract negotiation, "it will be considered confidential for purposes of Exemption 4 if it is the kind of information 'that would customarily not be released to the public by the person from whom it was obtained.'" Id. at 304-05 (citing Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 879 (D.C.Cir.1992) (en banc)).

As noted above, documents responsive to the Special Master's September 9 request include information about the unit prices and hourly rates charged under the OST contracts with Iron Mountain and CD&L. Iron Mountain and CD&L voluntarily provided this information to the government in the process of negotiating these contracts. Thus, to determine whether disclosure of this information is prohibited by the Trade Secrets Acts, it is necessary to decide whether it falls within FOIA Exemption 4–which, in turn, means asking whether it is the kind of information that Iron Mountain and CD&L would customarily not release to the public. As a general rule, it seems likely that parties will seek to avoid the public release of information about pricing for fear that competitors will use this information in an effort to underbid them. See, e.g., McDonnell Douglas, 180 F.3d at 306 (noting that McDonnell Douglas argued that "release of

line item pricing information would cause it competitive harm . . . [because, inter alia,] it would help its domestic and international competitors to underbid it . . . ."). More importantly, counsel for Interior Defendants asked both Iron Mountain and CD&L whether they would be willing to release information about unit prices and hourly rates and they both expressed reluctance, though to differing degrees. CD& L stated that it did not want its competitors to obtain information about its hourly rates and that it would release this information only if obligated to do so by a court order. Iron Mountain, in contrast, stated that it would consider providing us with a waiver permitting release of information about unit prices and hourly rates but only on the condition that we advise counsel for the Plaintiffs that it did not want this information to be disclosed or otherwise used other than as strictly necessary for purposes of this litigation.[2] Given the reluctance of both CD&L and Iron Mountain to disclose information about unit prices and hourly rates, it is clear that this is "the kind of information 'that would customarily not be released to the public by the person from whom it was obtained'" and that its disclosure is therefore prohibited by the Trade Secrets Act.

---

[2]See also Letter from Geoffrey S. Kelley, General Manager, Iron Mountain, to Amalia D. Kessler, Department of Justice (Oct. 22, 2002) (permitting disclosure of a November 15, 2001 statement of work on the condition that counsel for Interior Defendants "inform the Cobell plaintiff's [sic] that we do not give them permission or authorization to disclose the documents to others, or to make use of it [sic] other than that necessary for purposes of the Cobell litigation"). This statement of work also includes information about unit prices and hourly rates. Counsel for Interior Defendants requested a waiver regarding this particular statement of work, in order to produce the document in response to the Special Master's September 9 request. We subsequently realized, however, that there are many other documents responsive to this request that also contain such information.

Because these documents responsive to the Special Master's September 9 request contain information protected by the Trade Secrets Act, and because future Special Master requests may also implicate such protected information, Interior Defendants respectfully request that the Protective Order be modified such that the provisions concerning the Trade Secrets Act extend not only to formal discovery requests issued by Plaintiffs, but also to Special Master requests.

November 1, 2002

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Attorney
AMALIA D. KESSLER
Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	:	
Plaintiffs,	:	
v.	:	Case No. 1:96CV01285 (Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	:	
Defendants.	:	

ORDER

This matter coming before the Court on Interior Defendants' Unopposed Motion and Memorandum for Modification of the Protective Order Entered on March 29, 2000 and Modified on September 17, 2002 ("Motion for Modification"), any responses thereto, and the record in this case, the Court finds that the Motion should be GRANTED.

IT IS THEREFORE ORDERED that the provisions of this Court's March 29, 2000 Order, as modified by the Court's Order of September 17, 2002, concerning the Trade Secrets Act, 18 U.S.C. § 1905, be modified to read as follows:

ORDERED that Defendants shall release to plaintiffs' counsel, or make available for inspection by plaintiffs' counsel under Fed. R. Civ. P. 34(b), all materials responsive to proper formal discovery requests promulgated by plaintiffs' counsel and to requests for documents issued by Special Master Balaran which would otherwise be prohibited from disclosure pursuant

to the Trade Secrets Act, 18 U.S.C. § 1905. Plaintiffs shall not disclose or otherwise use information designated by Interior Defendants as protected by the Trade Secrets Act other than as strictly necessary for purposes of this litigation; it is further . . . .

SO ORDERED this _____ day of _____, 2002.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

Sandra P. Spooner
John T. Stemplewicz
Cynthia L. Alexander
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Fax (202) 514-9163

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
Fax (202) 318-2372

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, NW
Washington, D.C. 20036-2976
Fax (202) 822-0068

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
Fax (202) 986-8477

Joseph S. Kieffer, III
Special Master- Monitor
420 - 7th Street, N.W.
Apartment 705
Washington, D.C. 20004

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on November 1, 2002 I served the foregoing *Interior Defendants' Unopposed Motion and Memorandum for Modification of the Protective Order Entered on March 29, 2000 and Modified September 17, 2002* by facsimile in accordance with their written request of October 31, 2002 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
(202) 318-2372

By U.S. Mail upon:

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

By facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 986-8477

By Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
Apartment 705
Washington, D.C. 20004
(202) 478-1958

K.P. Kingston

Kevin P. Kingston