

CONFIDENTIAL TREATMENT REQUESTED / FOIA EXEMPT

United States of America

Before the Consumer Financial Protection Bureau

IN THE MATTER OF
ACTIVE Network, LLC

2019-MISC-ACTIVE Network, LLC-0001

**REQUEST FOR CONFIDENTIALITY PURSUANT TO FREEDOM OF
INFORMATION ACT EXEMPTION 4**

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Pursuant to the Decision and Order issued by the Director of the Consumer Financial Protection Bureau (“CFPB”) regarding the Petition to Set Aside Civil Investigative Demand, ACTIVE Network, LLC (“ACTIVE”) files the following request to treat the Petition to Set Aside and all supporting documentation filed on March 22, 2019, and the abovementioned Order to the extent it references any of this material as protected from disclosure pursuant to the Freedom of Information Act (“FOIA”) Exemption 4. 5 U. S. C. § 552(b)(4) (exempting from agency public disclosure requirements “trade secrets and commercial or financial information obtained from a person and privileged or confidential”).

I. FACTS AND PROCEDURAL HISTORY

The CFPB served the Civil Investigative Demand (“CID”) on ACTIVE on February 13, 2019. ACTIVE sought and obtained an extension to respond to the CID, resulting in a deadline of March 22, 2019 for a petition to set aside the CID and a deadline of March 26, 2019 to respond. In the interim, ACTIVE voluntarily provided the Enforcement Office with detailed information explaining how ACTIVE is outside of the CFPB’s jurisdiction. The parties met and conferred on March 11, 2019. During the conference, ACTIVE explained that the CID exceeded the jurisdiction of the CFPB. The CFPB disagreed, and the parties were at an impasse as to the threshold question of jurisdiction. ACTIVE timely filed a petition to set aside the CID on March 22, 2019. The Director issued her *Decision and Order on Petition by Active Network, LLC to Set Aside Civil Investigative Demand* on July 29, 2019, which denied ACTIVE’s request to set aside the CID, but modified the Notification of Purpose and provided ACTIVE with the opportunity to file the instant request.

II. ACTIVE'S PETITION TO SET ASIDE AND THE DIRECTOR'S DECISION AND ORDER ON THE PETITION ARE INFORMATION EXEMPTED FROM DISCLOSURE PURSUANT TO FOIA EXEMPTION 4

Pursuant to the Director's Order, within 10 days of the Order's issuance (August 8, 2019), ACTIVE must 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 FOIA Exemption 4 and (2) substantiate the claim that those portions fall within Exemption 4 by sworn statement establishing that the identified information would customarily be kept private. The Director's Decision and Order further directs ACTIVE to state "why it is 'reasonably foresee[able] that disclosure of the information would harm an interest protected by' Exemption 4." (Order, at 8 (quoting 5 U. S. C. § 552(a)(8)(A)(i)(I), (b)(4)) (alternations in original).)

As the Director notes in her Order, in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), the Supreme Court clarified the standard for determining what information may be withheld under FOIA Exemption 4, which exempts from disclosure "trade secrets and commercial or financial information obtained [by an agency] from a person and privileged or confidential." 5 U. S. C. § 552(b)(4). The Court explained that the term "confidential" includes commercial or financial information that is "customarily kept private, or at least closely held, by the person imparting it." 139 S. Ct. at 2363.

The first instruction from the Bureau to recipients of a CID states that "[t]his CID relates to a nonpublic, law-enforcement investigation being conducted by the Bureau." (CID, at 5.) The Bureau's regulations also indicate that "Bureau investigations generally are non-public. Bureau investigators may disclose the existence of an investigation to potential witnesses or third parties to the extent necessary to advance the investigation." 12 C.F.R. § 1080.14 (Confidential treatment of demand material and non-public nature of investigations). Although the Bureau's regulations

state that “[a]ll such petitions and the Director’s orders in response to those petitions are part of the public records of the Bureau,” such records can remain confidential upon a showing of “good cause.” 12 C.F.R. § 1080.6(g). The Bureau has not provide examples of “good cause” or otherwise defined this standard.¹

A. ACTIVE requests that the Director defer the publication of the Petition and Order until completion of the enforcement investigation.

The Bureau’s regulations authorize the Director to keep ACTIVE’s petition and any related material confidential or to delay the disclosure of such information until an appropriate time. Although ACTIVE believes that the information in the Petition and Order should remain confidential, to the extent the Director does decide this information should become public, ACTIVE respectfully requests that that publication date be deferred until the Bureau reaches a decision as to whether it both has jurisdiction over ACTIVE and determines that public enforcement action is necessary. This approach recognizes the harm to ACTIVE (or any similarly situated business) of public disclosure and the minimal benefit to the public.

Under this common-sense approach, the Bureau can continue its nonpublic investigation with all the benefits typically derived from such activity, but will cease the previous Administration’s unnecessary and punitive policy that made public a confidential investigation before the completion of the investigation for merely asserting their rights granted by statute. The requested delay will not prejudice the Bureau in conducting its investigation, because it routinely conducts investigations in a nonpublic manner. *See* 12 C.F.R. § 1080.14; CID Instructions (both noting investigations are generally conducted in a confidential manner). Additionally, as the Director’s Order notes, the Bureau has fully documented in existing public orders its position with

¹ Should the Director be willing to reconsider ACTIVE’s showing of good cause, as noted in its Petition ACTIVE could suffer harm as a presumptive target of an ongoing nonpublic investigation, particularly in this case where ACTIVE disputes that the Bureau has the expansive jurisdiction the CID suggests. (*See* Petition, at 11-13.)

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regards to various facets of CIDs, petitions to set aside or modify, and requests for confidential treatment. *See In re Jawad Nesheiwat*, 2018-MISC-Jawad Nesheiwat-0001 (April 22, 2019); *In re Firstsource Advantage, LLC*, 2017-MISC-Firstsource Advantage, LLC-001 (July 23, 2018); *In re Heartland Campus Sols., ECSI*, 2017-MISC-Heartland Campus Solutions, ESCI-001 (Sept. 08, 2017). For this reason, the public will suffer no harm, because the public can assess and understand the Bureau's petition process through review of this existing public information, as well as the Supreme Court's decision in *Food Marketing*, 139 S. Ct. at 2361-63.

Moreover, the Bureau has not followed any set timing with regard to when it makes determinations about disclosing petitions to the public in relation to public enforcement action or otherwise. *See, e.g., In re UniRush LLC*, 2015-MISC-UNIRUSH-0001 (Petition filed Nov. 9, 2015, Order entered Dec. 2, 2015, and settlement entered publicly Feb. 1, 2017); *In re Zero Parallel LLC*, 2016-MISC-Sero Parallel-001 (Petition filed on May 16, 2016, Order entered on Jul. 14, 2016, and settlement entered publicly on Sept. 6, 2017). The instant matter provides the Director with the opportunity to exercise her discretion to make petitions and related orders public in a fair and just manner to all involved at the culmination of the investigation into any alleged wrongdoing. Therefore, ACTIVE respectfully requests that the Director defer publication of the Petition and her Order until such time as the investigation of this matter is complete.

B. FOIA Exemption 4

In filing its Petition to Set Aside, ACTIVE had no choice but to reference the conduct under investigation, the material previously provided to the Bureau that explained ACTIVE's business operations, and the relevant CID. ACTIVE provided this information in furtherance of the ongoing CFPB investigation and with the belief that such information would be kept confidential pursuant to the CFPB's nonpublic investigation. At no time has ACTIVE made public

any of this information, including the CID, the Petition to Set Aside, any of the supporting documentation to the Petition, or any other documents and information related to correspondence with the Bureau attempting to explain the Bureau's lack of jurisdiction over a merchant. Exhibit A. Decl. of John Hanson, at ¶ 3. In fact, ACTIVE intends to keep this information private and confidential. *Id.* Additionally, because of the extent of the confidential materials, redactions would not sufficiently protect the confidentiality of the information when viewed collectively and in context. *See id.* at ¶ 9. As such, the entirety of the 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.

Notwithstanding the foregoing and without waiving the above argument, ACTIVE hereby details with particularity those portions of the Petition (and Exhibits) that it believes constitutes trade secrets and confidential commercial or financial information protected by Exemption 4.

First, [REDACTED] was only disclosed by ACTIVE in response to the issuance of the CID. *Id.* at ¶ 4. This information is nonpublic, proprietary, and contains information that if released to the public would harm both ACTIVE and [REDACTED] competition in the market, as well as ACTIVE's ability to work with [REDACTED].² *Id.* at ¶ 5.

Second, any reference to the Letter from Gerald S. Sachs to Casey Triggs that details ACTIVE's business model, payment processor [REDACTED], funds flow, and various sample or model

² We address the notion of "harm" as required by the Director's Order. However, the Court in *Food Marketing* pointed out that while its dissenting colleagues "seem to agree that the law doesn't demand proof of 'substantial' or 'competitive' harm" that "they think it would be a good idea to require a showing of some harm." 139 S. Ct. at 2366. The Court's opinion declines to adopt the dissenting opinion's citation to specialized dictionary definitions and policy arguments requiring some showing of harm. *Id.* Instead, the Court notes that, "as Justice Breyer has noted, when Congress enacted FOIA it sought a 'workable balance' between disclosure and other government interests—interests that may include providing private parties with sufficient assurances about the treatment of their proprietary information so they will cooperate in federal programs and supply the government with information vital to its work." *Id.* (citing *Milner v. Department of Navy*, 562 U.S. 562, 589 (2011)).

payment forms are all confidential and proprietary information that if disclosed would harm ACTIVE's competition in the marketplace by disclosing its methods of operation and how its vendors supply services to ACTIVE. *Id.* at ¶ 6; *see* Exhibit E to the Petition to Set Aside. Third, the declaration of ACTIVE's Vice President of Finance Operations also meets Exemption 4. This declaration details ACTIVE's business model and [REDACTED]. *Id.* at ¶ 7. As noted above, releasing any of this information into the public would damage [REDACTED] ACTIVE's ability to compete in the market, and ACTIVE's ability to maintain its relationship with [REDACTED]. *Id.* at ¶ 8.

III. CONCLUSION

ACTIVE respectfully requests that the Director defer the publication of ACTIVE's Petition and her Order until the Bureau completes its investigation or takes public action. Regarding FOIA Exemption 4, ACTIVE argues that the entirety of this investigation should be exempt from disclosure, but in the alternative, certain information contained within the documents is exempted, including ACTIVE's business model, the name of ACTIVE's payment processor [REDACTED] funds flow, various sample or model payment forms, the declaration of ACTIVE's Vice President of Finance Operations, and any documents that reference this information.

Respectfully submitted,

Date: August 8, 2019

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Exhibit A

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IN THE MATTER OF
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**DECLARATION OF STEVE RIDDELL IN SUPPORT OF REQUEST FOR
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I, Steve Riddell, declare the following:

1. I am of sound mind and over the age of 18. I have personal knowledge of the statements made in this Declaration, which is provided in support of ACTIVE Network, LLC's Request for Confidentiality Pursuant to Freedom of Information Act Exemption 4.

2. I have been employed at ACTIVE Network, LLC ("ACTIVE") since 2014, and I currently hold the position of Senior Manager of Financial Services. My business address is 717 North Harwood Street, Suite 2500, Dallas, TX 75201-6527.

3. The information detailed in the Petition to Set Aside Civil Investigative Demand, all supporting exhibits, correspondence with the CFPB, and John W. Hanson's declaration in support of the filing were necessary to support ACTIVE's arguments and initial response to the CID. This information is customarily kept private and will not be made publicly available by ACTIVE.

4. ACTIVE contracts with [REDACTED] to process customer payments. This information is not publicly available and was only disclosed at the request of the Bureau and in furtherance of responding to the CID served on ACTIVE in February 2019.

5. Any disclosure of this relationship or the terms of that relationship will likely harm ACTIVE [REDACTED] competitiveness in the market and damage both companies' reputation and ability to conduct routine business.

6. Any reference to the Letter from Gerald S. Sachs to Casey Triggs that details ACTIVE's business model, payment processor [REDACTED] funds flow, and various sample or model payment forms are all part of ACTIVE's business model and operations, which are confidential and proprietary information that if disclosed would harm ACTIVE's competition

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in the marketplace by disclosing its methods of operation and how its vendors supply services to ACTIVE.

7. John W. Hanson's declaration details ACTIVE's business model, its payment processor [REDACTED]

8. Releasing any of this information contained in my previous declaration into the public would damage [REDACTED] ACTIVE's competition in the market while also hurting ACTIVE's ability to maintain its relationship with [REDACTED] or any other payment processor.

9. In addition, ACTIVE has a unique business and because of that, I do not believe that redacting the ACTIVE name or the above-mentioned information from any filings will preserve our confidentiality when the Petition and related filings are viewed collectively and in context.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: 8/8/19


Steve Riddell