

Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552



IN RE ACTIVE NETWORK, LLC.

2019-MISC-ACTIVE Network, LLC-0001

SUPPLEMENTAL DECISION AND ORDER ON REQUEST FOR CONFIDENTIAL TREATMENT BY ACTIVE NETWORK, LLC PURSUANT TO FOIA EXEMPTION 4

ACTIVE Network, LLC (ACTIVE) has submitted a request that the Bureau keep confidential various materials related to a petition that ACTIVE filed on March 22, 2019, seeking to set aside a civil investigative demand (CID) from the Bureau’s Office of Enforcement. I grant ACTIVE’s request in part and deny it in part.

FACTUAL BACKGROUND

ACTIVE filed a petition (Petition) with the Bureau seeking to set aside a CID on March 22, 2019. ACTIVE also requested confidential treatment of the Petition and related materials. I denied the Petition by an order dated July 29, 2019 (July 29 Order or Order), but I deferred deciding ACTIVE’s request for confidential treatment to give ACTIVE an opportunity to submit additional information to support that request.

In the July 29 Order, I rejected the confidentiality arguments that ACTIVE made in its initial request for confidential treatment, but I noted that it was possible that the Petition and related materials could contain information protected from disclosure by Exemption 4 of the Freedom of Information Act (FOIA). *See* 5 U.S.C. § 552(b)(4). Exemption 4 exempts from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” *Id.* After ACTIVE submitted its Petition and request for confidentiality, the Supreme Court decided *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), which clarified the standard for determining what information may be withheld under Exemption 4. Because the Supreme Court had not yet announced that decision at the time ACTIVE filed its confidentiality request, I gave ACTIVE an opportunity to make an additional submission to establish that the information that it seeks to keep confidential meets the standard that the Supreme Court articulated. I therefore directed that ACTIVE could submit a detailed statement that (1) identifies with particularity those portions of the Petition that it

believes constitute trade secrets or confidential commercial or financial information protected by Exemption 4 and (2) substantiates the claim that those portions fall within Exemption 4. I further specified that ACTIVE should limit its statement to Exemption 4 only.

On August 8, 2019, ACTIVE timely filed a request for confidentiality pursuant to FOIA Exemption 4 (Request or Confidentiality Request).

LEGAL DETERMINATION

As explained in the July 29 Order, the Bureau's regulations governing investigations provide that CID petitions and the Bureau's orders in response to those petitions are "part of the public records of the Bureau unless the Bureau determines otherwise for good cause shown." 12 C.F.R. § 1080.6(g). A petitioner bears the burden of demonstrating good cause that a petition should not be made public. In evaluating whether a petitioner has shown "good cause" under 12 C.F.R. § 1080.6(g) to warrant withholding a petition and responsive order (or portions thereof) from the public record, the Bureau generally looks to the standards for withholding material from public disclosure established by FOIA. Accordingly, the Bureau will publicly disclose a petition to modify or set aside a CID unless either (i) the petitioner has made a factual showing that the information in the petition falls within one of the FOIA exemptions or (ii) the Bureau determines that other good cause exists to withhold all or a portion of the petition from public disclosure and the withheld information is not otherwise required by law to be made public

Here, ACTIVE's Confidentiality Request specifies two classes of information that it believes are protected by Exemption 4: (1) the name of its payment processor and the related payment processor contract; and (2) any reference to materials provided by ACTIVE that "detail[] ACTIVE's business model, ... funds flow, and various sample or model payment forms. Request at 5-6. ACTIVE also claims more broadly that the "entirety of Active's Petition, any supporting documentation to the Petition, the CID, and the Director's Order that references any of this material should remain confidential pursuant to FOIA Exemption 4."¹

For the reasons explained below, I grant the Request with respect to the payment processor information only.²

¹ ACTIVE separately requests that I defer publication of the Petition and Order until after the Bureau's investigation has been completed. Request at 3-4. But ACTIVE does not claim that this request has anything to do with Exemption 4. Instead it rehashes arguments that ACTIVE made in the Petition, and which I rejected in the Order. I reject this request both because it is without merit and because it is inconsistent with the explicit direction in the Order that ACTIVE limit its supplemental statement to Exemption 4 grounds.

² Separately, I have determined that there is good cause to redact two sentences in Exhibit E to ACTIVE's Petition that may disclose nonpublic activities of another regulator.

1. Payment Processor Information

I agree with ACTIVE that there is good cause to protect the name of its payment processor and information related to ACTIVE's agreement with that payment processor in light of FOIA Exemption 4. Exemption 4 protects information that is "(1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential." *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).³ Here, ACTIVE has a commercial interest in the identity of its payment processor and in its contract with that processor. *See Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006). The Bureau obtained this information from a person outside the government (i.e., ACTIVE). Finally, it appears that the information is "customarily kept private, or at least closely held, by" ACTIVE. *Food Mktg. Inst.*, 139 S. Ct. at 2363. And while the Supreme Court in *Food Marketing Institute* raised the possibility that information could be considered "confidential" for purposes of Exemption 4 only if a second requirement was met—namely, that the government have provided the submitter "some assurance that [the information] will remain secret," 139 S. Ct. at 2363—it is not necessary to resolve that issue today. That is because, in the circumstances here, there is "good cause" within the meaning of the Bureau's regulations to keep confidential the payment processor information that ACTIVE customarily keeps private, regardless of whether any "assurances" of confidentiality were made.

Accordingly, I grant ACTIVE's Confidentiality Request with respect to all information concerning ACTIVE's payment processor that is contained in the Petition, the July 29 Order, the Confidentiality Request and all supporting documents.

2. Business Model, Funds Flow, and Sample or Model Payments Forms

I reject ACTIVE's request to keep confidential the information about its business model, funds flow, and various sample or model payment forms that ACTIVE has submitted in connection with the Petition.

To begin, the Confidentiality Request appears to seek confidential treatment for information that is not actually part of this proceeding. Most notably, Exhibit E to the Petition refers to documents discussing ACTIVE's funds flow and payment forms. But while those

³ Under 2016 amendments to FOIA, an agency can withhold information under any FOIA exemption "only if ... the agency reasonably foresees that disclosure would harm an interest protected by" the exemption or "disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i). Under D.C. Circuit precedent, the Trade Secrets Act prohibits disclosure of information protected by Exemption 4. *See Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008) ("[U]nless another statute or a regulation authorizes disclosure of the information, the Trade Secrets Act requires each agency to withhold any information it may withhold under Exemption 4 of the FOIA."). Disclosure of ACTIVE's confidential commercial information is therefore "prohibited by law," and can be withheld without establishing foreseeable harm. *Accord Rosenberg v. U.S. Dep't of Defense*, 342 F. Supp. 3d 62, 73 n.1 (D.D.C. 2018) (explaining that "[i]nformation that is prohibited from disclosure," including information whose disclosure is prohibited by the Trade Secrets Act, is "not subject to the foreseeable harm standard").

additional documents may have been provided to the Office of Enforcement, they were not attached to the Petition and will not be made public in connection with the Petition.

After a careful review, I find that the business model, funds flow and payment form information that ACTIVE submitted in connection with its Petition is already public. For instance, the information that ACTIVE provided about its business model is available on ACTIVE's website. *See, e.g.*, Petition at 2-3 & nn.1-3 (describing ACTIVE's business model with citations to its website and noting that ACTIVE's website includes a "representative contract with event owners"); *id.* Ex. E at 3 n.2 (describing the standard terms of service between ACTIVE and event organizers and noting that "ACTIVE's standard contract with event organizers is publicly available online"). Other ostensibly "confidential" information ACTIVE provided as part of the CID process includes (1) descriptions of the membership program ACTIVE offers to the public and the disclosures that ACTIVE makes to consumers about that program, *see, e.g., id.* at 3, Ex. E at 3, (2) a generalized discussion of requirements imposed on merchants by the credit and debit card networks, *compare, e.g., id.* Ex. 3 at 3, *with, e.g.*, FFIEC, IT Examination Handbook, Retail Payment Systems, 19-21, 55-58 (Apr. 2016), https://ithandbook.ffiec.gov/media/274860/ffiec_itbooklet_retailpaymentsystems.pdf; and (3) a general description of the funds flow process ACTIVE uses, which ACTIVE describes as a "very common merchant processing system," Request Ex. 3 at 3; *see also id.* ("You can find this exact method of disclosure and acceptance for payment on virtually every merchant website in the United States.").

In sum, the Confidentiality Request asserts that Exemption 4 protects information that is publicly provided on ACTIVE's website, that is disclosed broadly to interested consumers, that merely restates publicly available information, and that concerns business processes that ACTIVE otherwise argues are commonly used and disclosed by virtually all merchants. Exemption 4 does not protect such materials, and I do not find there is good cause to withhold this information here.

3. The "Entirety" of the Petition and Related Materials

As noted above, ACTIVE argues that "the entirety of ... ACTIVE's Petition" and related materials should be kept confidential. ACTIVE bases this argument on two claims: (1) ACTIVE believed that the Bureau would keep all of the material related to the Petition confidential because Bureau investigations are generally nonpublic; and (2) that redacting ACTIVE's name along with information about its business model, operations, and payment processor, would not preserve ACTIVE's confidentiality. *See id.*; Riddell Decl. ¶¶ 5-9. Neither claim supports the requested relief.

First, whatever ACTIVE's subjective expectations, neither Exemption 4 nor good cause support withholding from the public commercial or financial information that is already publicly available. To be sure, publishing the Petition and the July 29 Order will reveal some information that is not already public: the fact and contents of the Bureau's CID. But Exemption 4 applies to information obtained "from a person"; it doesn't apply to information that the government

generates. *See, e.g., Ctr. for Auto Safety v. U.S. Dep't of Treasury*, 133 F. Supp. 3d 109, 119 (D.D.C. 2015).

Second, I reject ACTIVE's argument that redactions will not suffice to preserve the confidentiality of the protected information. Under FOIA, where some information falls within an exemption, an agency is obligated to "take reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A)(ii)(II). Here, I find that it is possible to protect the payment processor information through redactions while publishing the remainder of the petition materials.

CONCLUSION

For the foregoing reasons, ACTIVE's Request is granted in part and denied in part. The Petition, the July 29 Order, the Request, and all exhibits will be redacted to prevent disclosure of the payment processor information I have determined should be kept confidential.

This Supplemental Decision and Order, as well as the July 29 Decision and Order, the Petition, and the Confidentiality Request, along with all attached documents will be published on the Bureau's website no fewer than five business days after service of this Supplemental Decision and Order on ACTIVE.

4/13, 2020


Kathleen L. Kraninger, Director