

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 12 June 2019

CASE NO.: 2019-SOX-00003

In the Matter of:

BETH KRAEMER,
Complainant,

v.

SOFIE, INC.,
Respondent.

**DECISION AND ORDER APPROVING SETTLEMENT AGREEMENT; DISMISSING
COMPLAINT WITH PREJUDICE; AND CANCELLING HEARING**

This proceeding arises from a complaint of discrimination filed under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of The Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (“SOX”), and its implementing regulations at 29 C.F.R. Part 1980. These proceedings are conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18. *See* 29 C.F.R. § 1980.107(a).

On February 25, 2019, the parties filed a joint Settlement Application (“Application”), with an attached Confidential Settlement Agreement and General Release (“Agreement”). The Application included a “request” by the parties “that the Office of Administrative Law Judges and the Department of Labor place the Confidential Settlement Agreement and Release under seal, not to be available to the public.” Application ¶ 5.

On March 11, 2019, following a telephone conference with the parties, I issued an order directing the parties to explain how sealing the Agreement would comport with the applicable sealing rules contained in 29 C.F.R. § 18.85(b) (“Sealing the record”). On March 20, 2019, Respondent filed its brief in support of sealing the settlement agreement. On March 28, 2019, Claimant filed a letter stating that she did not oppose Respondent’s application to seal.

I. THE SETTLEMENT AGREEMENT

In reviewing the stipulation, I must determine whether the terms of the Agreement are fair, adequate, reasonable and not in contravention of the public interest. *See, e.g., Carciero v. Sodexo Alliance, S.A.*, ARB Case No. 09-067, 2010 WL 3910347, at *2 (ARB Sept. 30, 2010) (approving a SOX settlement that was found to be “fair, adequate, and reasonable, and does not contravene the public interest”); *see also*, 29 C.F.R. § 1980.111(d)(2) (“Adjudicatory settlements”); 29 C.F.R. § 18.71 (“Approval of settlement or consent findings”).

I find that both parties are ably represented by counsel. Having reviewed the Agreement, I find the provisions are fair, adequate, reasonable and do not contravene the public interest. Further, the settlement supports a finding that the complaint be dismissed with prejudice.

After careful review of the “Confidentiality” provision of the Agreement, I specifically find that it does not contravene the public interest. That provision expressly states that any *required* disclosures by Claimant (by subpoena or legal demand, for example), are not prohibited. However, I find nothing in that provision, or elsewhere in the Agreement, that would prevent Complainant from *voluntarily* communicating with, or providing information to, State and Federal government agencies about suspected violations of law involving the Respondent.¹ Any such provision, if it existed in the Agreement, would appear to contravene the public interest.²

Accordingly, approval of the agreement is appropriate. Upon my approval, the parties shall implement their settlement as specifically stated in the agreement.

II. CONFIDENTIALITY OF THE SETTLEMENT AGREEMENT

Separately from the Agreement, the parties have requested that the Agreement “be placed under seal in the files of the Office of Administrative Law Judges and the Administrative Review Board.” Application ¶ 5 (Feb. 25, 2019). In its brief explaining this request, Respondent asserts that the agreement should be filed under seal because “the recognized exception to public access of documents that constitute commercial and financial information under FOIA [Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4)] and Department of Labor’s interest in

¹ Of course, I neither find, nor intend to imply, the existence of any such conduct.

² *See Davis v. Ecoscape Solutions Group*, ARB Case No. 08-098, 2008 WL 3251345, at *2 (ARB Jul. 31, 2008):

the ALJ conditioned his recommendation of approval on the understanding that the parties’ settlement agreement would not “be read as restricting Complainant’s ability to voluntarily communicate with, and provide information to, any state or federal government agencies” and that the choice-of-law provision in the agreement would not limit the authority of the Secretary of Labor or any Federal court. We find these restrictions on the ALJ’s Recommended Approval of Settlement also in compliance with controlling precedent.

encouraging settlements of disputes outweighs the public's right to access the Settlement Agreement." Brief at 3.³

Although the request is based upon the Agreement's claimed protection under FOIA's Exemption 4, Respondent does not explain why it seeks protection under 29 C.F.R. § 18.85, governing "privileged, sensitive or classified material," rather than 29 C.F.R. § 70.26, which specifically governs "confidential commercial information" claimed to be protected under FOIA's Exemption 4. Even if the Agreement were placed under seal, it would "remain subject to statutes and regulations pertaining to public access to agency records." 29 C.F.R. § 18.85(b)(2).⁴

Procedurally, Respondent can obtain the protection of Section 70.26 by simply designating the Agreement under that Section, and by complying with the instructions it sets out. Respondent has already so designated the Agreement.⁵ Section 70.26 does not set forth any need to explain or justify the protection, and I appear to have no authority to deny it. Indeed, deploying both belt and suspenders, Respondent states in the very last sentence of its brief, that "the Agreement should be filed under seal *and the pre-notification provisions of 28 C.F.R. § 70.26 should be followed.*" Brief at 7 (my emphasis).⁶

There is at least one consequence of sealing the Agreement that would not obtain with a Section 70.26 designation. Specifically, there appears to be no time limit on how long a document remains sealed under Section 18.85. The Section 70.26 designation, on the other hand, expires after ten (10) years. *See* 29 C.F.R. § 70.26(b).⁷ Accordingly, I cannot simply grant the request to seal under the theory that it makes no difference which Section I apply.

Since 29 C.F.R. § 70.26 is the rule that applies to Respondent's request to protect its claimed confidential commercial information under FOIA Exemption 4, I construe Respondent's request to seal to be an assertion of its pre-disclosure notification rights under 29 C.F.R. § 70.26. The Agreement will therefore be maintained in a separate envelope and prominently identified

³ Respondent cites, among others, a Department of Labor website in support. Note that the correct citation begins with "https://" not "http://":
https://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/REFERENCE_WORKS/IRICKFOI.HTM.

⁴ I note that every Administrative Review Board decision I located that addressed the protection of confidential commercial information addressed it solely under the rubric of 29 C.F.R. § 70.26. *See, e.g., Hildebrand v. H.H. Williams Trucking, LLC*, ARB Case No. 11-030, 2011 WL 4915763 (ARB Sept. 26, 2011).

⁵ Each page of the Agreement bears the designation "CONFIDENTIAL COMMERCIAL AND FINANCIAL INFORMATION COVERED BY EXEMPTION 4 OF FOIA."

⁶ Respondent also cites, with apparent approval, OALJ decisions in which the ALJ denied the seal request, and instead granted the Section 70.26 pre-notification procedures. *See* Brief at 6. *See also, Davis v. Ecoscape Solutions Group*, ARB Case No. 08 098, 2008 WL 3251345 (arb Jul. 31, 2008) (in a case pre-dating Rule 18.85, ARB approved the settlement agreement being placed "under seal," and accompanied by a Section 70.26 notice).

⁷ Although there is no express requirement for Respondent to justify the basic designation, Respondent would have to provide "justification" for a designation period longer than ten years. *See* 29 C.F.R. § 70.26(b).

on the case record as being “Claimed Confidential Commercial Information under FOIA Exemption 4.”

To the degree Respondent is nevertheless requesting that the Agreement be sealed, as distinct from asserting its FOIA pre-disclosure notification rights, that request will be denied for the following reasons:

- Respondent has failed to show that the protections of Section 70.26 do not completely address its claimed need for confidentiality.
- Respondent has failed to show that the Agreement needs to be filed under seal in its entirety, rather than with redactions.
- While Respondent has set forth its own need for confidentiality, it has not explained why that need outweighs the presumption of public access.⁸
- I reject Respondent’s argument that the parties agreed “to file the Settlement Agreement under seal in paragraph 13” of the Agreement. Paragraph 13, entitled “Enforcement,” only provides that “[i]n any proceeding to enforce the terms of this Agreement, the Agreement shall be introduced under seal to maintain its confidentiality.” It therefore refers only to the introduction of the Agreement in an enforcement proceeding, and does not require that the Agreement be filed under seal now and be maintained under seal here.
- I reject Respondent’s argument that the Agreement is a purely private agreement between private parties. *See* Brief at 4. The parties seek settlement of a publicly filed complaint, and seek the imprimatur of this court on their Agreement. Presumably, the complaint could have been withdrawn, and the parties could have reached an entirely private agreement, by private mediation or otherwise. But that is not what happened here. The Agreement, and my order approving it, are *agency* documents.⁹
- While I can accept Respondent’s argument that the word “Confidential” in the title of the Agreement indicates the parties’ interest in keeping the Agreement confidential, I reject any extension of this argument to say that the parties therefore agreed to file it under seal pursuant to Section 18.85. To the contrary, the confidentiality clause of the Agreement only obliges *Complainant* to refrain from disclosure of its terms; it contains no mention of filing the Agreement under seal.

⁸ The reasons for keeping the Agreement confidential – such as encouragement of settlement, denying advantage to competitors and litigation adversaries, non-disclosure of non-party names – may well be valid, but that does not obviate the need for me to consider the public interest in access to agency records.

⁹ “As the Secretary has held numerous times, the settlement agreement and stipulation here are part of the record in this case and as such are ‘agency records’ and must be made available for public inspection and copying as provided in the Freedom of Information Act unless they are exempt from disclosure.” *Blanch v. Northeast Nuclear Energy Co.*, Case No. 90-ERA-11, 1994 WL 897323, at *1 (Sec’y, May 11, 1994).

Accordingly, **IT IS HEREBY ORDERED** that:

1. The Settlement Agreement is **APPROVED**, and the complaint is **DISMISSED WITH PREJUDICE**;
2. Respondent's unopposed request to seal the Agreement is **DENIED**;
3. Respondent's unopposed request to invoke the pre-notification provisions of 29 C.F.R. § 70.26 is **GRANTED**, and accordingly:
 - a. A notice shall be prominently placed on the case record noting the parties' invocation of the pre-notification provisions of 29 C.F.R § 70.26, and stating that the Agreement is "**Claimed Confidential Commercial Material under FOIA Exemption 4**;" and
 - b. The Office of Administrative Law Judges shall follow the procedures set forth in 29 C.F.R. § 70.26 if a FOIA request is received which encompasses the Agreement.

SO ORDERED.

NORAN J. CAMP
Administrative Law Judge

Boston, Massachusetts