UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU
August 1, 2014

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of	:	
	:	ORDER GRANTING MOTION
PHH CORPORATION,	:	TO AMEND PROTECTIVE
PHH MORTGAGE CORPORATION,	:	ORDER AND TO UNSEAL
PHH HOME LOANS LLC,	:	"CONFIDENTIAL" MATERIAL
ATRIUM INSURANCE CORPORATION, and	:	IN PART
ATRIUM REINSURANCE CORPORATION	:	

On January 29, 2014, the Consumer Financial Protection Bureau (Bureau) filed a Notice of Charges Seeking Disgorgement, Other Equitable Relief, and Civil Money Penalty in this proceeding. The hearing took place over nine days in Philadelphia, PA, between March 24 and June 4, 2014. On June 6, 2014, the Office of Enforcement (Enforcement) filed a Motion to Amend the Protective Order and to Unseal "Confidential" Material (Motion) and a memorandum in support of it (Memorandum). Respondents filed an opposition to the Motion (Respondents' Opposition; Document 163), as did the MI Companies (MI Opposition; Document 164),[1] and Enforcement filed a reply (Reply; Document 165), the MI Companies a surreply (Surreply; Document 172), and Enforcement a sur-surreply (Sur-surreply; Document 174).[2]

This Order assumes familiarity with the February 28, 2014, Protective Order (Document 48) entered in this matter. In brief, the Protective Order prevents public disclosure of all Confidential Information and Highly-Confidential Information, as defined by the Protective Order. It is indeed now clear that Confidential Information is a broad category and the Protective Order as currently fashioned prevents the public dissemination of any document, regardless of its content, that has been produced to the Bureau in connection with this proceeding.[3] See Response to Tribunal's Order Sealing Filing and Directing Public Release, Document 151.

[1] I previously granted the MI Companies—Radian Guaranty Inc., United Guaranty Residential Insurance Company, Mortgage Guaranty Insurance Corporation, Genworth Mortgage Insurance Corporation, and Republic Mortgage Insurance Company—third-party status. See Document 40.

[2] For about a week, the Motion was held in abeyance so that the parties could confer on a possible stipulated modification to the Protective Order, after which I provided leave for the filing of a surreply by the MI Companies and a sur-surreply by Enforcement. See Documents 170, 173.

[3] While Confidential Information is defined broadly, I agreed to enter the Protective Order as it was agreed to by the parties, and the plain language of 12 C.F.R. § 1081.119(c)(3) required me to enter a stipulated protective order. See Document 48 at 2.

Enforcement asks that Paragraph 8 of the Protective Order's Attachment A be modified to limit protection from disclosure to just Highly-Confidential Information, as previously defined, and Sensitive Personal Information, i.e., Social Security numbers, dates of birth, and the like. Mot. at 2. Enforcement reasons that this modification promotes public access and meets Rule 119's standard allowing for protective orders that prevent disclosure of sensitive personal information, materials that must not be disclosed pursuant to law, and documents that will likely result in a clearly defined and serious injury to a party. Mem. at 7, 9-10; see 12 C.F.R. § 1081.119(c).

In response, Respondents and the MI Companies criticize Enforcement's decision to withdraw from a painstakingly negotiated agreement many months after it was entered, and complain that removing protections over Confidential Information would create a tremendous amount of work for them. Respondents' Opp. at 2-3, 5; MI Opp. at 4-5. The MI Companies add that public disclosure of the Confidential Information is prohibited by law. MI Opp. at 5. Specifically, the MI Companies explain that materials produced to the Bureau or its predecessor agency the Department of Housing and Urban Development, were also produced to the Minnesota Department of Commerce (DOC). Id. at 2. The MI Companies insist that all materials produced to DOC were produced pursuant to Minnesota Statutes § 60A.031. Id. at 8-9. Enforcement disagrees, stating that the MI Companies produced materials to DOC pursuant to Minnesota Statutes § 45.027. Reply at 5. Section 60A.031 falls under the insurance provisions of the Minnesota Statutes while Section 45.027 falls under the commerce provisions.

Minnesota Statutes § 60A.031 includes this language:

> All working papers, recorded information, documents and copies thereof produced by, obtained by, or disclosed to the commissioner or any other person in the course of an examination made under this subdivision, or in the course of market analysis, must be given confidential treatment and are not subject to subpoena and may not be made public by the commissioner or any other person, except to the extent provided in paragraph (e). Access may also be granted to the National Association of Insurance Commissioners (NAIC), the Financial Industry Regulatory Authority, and any national securities association registered under the Securities Exchange Act of 1934. The parties must agree in writing prior to receiving the information to provide to it the same confidential treatment as required by this section, unless the prior written consent of the company to which it pertains has been obtained.[4]
>
> Nothing contained in this subdivision prevents or shall be construed as prohibiting the commissioner from disclosing the content of an examination report, preliminary examination report or results, or any matter relating to the reports, to the Commerce Department or the insurance department of another state or country, or to law enforcement officials of this or another state or agency of the federal government at any time, if the agency or office receiving

[4] Minn. Stat. § 60A.031, subdiv. 4(f).

> the report or matters relating to the report agrees in writing to hold it confidential and in a manner consistent with this subdivision.[5]

The MI Companies believe that this language prohibits public disclosure in this proceeding of any of the materials produced to DOC or the information underlying them. MI Opp. at 9-10; Surreply at 2-3. Enforcement, however, believes that, if Section 60A.031 applies, Enforcement can disclose in this proceeding records, produced under the Section, under the Section's subdivision 4(e)(2). Reply at 6.

Minnesota Statutes § 45.027 includes this language:

> Except for information classified as confidential under sections 60A.03, subdivision 9; 60A.031; 60A.93; and 60D.22, the commissioner may make any data otherwise classified as private or confidential pursuant to this section accessible to an appropriate person or agency if the commissioner determines that the access will aid the law enforcement process, promote public health or safety, or dispel widespread rumor or unrest. If the commissioner determines that private or confidential information should be disclosed, the commissioner shall notify the attorney general as to the information to be disclosed, the purpose of the disclosure, and the need for the disclosure. The attorney general shall review the commissioner's determination. If the attorney general believes that the commissioner's determination does not satisfy the purpose and intent of this provision, the attorney general shall advise the commissioner in writing that the information may not be disclosed. If the attorney general believes the commissioner's determination satisfies the purpose and intent of this provision, the attorney general shall advise the commissioner in writing, accordingly.[6]

Thus, if DOC's commissioner disclosed information to the Bureau consistent with this provision, and the information is not designated confidential under Section 60A.031 or otherwise designated confidential under the Minnesota Statutes, Enforcement can make that information public in this proceeding.

It is clear that at least some of DOC's requests for documents to the MI Companies were "issued pursuant to Minnesota Statutes § 60A.031." Surreply, Exs. A-C (Documents 172-A, 172-B, 172-C); see Surreply at 4 (stating that "each of DOC's requests to the MI Companies relating to captive mortgage reinsurance arrangements relied on Minn. Stat. § 60A.031"). Also, the Agreement to Confidentiality entered into between the Bureau and DOC references Section 60A.031, but not Section 45.027. Reply, Ex. D (Document 165-D). The Agreement provides that the Bureau agrees to hold "any examination report, workpapers or matters relating to the examination" of the MI Companies in confidence and not to disclose them. Id. Beyond these facts, it is within Enforcement's and the MI Companies' knowledge under what authority specific materials used in this proceeding has been produced.

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[5] Id., subdiv. 4(e)(2).

[6] Minn. Stat. § 45.027, subdiv. 7(b).

There is consensus that Highly-Confidential Information should retain the same protections previously afforded, and that trade secrets and privileged or confidential commercial or financial information, as described in FOIA Exemption 4, U.S.C. § 552(b)(4), should be protected from public disclosure. Respondents' Opp. at 5; Reply at 5; Surreply at 6; see Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871 (D.C. Cir. 1992) (describing Exemption 4 at length); CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1151 (D.C. Cir. 1987) ("scope of the [Trade Secrets Act, 18 U.S.C. § 1905] is at least coextensive with that of Exemption 4 of FOIA").

Ruling

The Bureau's rules reflect concern for maintaining public access to its administrative proceedings and the information in their records. See 12 C.F.R. §§ 1081.119(c) ("Documents and testimony introduced in a public hearing, or filed in connection with an adjudication proceeding, are presumed to be public."); .203(f) (presumption that scheduling conferences be public); .214(c) (presumption that prehearing conferences be public); .300 (presumption that hearings be public); see also 12 C.F.R. § 1081.111(c) (reiterating sentiment of Rule 119(c)). The Bureau's presumption of public access is consistent with the notion, voiced in both judicial and administrative proceedings, that the public maintains a right of access. See e.g., Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978); Va. Dep't of State Police v. Washington Post, 386 F.3d 567 (4th Cir. 2004), cert. den., 544 U.S. 949 (2005); see also Transwestern Pipeline Co., Docket Nos. TA88-4-42-000 & TQ89-1-42-000, 1989 WL 261744 (FERC June 29, 1989); Certain Apparatus for the Continuous Production of Copper Rod, Inv. No. 337-TA-52, Order No. 165, 1979 WL 61297 (Int'l Trade Comm'n Mar. 16, 1979).

Against this backdrop, I find good cause to modify the protective order and remove the protection from public disclosure previously afforded to Confidential Information.[7] See 12 C.F.R. § 1081.104(b)(2). After a number of months operating under the current Protective Order, it has become clear that the broad definition of Confidential Information could prevent, or is already preventing, the public from knowing anything of real substance about this proceeding. Likewise, the Protective Order should no longer permit the sealing of Confidential Information. However, protection should not be removed for the subset of Confidential Information that would be protected as a trade secret, or otherwise, under FOIA Exemption 4, and there is no dispute that such protection should remain. See 12 C.F.R. § 1081.119(c)(1).

[7] The Bureau's rules do not iterate a standard under which a party's request to modify a protective order should be assessed. Many adjudicative bodies apply a "good cause" standard to modification of protective orders, and this Order adopts that standard. See In Re Kolon Indus. Inc., 479 F. App'x 483, 485-86 (4th Cir. 2012) (citing Fed. R. Civ. P. 26(c)(1) and case law); U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., No. 99-cv-3298, 2004 WL 2009414, at *2 (D.D.C. May 17, 2004); R.J. Reynolds Tobacco Co., Docket No. 9285, 1999 WL 33913007, at *6 (F.T.C. May 26, 1999); Florida Power & Light Co., Docket Nos. ER93-465-000 & ER93-922-000, 1993 WL 467751, at *1 (FERC Nov. 10, 1993). Here good cause has been shown to modify the Protective Order because it is overly broad, to the public's detriment.

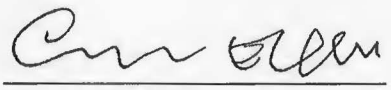
Further, the Bureau's rules state that a protective order must be granted where public disclosure is prohibited by law. 12 C.F.R. § 1081.119(c)(4). There is likely a subset of the Confidential Information whose disclosure is prohibited by law, and I find it justified to explicitly carve out for protection any materials prohibited from disclosure by law. However, if a document was produced by DOC to the Bureau under Minnesota Statutes § 45.027, and no other provision of the Minnesota Statutes or the Protective Order, as revised, affords it protected, non-public status, it must be unsealed.

Order

It is ORDERED that Enforcement's Motion to Amend the Protective Order and to Unseal "Confidential" Material is GRANTED IN PART. Paragraph 8 of the Protective Order's Attachment A is MODIFIED so that its first sentence now reads:

> Any submission filed or lodged in this Administrative Proceeding, and any portion of the record or transcript of a hearing before the Hearing Officer in this Administrative Proceeding, that contains, refers to, or reflects the use of any Sensitive Personal Information, Highly-Confidential Information, or any information that is exempted under 5 U.S.C. § 552(b)(4), or is prohibited from public disclosure by law shall be maintained under seal, and shall not be posted on the Bureau's website or otherwise made publicly available unless required by law.

The parties[8] SHALL CONFER to determine what should be unsealed pursuant to this Order. They should attempt to agree to a timeframe for reviewing materials previously designated as Confidential Information for redesignation as Highly-Confidential, Sensitive Personal Information, prohibited from disclosure by law, or exempted under 5 U.S.C. § 552(b)(4), where appropriate, and inform this Office of the results of their conference. Thereafter, any remaining Confidential Information in this proceeding SHALL BE UNSEALED. However, in no event shall any material be protected from disclosure under Paragraph 8 of the Protective Order's Attachment A if it was produced pursuant to Minnesota Statutes § 45.027 and no other provision of Paragraph 8 of the Protective Order's Attachment A or the Minnesota Statutes affords it confidential status. Finally, the parties are reminded to adhere to the procedure described in Paragraph 12 of the Protective Order's Attachment A if any dispute as to designation remains.



Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission

[8] See 12 C.F.R. § 1081.103.