



Issue Date: 18 July 2019

CASE NO.: 2019-SOX-00006

IN THE MATTER OF

MARGARET BRITTON
Complainant

v.

LGI HOMES INC.
Respondent

DECISION AND ORDER APPROVING SETTLEMENT
AGREEMENT, DISMISSING COMPLAINT WITH PREJUDICE,
DENYING JOINT MOTION TO SEAL

This proceeding arises from a complaint filed under the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A *et seq.* (SOX), and the regulations at 29 C.F.R. Part 1980. By letter dated October 3, 2018, the Assistant Regional Administrator for the U.S. Department of Labor, Occupational Safety and Health Administration, acting as agent for the Secretary of Labor, issued an order dismissing the complaint. The Complainant timely objected to the Secretary's preliminary order and requested a hearing pursuant to 29 C.F.R. 1980.106. The matter was scheduled for a hearing on June 4, 2019, which was continued after the parties' representation on May 28, 2019, that the matter had been resolved by agreement.

On July 1, 2019, the parties filed a Joint Motion to Approve Settlement and to Dismiss Action with Prejudice, attaching a copy of the signed Confidential Settlement Agreement and Release ("Settlement Agreement") and an EEOC letter approving the terms of settlement and withdrawal of complainant's charge. The parties also jointly moved to seal the Settlement Agreement.

The Settlement Agreement includes references to a charge filed with the EEOC and includes a general release of claims resolving a wide range of matters, including matters potentially arising under laws other than SOX. My authority over settlement agreements is limited to the statutes that are within my jurisdiction, and I have restricted my review of the Settlement Agreement to ascertaining whether its terms fairly, adequately, and reasonably settle this SOX case. *See Anderson v. Schering Corp.*, ARB No. 10-070, ALJ No. 2010-SOX-7, slip op. at 3 (ARB Jan. 31, 2011).

Paragraph 18 contains a choice-of-law provision naming the State of Texas as the law which shall govern interpretation of the Settlement Agreement, without regard to the conflict of law provisions thereof. The provision shall be construed as not limiting the authority of the Secretary of Labor or any federal court. *See Phillips v. Citizens Ass'n for Sound Energy*, 1991-ERA-00025, slip op. at 2 (Sec'y Nov. 4, 1991); *Anderson, supra*.

In reviewing the terms of the Settlement Agreement, I have assessed whether the terms fairly, adequately, and reasonably settle the Complainant's allegations against Respondent under SOX. *See* 29 C.F.R. § 1980.111(d)(2). In addition to my observations as to the limits of my jurisdiction and my comments regarding choice-of-law language at Paragraph 18, I find that the settlement agreement complies with the required standard, and thus it is **APPROVED**. *See id.*; *Carciero v. Sodexho Alliance, S.A.*, ARB No. 09-067, ALJ No. 2008-SOX-012, slip op. at 2 (ARB Sept. 30, 2010).

Regarding the request to keep the Confidential Settlement Agreement and Release under seal, the parties cite Exemption 4 of the Freedom of Information Act (FOIA), which protects from disclosure "trade secrets and commercial or financial information obtained from a person and [that is] privileged or confidential." 5 U.S.C. § 552(b)(4); 29 C.F.R. § 70.26 (FOIA regulation governing confidential commercial information) The parties submit that Respondent has a commercial interest in information contained in the Settlement Agreement and that its disclosure would provide a competitive advantage to its rivals; that Respondent qualifies as a "person" for FOIA purposes; and that the parties have agreed that the terms of the Settlement Agreement are to be kept confidential. The parties further submit that disclosure would discourage future settlements in similar SOX cases.

The parties also cite 29 C.F.R. 1980.111(d)(2), which provides,

Adjudicatory settlements. At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the ALJ, or by the ARB if the ARB has accepted the case for review. A copy of the settlement will be filed with the ALJ or the ARB, as appropriate.

A motion to seal differs from a determination of whether a government agency responding to a request under FOIA should disclose the requested materials or deny the request pursuant to a FOIA exemption. Adjudicative filings are only sealed when the reasons to seal outweigh the presumption of public access. *See* 29 C.F.R. § 18.85(b).

The files maintained by this Office are typically subject to disclosure under FOIA unless an exemption applies. *See* 5 U.S.C. § 552; *Jordan v. Sprint Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 12 (ARB June 19, 2008) (noting that there is "no authority permitting the sealing of a record in a whistleblower case because the case file is a government record subject to disclosure pursuant to [FOIA] unless the record qualifies for an exemption to such disclosure"). *See also Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002) (settlement agreement

approved by federal judge was presumptively a public document that should not have been sealed). Here, the parties seek to seal a settlement agreement that by regulation must be filed with the ALJ and is not effective until the ALJ's approval. *See* 29 C.F.R. § 1980.111(d)(2). Accordingly, the settlement agreement here is presumptively public, and the parties have not presented authority for sealing, or grounds for sealing that outweigh the presumption of public access. The parties instead have urged application of FOIA Exemption 4, addressed below.

Turning to the claimed FOIA exemption, exemptions are determined at the time of the request for disclosure of the record, not at the creation or retention of the record at issue. The parties have accurately cited Exemption 4 of FOIA as addressing two categories of information: (1) trade secrets and (2) information that is (a) commercial or financial and (b) obtained from a person and (c) privileged or confidential. 5 U.S.C. § 552(b)(4). A party claiming application of Exemption 4 would have to show that there is commercial or financial information at issue that is “both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy,” such that it should be considered “confidential” within the meaning of Exemption 4. *See Food Mktg. Inst. v. Argus Leader Media*, __ U.S. __, 204 L.Ed.2d 742 (2019) (concluding that store-level food stamp program data was “confidential” within the meaning of Exemption 4 where data was typically treated as private by retailers and provided to government only under express promise of confidentiality). Information such as “business sales statistics” and “customer lists” were referenced in official Congressional committee reports regarding the purpose of Exemption 4. *See id.* at 751. While the parties generally submit that the Settlement Agreement contains confidential commercial or financial information, any such qualifying information appears to be the dollar amount of the settlement and attorney's fees. The parties have not demonstrated how this information fits the Exemption. More importantly, here it is premature to determine the application of Exemption 4. *See Bettner v. Crete Carrier Corp.*, ARB No. 07-093, ALJ No. 2007-STA-033, slip op. at 3, n.11 (ARB Sept. 27, 2007) (ALJ could not decide that settlement contained commercial or financial information that fell within the FOIA's trade secrets exemption from disclosure because no FOIA request had yet been filed).

However, given the parties arguments against disclosure, the Confidential Settlement Agreement and Release and its attachments shall be marked with a notice that the parties object to disclosure in the event the office receives a FOIA request for the settlement agreement, and that the parties have asked for pre-disclosure notification under 29 C.F.R. § 70.26 prior to any release of information. This procedure is in accordance with the precedent of the Administrative Review Board. *See Bettner, supra; Davis v. Ecoscape Solutions Group*, ARB No. 08-098, ALJ NO. 2008-STA-048, slip op. at 2-3 (ARB Jul. 31, 2008).

ORDER

The settlement agreement is **APPROVED**. *See* 29 C.F.R. § 1980.111(d)(2).

The Complaint is **DISMISSED** with prejudice.

The Joint Motion to Seal Confidential Settlement Agreement and Release is **DENIED**.

The following notice will be placed with the Confidential Settlement Agreement and Release with attachments filed with this office:

In the event that this settlement agreement and attachments are the subject of a FOIA request, the parties assert that the records are exempt from production under FOIA Exemption 4. The parties request notice and an opportunity to object to any FOIA production of the settlement agreement and attachments. *See* 29 C.F.R. § 70.26.

So **ORDERED** this 18th day of July, 2019, at Covington, Louisiana.

ANGELA F. DONALDSON
Administrative Law Judge