UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 27, 2014

CBCA 3450

KIEWIT-TURNER A JOINT VENTURE,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

William E. Dorris, Chad V. Theriot, Reginald A. Williamson, and Damian M. Brychcy of Kilpatrick Townsend & Stockton LLP, Atlanta, GA; and Michael A. Branca of Peckar & Abramson, P.C., Washington, DC, counsel for Appellant.

Charlma Quarles, Khaliah Wrenn, Joylyn Winter, Benjamin Diliberto, and Eyvonne Mallet, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

STEEL, Board Judge.

ORDER

The underlying dispute involves a contract between Kiewit-Turner, a Joint Venture (KT or appellant) and the Department of Veterans Affairs (VA or respondent) in which appellant seeks a declaratory judgment entitling it to suspension of performance in the construction of the Denver Replacement Medical Center in Aurora, Colorado (Project). Discovery has commenced. On January 16, 2014, appellant began, but did not complete, its videotaped deposition of the VA contracting officer. Respondent objected to the video

deposition and requested that use of the video and transcripts be limited to the parties. The Board provisionally granted respondent's request by telephone and offered it the chance to file a supporting motion.

Now, pursuant to Civilian Board of Contract of Appeals Rule 13(f) (48 CFR 6101.13(f) (2013)), respondent seeks a protective order to prohibit public disclosure of the videotaped depositions and typed transcripts (collectively, the depositions) of *all* the VA employee deponents. The VA filed its motion for protective order under seal. Appellant opposes the motion and requests, in addition to the denial of the VA's motion for protective order covering the depositions of all its employee deponents, that Respondent's motion be unsealed and made available to the public. For the reasons set forth below, Respondent's motion is granted in part and denied in part, and Appellant's motions is denied.

Discussion

Respondent's Motion for Protective Order

The thrust of Respondent's argument is that there is no presumption in favor of the public's right to access materials exchanged during pretrial discovery. Respondent maintains that the depositions contain confidential information related to personnel issues involving the VA employee deponents that "describes embarrassing activity" which may "cause unnecessary or serious damage to working relationships among the individuals." Respondent urges that, if disseminated, the depositions are susceptible to abuse by the media, and "deponents would suffer at seeing clips of the deposition on the news[.]" The potential for media abuse, the VA contends, thus establishes good cause justifying an order covering both the video and typed transcript materials.

Appellant asserts that there is a strong presumption in favor of the public's right to know about the VA's handling of the Project that far outweighs any interest the VA has in maintaining confidentiality. The acts and omissions of government employees and the level of public funds involved, in its view, make the deposition testimony highly relevant to the public. Appellant further contends that the VA fails to identify any specific personal or confidential information worthy of protection, or to prove that any injury would result from disclosure. Finally, because the existing protective order already permits redaction of any personal or confidential information before being disclosed, it argues that the VA has not shown good cause for the broad protection it seeks.

The Public Right of Access to Pretrial Discovery Materials

American courts have long recognized a general common law right of the public to "inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (footnotes omitted). This right, however, is not absolute, and, for just as long as courts have recognized this right, they have struggled to mark its boundaries. *Id.* at 598.

The United States Supreme Court has drawn the line of the public's right of access between filed and unfiled discovery materials. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). There, in rejecting the newspaper petitioner's First Amendment challenge to a protective order issued covering pretrial discovery materials it sought, the Court noted:

> Pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

Id. (footnote and citations omitted). Therefore, there is no presumptive right of public access to unfiled discovery materials.

A predecessor board of contract appeals has endorsed this proposition. *Virtexco Corp.,* DOT BCA 3092, 99-1 BCA ¶ 30,176, at 149,307 (1998) ("Information obtained in the course of pretrial discovery is not a judicial record subject to the common law presumption of the right of access by the general public."); *Aerospatiale Helicopter Corp.*, DOT BCA 1905, et al., 89-1 BCA ¶ 21,502, at 108,334-35 (1988) ("The fruits of discovery are not available to the public unless or until they become part of the record.").

Moreover, this presumed right of access is further undermined by the 2000 amendment to Federal Rule of Civil Procedure 5(d). Prior to 2000, the language of Rule 5(d) supported a presumption of a right of public access because the Rule *required* all discovery to be filed with the court, except for good cause, and several courts so held. *See* Gregory P. Joseph, *Rule 5(d) and Public Access to Discovery Materials in Federal Court*, 18 No. 1 Prac. Litigator 45 (Jan. 2007). The Rule now states that certain materials

(including depositions) "*must not be filed* until they are used in a court proceeding or the court orders filing[.]" Fed. R. Civ. P. 5(d)(1) (emphasis added). Rule 5(d) in its present form thus weakens any presumption of public access to unfiled discovery. *Id*.; *see also Bond v. Utreras*, 585 F.3d 1061, 1075-76 (7th Cir. 2009).

Most of the materials at issue here are not yet a part of the record. Accordingly, the depositions are not presumptively public.

Good Cause

While no presumption of public access attaches to the depositions, the Board may also "seal the [depositions] in issue if they warrant protection from public disclosure." *Ann Riley Associates, Ltd.*, DOT BCA 2418, 91-3 BCA ¶ 24,193, at 121,004. Under Board Rule 13(f), the Board may issue protective orders to shield "a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" Rule 13(f) mirrors the language of Federal Rule of Civil Procedure 26(c), which gives courts discretion to issue protective orders upon a showing of good cause. This standard has been applied by both the Supreme Court, *Seattle Times*, 497 U.S. at 34 ("a protective order is entered on a showing of good cause as required by Rule 26(c)"), and the Department of Transportation Board of Contract Appeals. *See*, *e.g.*, *Virtexco*.

Good cause is shown when the party seeking the order has established that "disclosure will work a clearly defined and serious injury." *Virtexco*, 99-1 BCA at 149,307. Further, the injury must be shown with specificity. *Id*. "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a showing of good cause." *Id*. Finally, the onus is on the party seeking a protective order to "demonstrat[e] the confidentiality of the information to be protected from disclosure." *Id*. (internal citation omitted).

Respondent fails to meet this standard. The VA has not articulated a clearly defined or serious injury. As an initial matter, Respondent fails to state the kind of information sought to be protected or why this information is private and confidential in the first place. *See Virtexco*, 99-1 BCA at 149,308 (finding parties' request for protective order did not "identif[y] the category of information to be protected" and failed to "demonstrat[e] the legitimacy of the claim that the information is indeed proprietary and/or confidential"). Even assuming the confidential nature of the information sought to be guarded from disclosure, harm to employee deponents' working relationships is not the kind of harm the courts or our predecessor board have recognized as good cause in granting a protective order. *See*, *e.g.*, *Seattle Times*, 467 U.S. at 28 ("annoyance,

embarrassment, and even oppression" from disclosure of foundation membership lists and amounts donated to it over a five-year period). Though respondent describes one instance in which other pretrial discovery material (an email exchange between the parties) came into the hands of a non-party, the purported damage disclosure would work upon the interpersonal relationships of VA employees is a broad allegation of harm that generally would not support a showing of good cause.

However, "[t]he determination of whether information should be sealed is vested in the discretion of the trial court." *Ann Riley Associates*, 91-3 BCA at 121,004. Such discretion is "to be exercised in light of the relevant facts and circumstances of the particular case." *Id*. (quoting *Nixon*, 435 U.S. at 598 (noting the court's power to deny access where materials may "become a vehicle for improper purposes")). "It is clear from experience that pretrial discovery by depositions . . . has a significant potential for abuse." *Seattle Times*, 467 U.S. at 34 (footnote omitted). Videotaped depositions are especially vulnerable to potential abuse. *Stern v. Cosby*, 529 F. Supp. 2d 417 (S.D.N.Y. 2007). While typed transcripts have similar potential for misuse as videotape, they are not apt to be used in the same manner as videotape, which "can be cut and spliced and used as 'sound bites' on the evening news." *Id*. at 422. The case before us has already garnered significant media attention in both the Colorado and national press. In such a case, permitting public disclosure of the videotaped depositions, which are properly used to "facilitate presentation of evidence to [the Board]," would expose them to the risk of being exploited as "a vehicle for generating content for broadcast and other media." *Id.* at 422-23 (internal quotation marks and citation omitted). The videotaped depositions should therefore be subject to the standing protective order in this appeal.

It is within a tribunal's supervisory power to ensure the integrity of proceedings. The more appropriate public use of videotaped depositions and transcripts takes place in judicial proceedings, not the editing booth of the newsroom or internet media. Video depositions and other forms of electronic media, if made public, can more readily be used for improper purposes by the media than transcripts. Therefore, Respondent's motion is granted with respect to the videotaped depositions. With respect to the typed transcripts, the motion is denied, except insofar as they are also protected as unfiled discovery materials.

Appellant's Motion to Unseal

The VA filed its motion for protective order under seal. Appellant requests that this motion be unsealed and made available to the public. In addressing this issue, we

must first determine what right, if any, the public has *to the motions themselves*, which contain some of the material obtained in the discovery process.

A motion filed with the Board is a "public component of a civil trial." *Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates*, 800 F.2d 339, 343-44 (3d Cir. 1986). While there is no presumption favoring public access to pretrial discovery, it is well settled that such a presumption attaches to documents filed with the Board. Such access promotes "informed discussion of governmental affairs by providing the public with [a] more complete understanding of the judicial system and the public perception of fairness which can be achieved only by permitting full public view of the proceedings." *Id.* at 345. Accordingly, "the common law presumption of access attaches to motions filed in court proceedings[.]" *Id*. at 343.

The right of access presumption changes, however, when the motions themselves contain materials obtained in discovery. *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157 (3d Cir. 1993). The *Leucadia* court refused to ignore the line clearly drawn in *Seattle Times* between filed judicial documents and unfiled discovery. *Id*. at 165. Thus, it held that "there is a presumptive right to public access to *all* material filed in connection with *nondiscovery* pretrial motions, whether these motions are case dispositive or not, but *no* such right as to *discovery* motions and their supporting documents." *Id*. (emphasis added).

Though, with respect to the presumption of public access, *Leucadia* expressed that the distinction between procedural and more substantive motions was unimportant as to nondiscovery motions, other courts have found this distinction significant as to discovery motions. "[T]he strong weight to be accorded the public right of access to judicial documents was largely derived from the role those documents played in determining litigants' substantive rights—conduct at the heart of Article III—and from the need for public monitoring of that conduct." *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995). Thus, the presumption of public access is stronger where the documents in question (e.g., a motion for summary judgment) effectively adjudicate the litigants' rights. *Id*. at 1050; *see also Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 & n.11 (11th Cir. 2001) ("material filed with discovery motions is not subject to the common-law right of access, whereas discovery material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right").

Here, the documents in question are discovery motions: the VA's motion for protective order and KT's motion in opposition and motion to unseal, which includes reference to, and nearly 200 pages of excerpts from, the deposition transcripts. As such,

there is no presumption in favor of public access to these motions or their supporting documents. The motions here are procedural in nature, as opposed to substantive motions effectively adjudicating the parties' rights or respecting the merits of their claims.

Appellant's motion to unseal and make both parties' motions available to the public is therefore denied.

Decision

Accordingly, Respondent's motion is **GRANTED IN PART** as to videotaped deposition media, and Respondent's motion is **DENIED IN PART** as to protection of typed deposition transcripts. Appellant's motion is **DENIED**.

CANDIDA S. STEEL
Board Judge