



**Issue Date: 15 May 2018**

CASE NO. 2017-SOX-00037

*In the Matter of*

**RONALD STURDEVANT,**  
Complainant,

v.

**DEAN FOODS COMPANY,**  
Respondent.

**ORDER DENYING MOTION TO SEAL**

The parties have settled this matter in a revised agreement that I reviewed and approved in an order issued on May 15, 2018. I previously disapproved an earlier draft in an order issued on April 12, 2018. Both parties move to seal both versions of the unredacted settlement agreement. Respondent has requested that the settlement amount be redacted from the public versions of both agreements. I will deny the motion to seal while preserving for later determination whether the unredacted agreements are exempt from the disclosure requirements in the Freedom of Information Act.

Discussion

Adjudicative filings may not be sealed absent a showing that the reasons to seal outweigh the presumption of public access. *See* 29 C.F.R. § 18.85(b). The common-law right of access to judicial records is well-established. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).<sup>1</sup> “This right of access bolsters public confidence in the judicial system by allowing citizens to evaluate the reasonableness and fairness of judicial proceedings and to keep a watchful eye on the workings of public agencies.” *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013) (citations omitted). It also provides a “measure of accountability to the public at large, which pays for the courts.” *Id.*<sup>2</sup>

The right is not absolute. *See Nixon* at 597-98; *IDT* at 1221.

---

<sup>1</sup> Eleven Circuits apply this right to civil cases as well as criminal. *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013) (citations omitted).

<sup>2</sup> As Judge Easterbrook has admonished, “People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.” *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (Easterbrook, J.).

Where the common-law right of access is implicated, the court must consider the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information sought to be sealed.

*IDT* at 1223; 29 C.F.R. § 18.85(b).

As the Supreme Court held, “The decision as to access is one best left to the sound discretion of the trial court . . . in light of the relevant facts and circumstances of the particular case.” *Nixon* at 599. For example, trade-secrets or “compelling reasons of personal privacy” may warrant sealing. *Goesel v. Boley International (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013) (Posner, J.) But to defeat the general right of access to judicial records, the reasons for sealing must rebut the presumption that documents bearing on the “disposition of federal litigation” are “open to public view.” *Goesel*, 738 F.3d at 833.

Settlement agreements that require judicial approval fall squarely within the range of documents that generally must be made available to the public.<sup>3</sup> *Id.* So long as the settlement is filed with the court and the judge participates in its approval, the public has an interest, and the document is presumptively public.<sup>4</sup> *Jessup v. Luther*, 277 F.3d 926, 929-30 (7th Cir. 2002) (Posner, J.).

Here, the parties move to seal a settlement agreement filed with this Office that, with the ALJ’s approval, disposes of the case. The settlement agreement is ineffective without the ALJ’s approval. *See* 29 C.F.R. § 1980.111(d)(2). The public has an interest in knowing what the judge would approve and what the judge has approved in this case. It is a presumptively public document in which the people retain their common law right of access.

The parties argue that the information they seek to redact is exempt from disclosure under FOIA. The argument fails to address the applicable standard discussed above.

Applying that standard, I find that the parties’ agreement to treat the settlement terms confidentially is an agreement applicable only to themselves. I find no reason for the Department to extend this private agreement to the Department’s activities. The parties do not speak for the public interest; they are not in a position to address the Department’s statutory and regulatory obligations and its public policy goals.

Knowing how administrative enforcement proceedings resolve at the Department is central to what the public should know. Congress’s purpose in Sarbanes-Oxley and other whistleblower protection statutes was to encourage people who know about unlawful, unsafe, fraudulent, or

---

<sup>3</sup> This is the rule even if the approval does not make the settlement agreement enforceable by contempt. *Jessup v. Luther*, 277 F.3d 926, 927, 929 (7th Cir. 2002).

<sup>4</sup> As Judge Posner wrote, the judge is not a kibitzer, but even were he, “Judicial kibitzing is official behavior. The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to.” *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002).

other similar activity to come forward and disclose what they know to people who are in a position to correct it. The public should know whether – and to what extent – the government is doing its part to make good on the promise of protection. Some cases are meritorious and others are not. The public can draw whatever inferences they choose from the information that is disclosed. But, if the Department’s activities are opaque, the public is left without a basis to evaluate how the Department is putting into practice the purpose of Congress. Potential whistleblowers cannot evaluate the extent to which their statutory rights will be enforced.

I find the reasons the parties advance to seal portions of the agreement do not outweigh the presumption of public access. *See* 29 C.F.R. § 18.85(b). There is no involvement of trade secrets. Although there are some privacy considerations, I find nothing compelling or extraordinary. The requirement of the ALJ’s approval increases the reason to make the document public. The motion to seal must therefore be denied.

What remains is the parties’ argument about FOIA exemptions. Under this Office’s current practice, public access to this Office’s files is by FOIA request. The ALJ is not a FOIA officer and does not determine whether FOIA exemptions apply to a given request for information. The FOIA officer might determine that requested documents are not exempt and must be disclosed even if the ALJ previously sealed the document. Similarly, the FOIA officer might apply and exemption and decline exposure even if the ALJ denied a motion to seal.

In practice, this means that persons seeking access to records in this Office’s files will likely gain that access unless the records are exempt from FOIA disclosure. The FOIA officer will address the rights of parties in the event that the Department receives a FOIA request. Central to the process are the pre-disclosure requirements in 29 C.F.R. § 70.26. In an effort to be more certain that the Department processes any FOIA request consistent with applicable law, I will physically note the settlement agreements (rejected unredacted draft and unredacted approved final) to communicate to any FOIA officer the regulatory pre-disclosure obligations.

#### Order

1. The parties’ motion to seal or redact portions of both unredacted versions of the settlement agreement is DENIED.
2. The approved unredacted settlement agreement and the disapproved earlier draft of it will be placed in sealed envelopes in the file and noted as follows:

#### NOTICE TO THE DOL FOIA OFFICER:

In the event that this settlement agreement is the subject of a FOIA request, the parties assert that the settlement agreement is exempt from production under FOIA Exemptions 4 and 6. 5 U.S.C. § 552(b)(4), (6). Respondents request notice

and an opportunity to object to any FOIA production of the unredacted settlement agreement or the disapproved prior unredacted draft settlement agreement. *See* 29 C.F.R. § 70.26.

SO ORDERED.

STEVEN B. BERLIN  
Administrative Law Judge