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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TRAYLOR BROS., INC., et al.,)	Civil No. 08-1019-L(WVG)
)	
Plaintiffs,)	ORDER REGARDING
)	PROTECTIVE ORDER
v.)	
)	
SAN DIEGO UNIFIED PORT)	
DISTRICT,)	
)	
Defendant.)	
_____)	

1. Introduction

On January 13, 2011, the Court held a Case Management Conference (hereafter "CMC") in this action. Prior to the CMC, counsel submitted to the Court a Joint Discovery Plan. At the CMC, the Court discussed with counsel, *inter alia*, the need for a protective order, as noted in the Joint Discovery Plan at section II.G. After the Court discussed with counsel the issues related to the protective order, it ordered counsel to file supplemental briefs

1 regarding the propriety of the protective order. On January 20,
2 2011, counsel filed the requested supplemental briefs.^{1/}

3 2. Parties' Arguments

4 Plaintiff Traylor Bros, Inc. (hereafter "Traylor"), argues
5 that a protective order, as suggested in the Joint Discovery Plan at
6 section II.G., is appropriate in this case for the following
7 reasons: It intends to make available to all parties in this case
8 (1) confidential, proprietary information and trade secrets with
9 respect to the means and methods by which it bids and performs
10 projects; (2) proprietary computer software; (3) financial informa-
11 tion relating to revenues, margins, profits, costs of labor and
12 equipment; and (4) staffing, scheduling, subcontracting and
13 equipping particular projects. Therefore, if a protective order is
14 not in place in this litigation, Traylor's competitors could seek
15 its confidential and proprietary information through a California
16 Public Records Act^{2/} (hereafter "CPRA") request to the San Diego
17 Unified Port District (hereafter, "the Port").

18 Further, Traylor argues that by suing the Port, it did not
19 waive its rights to privacy, a protective order insulates the Port
20 from CPRA exposure, and that it is inappropriate to have it
21 indemnify the Port by requiring it to hold the Port harmless and
22 defend and indemnify the Port for costs and fees associated with
23 responding to a CPRA request for its confidential information.

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25
26 ^{1/} Third Party Defendant Anchor Environmental joined Traylor Bros.,
27 Inc. in its position regarding the San Diego Unified Port District's
28 request for an indemnity provision in the Joint Discovery Plan. See
the discussion regarding the San Diego Port District's request for
an indemnity provision below.

^{2/} California Government Code §§ 6250-6264.

1 The Port argues that Traylor has failed to show good cause
2 for the protective order, Traylor has waived its privacy rights, and
3 that imposition of a protective order will subject the Port to costs
4 and fees associated with responding to state and federal law record
5 requests that seek Traylor's confidential information. Therefore,
6 Traylor should defend and indemnify the Port for any costs and fees
7 associated with the Port's responses to requests for Traylor's
8 confidential information.

9 3. Discussion

10 a. Protective Order Under the Federal Rules of Civil
11 Procedure

12 Pursuant to Federal Rule of Civil Procedure 26(c)(1)(G), a
13 protective order is appropriate if the party seeking the protective
14 order shows good cause and the information sought to be protected is
15 a trade secret, confidential research, development or commercial
16 information. "A party asserting good cause (for a protective order)
17 bears the burden, for each particular document it seeks to protect,
18 of showing that specific prejudice or harm will result if no
19 protective order is granted." Foltz v. State Farm, 331 F.3d 1122,
20 1130 (9th Cir. 2003).

21 Here, Traylor has sufficiently met its burden by explaining
22 the nature of the documents that require protection and the
23 rationale underlying its request for a protective order for those
24 documents. In addition, the Court relies on its own experience to
25 conclude that the nature of the documents identified by Traylor
26 require protection from disclosure to persons or entities that are
27 not parties to this litigation.

1 b. CPRA California Government Code §6254(b)

2 The CPRA, at California Government Code §6254, lists several
3 areas where disclosure of documents, subject to a CPRA request, are
4 exempt from disclosure. California Government Code § 6254 states in
5 pertinent part:

6 ...(N)othing in this chapter shall be construed to
7 require disclosure of records that are any of the
8 following...

9 (b) Records pertaining to pending litigation to which
10 the public agency is a party,... until pending litigation or claim has been finally adjudicated or otherwise settled.

11 ...
12 (k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

13 "Since disclosure (under the CPRA) is favored, all exemptions
14 are narrowly construed. The agency opposing disclosure bears the
15 burden of proving that an exemption applies." County of Santa Clara
16 v. Superior Court, 170 Cal. App. 4th 1301, 1321 (2009)(citations
17 omitted).

18 Section 6254(b) does not apply in this case because "(a)
19 document is protected from disclosure under the pending litigation
20 exemption only if the document *was specifically prepared for use in*
21 *litigation.*" Board of Trustees v. Superior Court, 132 Cal. App. 4th
22 889, 897 (2005), citing County of Los Angeles v. Superior Court
23 (Axelrad), 82 Cal. App. 4th 819, 825 (2000)(emphasis in original).
24 Here, the documents Traylor seeks to protect were not prepared for
25 use in litigation. In fact, it appears that at the time the
26 documents Traylor seeks to protect were created, litigation was not
27 even contemplated, much less specifically prepared for use in
28 litigation.

1 Even if § 6254(b) applied, the confidential nature of the
2 documents Traylor seeks to protect would expire upon completion of
3 the litigation. Therefore, the documents would become disclosable by
4 the Port upon an appropriate request. "Section 6254(b) only applies
5 to litigation-related documents while litigation is pending.
6 Documents exempt from disclosure while litigation is pending are
7 subject to disclosure under the (C)PRA once the litigation has
8 ended." Board of Trustees, 132 Cal. App. 4th at 899. Accordingly, §
9 6254(b) does not provide the type of protection that Traylor seeks
10 because the Port could disclose the documents for which Traylor
11 seeks protection after the litigation has ended. As a practical
12 matter, documents disclosed under a protective order are often
13 returned to the disclosing party, or destroyed, when the litigation
14 has concluded. Consequently, even under § 6254(b), Traylor's trade
15 secrets and confidential information may not be in the Port's
16 possession after the litigation is concluded and thus not subject to
17 disclosure under the CPRA.

18 c. CPRA California Government Code § 6254(k)

19 While California Government Code § 6254(b) does not apply in
20 the situation presented to the Court, § 6254(k) does apply. The
21 documents protected from disclosure pursuant to this section are
22 documents that were not prepared for use in litigation, (e.g. trade
23 secrets) and also applies after the litigation has concluded. Trade
24 secrets are generally protected from disclosure but not when "the
25 owner divulges them or when they are discovered through proper
26 means." Chicago Lock Co. v. Fanberg, 676 F.2d 400, 404 (9th Cir.
27 1982).

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1 Here, the Port provided the Court a list of disclosures made
2 by Traylor in the bidding process, during the performance of the
3 project, and in the claims process. The Port contends that these
4 disclosures were not made pursuant to a protective order nor
5 pursuant to a confidentiality agreement. The Port further claims
6 that Traylor's disclosures in these regards are the very same trade
7 secrets and proprietary and confidential information, which Traylor
8 now wants to protect from disclosure. If the Port is correct and
9 Traylor made certain disclosures during the bidding process,
10 performance of the project, and in the claims process, then as to
11 those documents, such protection was waived pursuant to Chicago
12 Lock. Therefore, the Court agrees that the Port's position in this
13 regard has merit.

14 However, the Port's request that Traylor agree to defend and
15 indemnify it for costs and expenses of responding to a CPRA request
16 does not have merit. The Port has not presented to the Court any
17 authority that would support such a request.

18 As a result of the foregoing, counsel shall modify the
19 protective order to include the following language:

20 With respect to documents submitted by Traylor during
21 the bidding process, performance of the project, and
22 in the claims process, and which are now considered
23 public documents subject to disclosure under the CPRA,
24 confidentiality is waived. These documents are specif-
25 ically excluded from protection under this Protective
Order. Any other documents identified by Traylor that
fall within the categories of trade secrets, propri-
etary and/or confidential information are properly
subject to confidentiality under the Protective Order.

26 On or before February 23, 2011, counsel shall provide to the
27 Court clarification regarding what is meant by "within a reasonable
28

1 time," as used in the Joint Discovery Plan at page 14, paragraph
2 G.1.(c).

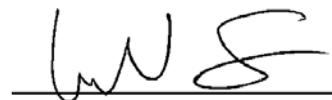
3 On or before March 2, 2011, counsel shall file with the Court
4 the Joint Discovery Plan. The Joint Discovery Plan shall include all
5 of the changes noted in this Order, as well as the changes noted by
6 the Court in its January 13, 2011 discussions with counsel.

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8 DATED: February 16, 2011

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Hon. William V. Gallo
U.S. Magistrate Judge

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