COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

January 6, 2011

Mr. Cris Barrish
The News Journal
950 West Basin Road
New Castle, DE 19720

Chad M. Shandler, Esquire
Richards, Layton & Finger, P.A.
One Rodney Square
Wilmington, DE 19801

Jason C. Powell, Esquire
Ferry, Joseph & Pearce, P.A.
824 North Market Street, Suite 1000
Wilmington, DE 19801

David A. Jenkins, Esquire
Smith Katzenstein & Jenkins LLP
800 Delaware Avenue
Wilmington, DE 19801

Mark D. Olson, Esquire
Morris James LLP
500 Delaware Avenue, Suite 1500
Wilmington, DE 19801

Grover C. Brown, Esquire
Gordon Fournaris & Mammarella, P.A.
1925 Lovering Avenue
Wilmington, DE 19806

Collins J. Seitz, Jr., Esquire
Connolly Bove Lodge & Hutz, LLP
1007 North Orange Street
Wilmington, DE 19801

David E. Ross, Esquire
Connolly Bove Lodge & Hutz, LLP
1007 North Orange Street
Wilmington, DE 19801

Michael A. Weidinger, Esquire
Pinckney, Harris & Weidinger, LLC
1220 N. Market Street, Suite 920
Wilmington, DE 19801

Re: In the Matter of Trust for Grandchildren of Wilbert L. and Genevieve W. Gore dated April 14, 1972
C.A. No. 1165-VCN
Date Submitted: December 22, 2010

Dear Mr. Barrish and Counsel:

This intra-family dispute, in broad stroke, is about the adoption of a former spouse and the consequences of that act on the allocation framework of the Pokeberry Trust (the "Trust") that Wilbert L. and Genevieve W. Gore had established for the benefit of their grandchildren.[1] The principal asset of the Trust is all of the stock of Pokeberry Hill Securities, Inc., which has a substantial holding of stock of W.L. Gore & Associates, Inc., a successful, privately held company (the "Company").

* * *

During trial of a portion of this case on March 16, 2010, testimony was inadvertently given that revealed both a per share value for Company stock and the approximate value of the Company stock held indirectly by the Trust.[2] From that, it might also be possible to extrapolate a valuation of the Company as a whole. That information has been consistently treated as confidential; a confidentiality order has

[1] This, of course, assumes that the instrument, dated May 8, 1972, does not control the matters at hand.
[2] Tr. 251-52.

been entered in this action. Although the trial was open to the public, only court personnel and individuals bound by the terms of the confidentiality order were in the courtroom at the time of the inadvertent disclosure. Certain trustees of the Trust promptly moved to seal that portion of the trial transcript which included this sensitive information. The Court granted that application.[3] The trial transcript is public except for that small redacted portion.

The redacted information took two forms. The first reference was to the difference between the number of shares in the Trust for each of the Otto Grandchildren and the number of shares in the Trust for each of the other Gore cousins (the "Share Information"). The second reference was to the difference in value between the interests of one of the Otto Grandchildren and the interests of one of the Gore cousins (the "Valuation Information").

* * *

Cris Barrish, a senior reporter for The News Journal, has requested that the order sealing a portion of the trial transcript be vacated and that he and the public be allowed access to the redacted information.

[3] Tr. 303.

Mr. Barrish makes several arguments in support of his application:

1. The statements were made in open court, a forum with no constraints on public access. In essence, the information entered the public domain when the testimony was given and, once public, may not be restored to confidential status.

2. Under these circumstances, Delaware's Freedom of Information Act (the "FOIA"), 29 *Del. C.* ch. 100, requires disclosure of the redacted testimony.

3. The redacted information is not a trade secret or otherwise entitled to confidential treatment.

4. The public's right to know is paramount, especially because the valuation of the stock in the Trust drives the scope of the litigation and is important to the public's understanding of the merits of this dispute.

* * *

Nonpublic estimates of the value of a privately held company are generally entitled to confidential treatment.[4] Perhaps there will be a public offering of

[4] The testimony disclosed both personal financial information (i.e., the interests of the Gore heirs, including minors) and the Company's confidential business information. *See, e.g.*, *Stroud v. Grace*, 606 A.2d 75, 89 (Del. 1992) (recognizing "the essential nature of keeping financial information confidential in privately-held corporations . . . ."); *Amalgamated Bank v. UICI*, 2005 WL 1377432, at *6 (Del. Ch. June 2, 2005) (treating as confidential information that is "proprietary, or commercially or personally sensitive . . . .").

Company stock at some point; at that time, all sorts of valuation information and data would have to be disclosed. Those disclosures, however, would then be the product of a conscious decision to involve the public in the previously private affairs of the Company. Valuation of the Company has been closely guarded in the past, and an inadvertent slip of the tongue should not undo those consistent efforts. If valuation of Company stock were material to the Court's function, then a different view might result.[5] Mr. Barrish, for example, directs the Court to an order issued by the Eastern District of Texas denying a motion to redact portions of a trial transcript containing previously confidential information because (i) allowing access to that information would help the public understand the issues before the court and (ii) disclosing the testimony would "present minimal harm" to the parties involved.[6] Here, however, the value of the Company stock held indirectly by the Trust has no material effect on the work of the judicial system.[7] Moreover, knowledge of the value of the Company stock is not important for the public's understanding of the merits of the dispute

---

[5] *See, e.g.*, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1978); *see also Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984); *In re Nat'l Citi Corp S'holders Litig.*, 2009 WL 1653536, at *2 (Del. Ch. June 5, 2009).

[6] *I.P. Innovation v. Red Hat, Inc.*, No. 2:07-cv-447(RRR) (E.D. Tex., Sept. 21, 2010) (ORDER).

[7] Arguably, the value of the Trust's assets drives the intensity of the litigation and the related demand that is placed on judicial resources. It does no harm to the confidentiality of the Valuation Information to confirm that a substantial amount of money is at stake. Significantly, a substantially smaller Trust corpus would, nevertheless, still likely result in litigation of the same magnitude.

within the Gore family. Thus, the Valuation Information merits confidential treatment.[8]

The Share Information is different. The allocation of shares through the Pokeberry formula does not, by itself, reflect a quantified valuation. Instead, the Share Information demonstrates the disparity resulting from application of the formula—it would assist the public in understanding the dispute that the Court has been called upon to resolve. To that end, the policy values served by disclosure of the Share Information outweigh any incidental confidentiality concerns of the parties.[9] Accordingly, the redaction of the Share Information[10] will be removed.

* * *

The contention that the FOIA requires disclosure of the Valuation Information raises two questions: does the FOIA apply to the judicial system, and, if so, is the redacted information requested within the scope of records to which the public has a right of access under that statute?

---

[8] *See, e.g.*, *Jones v. Avidyne Corp.*, 2010 WL 3829215, at *1 (D. Or. Sept. 24, 2010) (upholding a magistrate judge's decision to deny a joint motion to seal the trial transcript and instead to redact certain confidential information because (i) there was no compelling public interest in revealing the confidential information, and (ii) Avidyne asserted it would be harmed by revelation of the information. The decision to selectively redact the transcript showed "careful attention to the tension between the public's recognized right of access and Avidyne's interest in confidentiality."

[9] The Company's confidentiality interests do not appear to be impaired by the Share Information.

[10] Tr. 251.

First, the FOIA has been interpreted as not applying to the judicial system, on the basis that a court is not a "public body" under the act.[11] Although the confidentiality of its proceedings and its records is properly a matter for the judicial system,[12] the values reflected in the FOIA do inform the Court's exercise of its discretion.[13]

Second, and regardless, the FOIA would not compel disclosure of the Valuation Information if the statute were applicable to the Court and its records. The FOIA requires only the disclosure of "public records."[14] The FOIA's definition of "public records" specifically excludes "commercial or financial information obtained from a person which is of a . . . confidential nature."[15] Because of the confidential nature of the Valuation Information, it is not a public record the disclosure of which the FOIA would compel.

---

[11] Del. Atty. Gen. Op. No. 07-IBO2 ("The statutory language and legislative history of FOIA evidence the General Assembly's intent to respect the inherent authority of the judiciary—as a co-equal branch of government—to control access to court records and proceedings."). Apart from constitutional issues, the statutory interpretation question turns on whether the Court is an "appointive . . . body" within the meaning of 29 *Del. C.* § 10002(c).

[12] *See Husband C. v. Wife C.*, 320 A.2d 717, 727 (Del. 1974) ("[T]here is no absolute right of a member of the public to inspect judicial records." In the absence of a right to access, "[t]he decision is a discretionary one of the trial court.").

[13] *Kronenberg v. Katz*, 872 A.2d 568, 608 (Del. Ch. 2004) (discussing Delaware's strong public policy in favor of allowing public access to judicial proceedings, subject to reasonable restrictions aimed at protecting genuinely sensitive information).

[14] 29 *Del. C.* § 10003.

[15] 29 *Del. C.* § 10002(g)(2).

* * *

Finally, there is the debate, one with an almost metaphysical aura, about whether once something is said in open court it becomes part of the public domain. If someone from the public—i.e., someone not bound by confidentiality restrictions—had been present, that might have been the end of the debate.[16] In this instance, no one from the public was present. No one from the public heard the inadvertent statement. The public has never had direct access to the Valuation Information. Accordingly, the Valuation Information has not, in any meaningful sense, entered the public sphere.

Although inadvertent disclosures may have led to differing consequences in differing circumstances, the better policy is to mitigate the consequences of an inadvertent disclosure, at least where the public's interest in access is outweighed by the confidentiality interests of the parties involved. It is perhaps especially important not to impose adverse consequences on individuals who were not responsible for the inadvertent disclosure but who would suffer harm if the Valuation Information were

[16] *See One Sky, Inc. v. Katz*, 2005 WL 1300767, at *1 (Del. Ch. May 12, 2005) (observing that previously confidential information that has "entered the public sphere should be deemed available for public disclosure").

made public.[17] Ultimately, the Valuation Information is deserving of continued confidential treatment.

After reviewing the trial transcript, the Court is satisfied that the limited redaction of the Valuation Information was narrowly tailored to protect confidential, personal financial and proprietary business information. Further public disclosure because of inadvertent testimony is unwarranted.

* * *

Accordingly, for the reasons set forth above, the application of Mr. Barrish to vacate the Court's Order redacting the Share Information is granted. His application to vacate the Court's Order redacting the Valuation Information is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Greg Burton, Assistant Managing Editor, The News Journal
Register in Chancery-K

[17] Reasonable steps, such as obtaining a confidentiality order, to protect the sensitive information had been taken. The disclosure that did occur was not reasonably foreseeable.