



**Issue Date: 16 April 2019**

Case No.: 2014-ERA-00004

*In the Matter of:*

SHIH-PING KAO,

Complainant,

v.

FRAMATOME, INC.,  
f/k/a AREVA INC.,

Respondent.

**ORDER GRANTING JOINT MOTION TO SEAL SETTLEMENT AGREEMENT  
AND ORDER CANCELING HEARING**

This matter arises under the employee protection provisions of the Energy Reorganization Act of 1974, U.S. Code Title 42, Section 5851 (“ERA”) and its implementing regulations at 29 C.F.R. Part 24. Pursuant to 29 C.F.R. § 24.107(a), the proceedings are subject to the procedural rules set forth in 29 C.F.R. Part 18. This case is scheduled for formal hearing to be held May 15-23, 2019, in Lynchburg, Virginia.

On April 12, 2019, the parties submitted a *Joint Motion to Seal and Approve Confidential Settlement Agreement and to Dismiss This Matter with Prejudice*. The parties separately submitted a *Confidential Settlement Agreement* in a sealed envelope, with each page marked “Confidential Predisclosure Notification Materials, See 29 C.F.R. § 18.85 & 29 C.F.R. § 70.26.” The joint motion stated that an “essential, bargained-for term” of the settlement is that the Agreement and its terms and conditions remain strictly confidential. The parties agreed that the Settlement Agreement contains confidential commercial and financial information exempt from public disclosure under Exemption Four of the Freedom of Information Act (“FOIA”). Respondent asserted that its commercial interest in the confidential Settlement Agreement outweighs the presumption of public access, and Complainant agreed. The parties requested that this tribunal seal the Settlement Agreement and require that the parties be given predisclosure notification of any FOIA request seeking release of the agreement.

The procedural rules applicable to matters before the OALJ permit parties to move to seal documents from public access. 29 C.F.R. § 18.85(b). I find that sealing the parties’ separate settlement agreement is appropriate. The parties’ Joint Motion to Seal and Approve Confidential

Settlement Agreement, which was not filed under seal, sets forth several components of the parties' settlement: the parties reached a "comprehensive written agreement" that settles this matter "without an admission of wrongdoing by the Respondent"; the Complainant agreed his complaint should be dismissed with prejudice; the parties' representations that they entered into the Settlement Agreement freely and voluntarily, and that its terms are fair, adequate, reasonable, and do not contravene the public interest; and the request to approve the settlement and dismiss the complaint with prejudice.

The specific consideration and release terms set forth in the separate Confidential Settlement Agreement, which the parties filed under seal, may be treated as "confidential commercial information" under 29 C.F.R. § 70.26. That regulation provides: "A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4." 29 C.F.R. § 70.26(b).

The Freedom of Information Act, 5 U.S.C. § 552, *et seq.* (1988) (FOIA), requires federal agencies to disclose requested documents unless they are exempt from disclosure. *Faust v. Chemical Leaman Tank Lines, Inc.*, Case Nos. 92-SWD-2 and 93-STA-15, ARB Final Order Approving Settlement and Dismissing Complaint, March 31, 1998. Exemption 4 of FOIA protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

Courts examining Exemption 4 give the terms "commercial" or "financial" information their ordinary meanings. For example, the D.C. Circuit has held that records are commercial so long as the submitter has a "commercial interest" in them (see *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)) and the Second Circuit has held that the term "commercial" "surely . . . means anything pertaining or relating to or dealing with commerce" (see *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978)). Under these straightforward meanings, the information in the separate Confidential Settlement Agreement appears properly designated as "confidential commercial information." Further, Respondent qualifies as a "person" under Exemption 4, because that term encompasses corporations. See, e.g., *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996) (the term "person" includes "an individual, partnership, corporation, association, or public or private organization other than an agency"); *FlightSafety Servs. v. Dep't of Labor*, 326 F.3d 607, 611 (5th Cir. 2003) (per curiam) (the term "person" includes business establishments). Finally, Respondent has a legitimate argument that the information is "privileged or confidential," as it is not otherwise in the public domain nor is it otherwise required to be made public. Given the public policy of favoring settlements, Respondent has a strong argument that its settlement document is "privileged or confidential." Therefore, I find that Respondent designated the separate Confidential Settlement Agreement as "confidential commercial information" in good faith in accordance with 29 C.F.R. § 70.26.

Confidential business information "will be disclosed under the FOIA only in accordance" with 29 C.F.R. § 70.26. That regulation requires pre-disclosure notice to the submitter of commercial information; an opportunity to object to disclosure and state why the information is commercial or financial information that is privileged or confidential; consideration of the

submitter's timely objections and arguments for non-disclosure; and, if the objections are not sustained, written notice stating why the objections were not sustained and providing particular information about the information to be disclosed. 29 C.F.R. § 70.26(c)-(f).

OALJ's procedural rule at 29 C.F.R. § 18.85 provides: "Notwithstanding the judge's order [sealing material], all parts of the record remain subject to statutes and regulations pertaining to public access to agency records." Thus, an order sealing the Confidential Settlement Agreement in this case does not bar public access if such access is appropriate under the pertinent statutes and regulations, including 29 C.F.R. § 70.26.

The strength of Respondent's contention that the document is confidential commercial information protected from disclosure outweighs the presumption of public access in this instance. Accordingly, the joint motion to seal the Confidential Settlement Agreement is **GRANTED**, and the Confidential Settlement Agreement is filed under seal.

The parties' motion to approve the settlement agreement will be addressed by separate Order.

In light of the parties' submission of a settlement agreement, the formal hearing scheduled for May 15-23, 2019, in Lynchburg, Virginia is hereby **CANCELED**.

**SO ORDERED.**

MONICA MARKLEY  
Administrative Law Judge

Newport News, VA