

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of:)
)
PHH CORPORATION,)
PHH MORTGAGE CORPORATION,)
PHH HOME LOANS LLC,)
ATRIUM INSURANCE CORPORATION,)
and ATRIUM REINSURANCE)
CORPORATION)

**ENFORCEMENT COUNSELS' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO
AMEND THE PROTECTIVE ORDER AND TO UNSEAL "CONFIDENTIAL" MATERIAL**

Enforcement Counsel's Proposed Order affects only twenty-three filings and the hearing transcript.¹

Enforcement Counsel's proposed change accords with Rule 119, is good public policy with good cause, and is allowed by the Protective Order. The Proposed Order does not violate other statutes and regulations. Indeed, it aligns the Protective Order more closely with them.

I. Enforcement Counsel have "Good Cause" to Amend the Order

While the express language in Paragraph 18 of the Protective Order allowing its modification negates any need to show "good cause" to modify the Protective Order,² Enforcement Counsel can nevertheless meet that standard. In our Memorandum, Enforcement Counsel explained that the Protective Order currently offends the Rule that, "[d]ocuments and testimony introduced in a public hearing, or filed in connection with an adjudication proceeding, are presumed to be public." 12 C.F.R. § 1081.119. The language of Rule 119 and the public policy in favor of transparency in administrative adjudications constitutes good cause. Also, the "good cause" factors described in R.J. Reynolds Tobacco Co.,³ especially the fourth,

¹ See, **Appendix A**. The Proposed Order will also affect forthcoming post-hearing briefings and the final order.

² Prot. Order Governing Discovery Material, Matter of PHH Corp., 2014-CFPB-0002, Document 48 (Feb. 28, 2014), Attachment A, ¶ 18. (hereinafter, "Protective Order") ("[n]othing in this Protective Order shall prevent any Party, Third Party, or other person from seeking its modification...").

³ In the Matter of R.J. Reynolds Tobacco Co 127 F.T.C. 765, 773-74 (1999) ("[t]o determine whether good cause has been shown, courts consider such factors as the nature of the protective order and the modification

“prejudice caused by the status quo,” weigh in favor of modification:

1. Nature of the Protective Order and the modification sought. The modification only affects the transcript and 23 sealed filings and Orders, as well as the forthcoming post-hearing filings.⁴ Highly-Confidential material is unaffected by the change. And the Parties must still keep confidential the thousands of documents in the remainder of the investigative file. The hearing filings consist of legal arguments and specific attached exhibits, which are too general to be sensitive. Indeed, in emails between Respondents and MI counsel, Respondents argued at least twice to UGI that the Third Party’s proposed redactions are improper because of the statements’ generality and that the statements do not comprise protectable information.⁵
2. Foreseeability of the modification now requested at the time the order was entered. The Protective Order explicitly allows parties to seek modification. Also, Enforcement Counsel did not know until the end of the hearing the evidence Respondents would present and what Paragraph 8 language would strike the balance between transparency and protecting the sensitive information of PHH’s competitors. Thus, Enforcement Counsel’s filing of the Motion to Amend the day after hearings closed was timely. Also, we did not foresee that Respondents and the MIs would interpret “Confidential” information so expansively. Thus far, parties and third parties marked Confidential general statements about contract provisions,⁶ publicly available information, general and aggregated information, as well as the expert witness’ conclusions based on this non-confidential or publicly available material.⁷ Enforcement Counsel could not have known that the parties and third-parties would seek such excessive redactions to the filings.
3. Prejudice caused by the modification. Neither opposition motion articulates why selectively unsealing these specific hearing transcripts and the twenty-three sealed filings in this matter is harmful. The Parties would still treat the remainder of the investigative file as confidential material. It is just the OAA that has restrictions removed by the modification. This modification causes no inherent unfairness to the MIs; had we not stipulated to an order, the Tribunal would have fashioned an order. In this event, Rule 119(c)(1)’s standard, which requires “a clearly defined serious injury,” would apply to all records under the protective order, not just the filings.
4. Prejudice caused by the *status quo*. Maintaining the filings and orders under seal prejudices Enforcement Counsel’s ability to enforce the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et. seq.* (RESPA). The filings and orders in this matter are significant to all real estate settlement service providers who wish to understand recent developments in RESPA Section 8 law. Enforcement Counsel also will rely on the filings when continuing to enforce RESPA Section 8 violations against other companies engaged in captive mortgage reinsurance. Significantly,

that is sought, the foreseeability at the time the order was entered of the modification that is now requested, and the extent to which a party or a third party will be prejudiced by the modification or by the retention of the status quo.”)

⁴ For example, only 6 documents that the Bureau received from the Minnesota DOC were attached to Enforcement Counsel filings: ECX 0035; ECX 0586; ECX 0580; ECX 124; ECX 0583; and ECX 0544.

⁵ **Exhibit A**, attached. **Exhibit B**, attached. (“Confidential” designations were withdrawn by counsel)

⁶ *Id.*

⁷ *See*, **Exhibit C**, attached (email from Ms. Rust (counsel for PHH) to Mr. Kim (Enforcement Counsel): “Regarding Dr. Crawshaw’s expert rebuttal report, Respondents take the position that the entire expert rebuttal report, including all of the attachments and exhibits thereto, must remain under seal.”).

Respondents claimed that the *entire* rebuttal expert report of Mark Crawshaw and all of the attached exhibits are Confidential (including large portions of which are publicly available).⁸ Dr. Crawshaw's rebuttal report provides an analytical framework for captive reinsurance agreements that can provide guidance to the entire industry. Keeping it sealed impedes the Consumer Financial Protection Bureau's ability to enforce the law.

Finally, modifying the Protective Order now allows Enforcement Counsel to respond to new information to meet the conflicting demands of protecting truly sensitive materials from misuse while also facilitating public discourse about our activities and enforcing the consumer financial protection laws.

II. Enforcement Counsel's Proposed Order Complies with Applicable Laws

The MIs cite three sets of laws that may apply to the materials at issue: (a) the rules concerning the Bureau's confidential investigative information, 12 CFR § 1070.41; (b) the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), and the Trade Secrets Act, 18 U.S.C. § 1905; and (c) Minnesota Statutes § 60A.031. None of these provisions support indiscriminately sealing investigative materials filed with the OAA.

A. Investigative Information Rules Protect only Limited Classes of Material Here

Contrary to the argument advanced by the MIs,⁹ the relevant CFPB investigative information disclosure rules dictate that only certain categories of sensitive materials may be sealed from disclosure by a protective order. The CFPB "may disclose confidential investigative information...in an administrative or court proceeding to which the CFPB is a party." 12 C.F.R. § 1070.45(a)(4). The regulation then says that only certain sub-categories of investigative material may be protected by a protective or *in camera* order; it does not say that all investigative material should be so protected: when investigatory material "contains any trade secret or privileged or confidential commercial or financial information, as claimed by designation by the submitter of the material, or confidential supervisory information, the submitter may seek an appropriate protective or *in camera* order prior to disclosure of such material in a proceeding."¹⁰ This Rule, instead of preventing

⁸ **Exhibit B**, attached.

⁹ Joint Opp'n of Radian Guaranty Inc., *et al.* to Enf. Counsel's Mot. to Amend the Prot. Order, *filed by Radian Guaranty, et. al. ("MIs")*, Matter of PHH Corp., et. al., 2014-CFPB-0002, Document __ (filed June 23, 2014).

¹⁰ 12 C.F.R. § 1070.45(a)(4).

Enforcement Counsel's proposed change, supports the argument that the OAA should only seal a limited subset of sensitive material and not the entire investigative file.

B. The FOIA and Trade Secrets Act only Protects from Disclosure Limited Categories of Information

Likewise, the Protective Order's indiscriminate prohibition against publishing on the OAA website any information from the investigative file also does not fit the narrower standards of the FOIA and the Trade Secrets Act. These two federal disclosure statutes define a narrow category of protectable information: "trade secrets,"¹¹ and "Commercial or Financial Information" that is (1) obtained from a person, and (2) privileged or confidential.¹² These definitions are much narrower than the Protective Order's sweeping definition of "Confidential Information."¹³ Second, information generated by the federal government itself is not "obtained from a person" and is therefore excluded from Exemption 4's coverage.¹⁴ Thus, the Hearing Officer's Orders and Enforcement Counsel's motions, memoranda, and expert report filings are not covered by Exemption 4, except to the extent they are "simply a summary or reformulation of information" provided by a person from outside the government.¹⁵ The Orders in this matter and Enforcement Counsel's filings, including its expert reports, involve analysis prepared by the government and cannot be considered a simple reformulation, thus they are not covered by Exemption 4.¹⁶ Accordingly, and ideally, this Tribunal should

¹¹ Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983); see, also Hercules, Inc. v. Marsh, 659 F. Supp. 849, 854 (W.D. Va. 1987) *aff'd*, 839 F.2d 1027 (4th Cir. 1988) (As it relates to defining trade secrets "[b]ecause FOIA Exemption 4 and § 1905 are the same...this court may utilize cases which interpret the scope and requirements of Exemption 4 to determine § 1905's requirements and scope.").

¹² 5 U.S.C. § 552(b)(4).

¹³ Protective Order ¶ 1(h).

¹⁴ Bd. of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 404 (D.C. Cir. 1980).

¹⁵ Phila. Newspapers, Inc. v. HHS, 69 F. Supp. 2d 63, 67 (D.D.C. 1999) (characterizing an agency audit as "not simply a summary or reformulation of information supplied by a source outside the government" and finding that an analysis "prepared by the government" is not "obtained from a person" and so "may not be withheld under Exemption 4"), appeal dismissed per stipulation, No. 99-5335 (D.C. Cir. Mar. 17, 2000).

¹⁶ S. Alliance for Clean Energy v. U.S. Dep't of Energy, 853 F. Supp. 2d 60, 68 (D.D.C. 2012) ("[T]he key distinction—which will obviously be blurry in many instances—is between information that is either repeated verbatim or slightly modified by the agency, and information that is substantially reformulated by the agency, such that it is no longer a "person's" information but the agency's information. The latter type is not shielded by Exemption 4.").

amend Paragraph 8 to align more closely with the federal disclosure statutes.

The Proposed Order accomplishes this goal. It seals only filed information that is Sensitive Personal Information or Highly Confidential (*i.e.* “business or proprietary information that is not publicly known and that, if released to an entity’s competitors, would confer on those competitors a competitive advantage.”). From a practical standpoint, since there is significant overlap between “Highly Confidential” records and the “privileged and confidential” standards for Exemption 4—especially if the involuntary standard applies¹⁷—it’s likely that changing Paragraph 8 of the Protective Order would not unseal anything that should be not disclosed under Exemption 4. To be certain, however, this Tribunal could include “Sensitive Personal Information, Material exempted under 5 U.S.C. § 552(b)(4), or Highly-Confidential Information,” in the list of sealed material in Paragraph 8.

C. Minnesota DOC Records can be Disclosed in this Proceeding on Three Separate Bases

Enforcement Counsel can disclose in this administrative proceeding documents it received from the Minnesota Department of Commerce (DOC) consistent with Minnesota statutes. Minnesota’s RESPA investigation of the MI’s activities was pursuant to its investigatory authority, MINN. STAT. § 45.027, not—as the MI’s argue—under its supervision authority described at Minnesota Statute § 60A.031. The RESPA Section 8(d)(4) gives the insurance commissioners of the 50 states the power to enforce RESPA Section 8.¹⁸ MINN. STAT. § 60A.031 allows DOC to suspend an examination in order to pursue other legal action under the state insurance laws.¹⁹ MINN. STAT. § 45.027 then gives the DOC the authority to investigate and impose “a civil penalty” for violations of laws, like RESPA.²⁰ Under § 45.027, the DOC can provide investigatory

¹⁷ See, Joint Opp’n of Radian Guaranty Inc., *et al.* to Enf. Counsel’s Mot. to Amend the Prot. Order, *filed by Radian Guaranty, et. al.* (“MIs”), Matter of PHHI Corp., et. al., 2014-CFPB-0002, Doc. ___ (filed June 23, 2014) at 11-13 (explaining distinction between Commercial and Financial Information produced voluntarily vs. involuntarily. Information produced to the government voluntarily is “privileged and confidential” under the FOIA if it “is of a kind that would customarily not be released to the public by the person from whom it was obtained.” Critical Mass v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992)(en banc).

¹⁸ 12 U.S.C. § 2607(c)(4); 12 U.S.C. § 2607 (c)(1).

¹⁹ MINN. STAT. § 60A.031 Subd. 4(d).

²⁰ MINN. STAT. § 45.027 Subd. 1.; MINN. STAT. § 60A.052.

information to other law enforcement agencies without restriction on the recipient.²¹

In addition, Enforcement Counsel could disclose records in this administrative hearing even if the supervision and examination provision applied.²² MINN. STAT. § 60A.031 provides that “[n]othing in this section shall be construed to limit [DOC’s] authority to use as evidence... company work papers or other documents, or other information discovered or developed during the course of an examination in the furtherance of a legal or administrative action which [the DOC] may, in the [DOC’s] sole discretion, consider appropriate.”²³ The Bureau’s use here is consistent with that authority, and thus fulfills a prerequisite to disclosure under MINN. STAT. § 60A.031.

Finally, the Bureau can disclose records in this administrative proceeding pursuant to its Agreement to Confidentiality with the DOC under the proviso that “[n]othing in this Agreement to Confidentiality shall prevent CFPB from using and/or disclosing information and documents...as required or permitted by law or the CFPB regulations cited above [12 C.F.R. §§ 1070.40-47] or ordered by a court in a civil, criminal, or administrative proceeding.”²⁴ The DOC released the MIs investigative information to the Bureau upon the terms of this Agreement. As explained above, Enforcement Counsel’s Proposed Order complies with 12 C.F.R. §§ 1070.40-47, so there is no reason under Minnesota state law to reject our Motion to Amend the Protective Order.

CONCLUSION

Enforcement Counsel reiterates that our Proposed Order impacts a small subset of material, but it provides tremendous benefits to the continued development and enforcement of RESPA Section 8 jurisprudence. All the laws and Rules cited by Respondents and MIs strongly suggest that the current prohibition against OAA releasing any type of investigation information is too broad. The Proposed Order offers an acceptable fix that should be issued by this Tribunal.

²¹ MINN. STAT. § 45.027.

²² *See*, MINN. STAT. § 60A.031 subd. 4(f).

²³ MINN. STAT. § 60A.031 subd. 4(e).

²⁴ **Exhibit D**, attached.

DATED: June 27, 2014

Respectfully submitted,

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Enforcement Counsel

Certificate of Service

I hereby certify that on this 27th day of June 2014, I caused a copy of the foregoing “Enforcement Counsel’s Reply Memorandum in Support of its Motion To Amend The Protective Order And To Unseal “Confidential” Material” to be filed with the Office of Administrative Adjudication and served by electronic mail on the following persons who have consented to electronic service on behalf of Respondents:

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Appendix A

1. Opposition to PHH Motion to Dismiss, *filed by Enforcement Counsel, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 41 (filed 2/20/2014).
2. Statement of Disp. Facts in support of Opp'n to Respondent's Motion for Summary Judgment, *filed by Enforcement Counsel, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 42 (filed 2/24/2014).
3. Declaration of Donald R. Gordon; Exhibits A-Y, *filed by Enforcement Counsel, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 43 (filed 2/24/2014).
4. Respondents' Reply Brief in Support of their Motion to Dismiss the Notice of Charges or, in the Alternative, for Summary Disposition; Exhibit 1, *filed by Respondents, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 49 (filed 2/28/2014).
5. Respondents' Response to Enforcement Counsel's Statement of Disputed Issues of Material Fact in Opposition to Respondents' Motion for Summary Disposition; Exhibits A-C, *filed by Respondents, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 50 (filed 2/28/2014).
6. Enforcement Counsel's Notice of Filing a Corrected Exhibit; Declaration of Donald R. Gordon; Exhibit A, *filed by Enforcement Counsel, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 53 (filed 3/3/2014).
7. Expert Report of Mark Crawshaw Ph.D., Fcas, Maaa; Attachments 1-7; Exhibits 1-74, *filed by Enforcement Counsel, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 55 (filed 3/4/2014).
8. Respondents' Expert Report; Attachment 1; Attachment 2, *filed by Respondents, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 57 (filed 3/5/2014).
9. Respondents Notice of Clarification; Exhibits A-D, *filed by Respondents, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 68 (filed 3/13/2014).
10. Enforcement Counsel's Motion to Disqualify Schnader; Proposed Order (sealed); Ravener Declaration (sealed); Vazire Declaration (sealed), *filed by Enforcement Counsel, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 95 (filed 4/15/2014).
11. Respondents' Renewed Motion to Dismiss; Brief in Support of Motion to Dismiss; Exhibits A-D, *filed by Respondents, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 101 (filed 4/18/2014).
12. Response to Motion to Disqualify; Declaration of David Smith; Declaration of Stephen A. Fogdall, *filed by Schnader Harrison Segal and Lewis, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 115 (filed 4/30/2014).
13. Respondents' Opposition to Enforcement Counsel's Motion for Summary Disposition, *filed by Respondents, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 121 (filed 5/5/2014).
14. Respondents' Opposition to Enforcement Counsel's Statement of Undisputed Facts, *filed by Respondents, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 122 (filed 5/5/2014).
15. Enforcement Counsel's Opposition to Respondents' Renewed Motion to Dismiss, *filed by Enforcement Counsel, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 123 (filed 5/5/2014).
16. Declaration of Donald R. Gordon; Exhibits A-C, *filed by Enforcement Counsel, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 124 (filed 5/5/2014).
17. Enforcement Counsel's Reply Motion to Disqualify Schnader, *filed by Enforcement Counsel, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 127 (filed 5/6/2014).
18. Response to Motion to Disqualify, *filed by Schnader Harrison Segal and Lewis, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 115 (filed 5/9/2014).
19. Reply Memorandum in Support of Motion to Dismiss, *filed by Respondents, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 135 (filed 5/12/2014).
20. Enforcement Counsel's Opposition to Motion to Strike Crawshaw Rebuttal; Exhibits A-F, *filed by Enforcement Counsel, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 140 (filed 5/14/2014).
21. Response to Objection to Subpoena Burke Deposition, *filed by Enforcement Counsel, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 142 (filed 5/15/2014).
22. Order on motion to disqualify, *filed by Cameron Elliot, Administrative Law Judge, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 145 (filed 5/16/2014).

23. Enforcement Counsel's Opposition to Motion to Strike Crawshaw Rebuttal; Exhibit B; Exhibit F; Proposed Order, *filed by Enforcement Counsel, Matter of PHH Corp. et. al.*, 2014-CFPB-0002, Document 140 (filed 5/19/2014).