



Issue Date: 15 November 2018

CASE NO.: 2018-SOX-00043

OSHA NO.: 8-1700-17-038

In the Matter of:

MICHAEL SEELEY,
Complainant,

vs.

LIFE ADVANTAGE CORPORATION,
Respondent.

**ORDER APPROVING SETTLEMENT
AND NOTING CLAIM OF EXEMPTION FROM FOIA DISCLOSURE**

This is a claim under the employee-protection provisions of the Corporate and Criminal Fraud Accountability Act of 2002 (the “Sarbanes-Oxley Act” or “SOX”), 18 U.S.C. §1514A, and regulations at 29 C.F.R. Part 1980. It is not currently set for hearing.

The parties submit for court approval their “Confidential Settlement Agreement and General Release” (the “agreement”). Citing 29 C.F.R. § 70.26, the parties ask me to shield the agreement from public disclosure pending a request to produce it under the Freedom of Information Act (FOIA), because the parties claim the agreement is exempt from FOIA disclosure as “confidential commercial information.” The parties also cite *Walker v. Pacificare Health Sys., Inc.*, 2005 WL 4889039, in support of their request.

In *Walker*, Administrative Law Judge Russell D. Pulver observed, “[m]y review of the settlement agreement is limited to a determination of whether its terms are fair, adequate, and reasonable. The settlement must adequately protect the whistleblower. Furthermore, the settlement must not be contrary to the public interest.” 2005 WL 4889039, at *1. Judge Pulver made no determination that the settlement agreement before him in *Walker* was exempt from disclosure under

FOIA. Rather, he noted “[t]he parties in this matter have indicated that the settlement agreement comprises and includes confidential commercial information which they believe are exempt from disclosure under FOIA.” *Id.* He cited 29 C.F.R. § 70.26 in asserting DOL regulations “provide specific procedures for responding to FOIA requests, for appeals by requestors from denials of requests and for protecting the interests of submitters of confidential commercial information.” Judge Pulver concluded he could appropriately follow those procedures in the case before him. Although I have serious reservations about the validity of the claimed FOIA exemption, I conclude I likewise should follow those procedures in this case.

The Agreement in its Entirety Is Likely Not Exempt

My first reservation is that the parties here assume the agreement, in its entirety, comprises “confidential commercial information” exempt from disclosure. The applicable regulations appear to take a different view. Under 29 C.F.R. § 70.26, subsection (b),

A submitter of confidential commercial 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. These designations will expire ten years after the date of submission unless the submitter requests, and provides justification for, a longer designation.

In this case, the parties have made no effort to designate which portions of the agreement set forth “confidential commercial information.” It strikes me as very unlikely that every word in the agreement could reasonably be expected to cause substantial competitive harm if disclosed to the public, *see* Executive Order No. 12600, 1987 WL 959922 (Pres.), Section 3. But the parties’ failure to comply with subsection (b) of the regulation is not fatal, because there is no prejudice to any requesting party, so long as the submitting parties make their designation within a reasonable time of a FOIA request. Accordingly, I leave that issue for another day.

Once Approved, the Agreement Comprises the Final Order of the Secretary

My second reservation is that under current law, an approved settlement agreement in a SOX case becomes the Final Order of the Secretary on the matter, and may be enforced in the United States District Court. 29 C.F.R. § 1980.111(e). I doubt the Secretary’s Final Order in a case is exempt from disclosure under FOIA.

Common Law Right of Access to Judicial Records

My third reservation is that the common-law right of public access to judicial records is well-established. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). To be sure, it is not absolute. But “[t]he 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*, 435 U.S. at 599. For example, trade secrets or “compelling reasons of personal privacy” may warrant sealing, 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 v. Boley International (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013)(Posner, J.). Settlement agreements that require judicial approval fall squarely within the range of documents that generally must be made available to the public. *Id.* So long as the settlement is filed with the court and the judges participates in its approval, the public has an interest, and the document is presumptively public. *Jessup v. Luther*, 277 F.3d 926, 929-30 (7th Cir. 2002)(Posner, J.).

Hearings before the Office of Administrative Law Judges are open to the public unless the authorizing statute, its implementing regulations, or an executive order provide otherwise. *See* 29 C.F.R. §§ 18.10, subsection (a); 18.81, subsection (a). Nothing in SOX, the regulations, or any executive order limits the general rule here.

For this reason alone, had I been asked to seal this record under OALJ’s own procedure, 29 C.F.R. § 18.85, I would decline to do it on the record before me.

But I am not being asked to seal the record under 29 C.F.R. § 18.85. I am being asked to handle the record consistently with 29 C.F.R. § 70.26, something DOL Administrative Law Judges have done in the past without making any determination as to the validity of any asserted FOIA exemption. 29 C.F.R. § 70.26 does not require me to determine the validity of the objection, and I do not do so in this case. Since persons may obtain OALJ records only by requesting them under FOIA, upon receipt of any FOIA request for the agreement, the Department of Labor will give the parties notice under 29 C.F.R. § 70.26, subsections (e) and (j), and will consider the parties’ objections to disclosure (if any), and give notice of its decision, under 29 C.F.R. § 70.26, subsections (f) and (g). The Department will also give notice, under 29 C.F.R. § 70.26, subsection (h), of any lawsuit seeking to compel disclosure of the agreement.

The settlement agreement is approved.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge