

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America <i>ex rel.</i>	:	
Donald E. Howard, <i>et al.</i> ,	:	Case No. 1:99-cv-285
	:	
Relators,	:	Chief Judge Susan J. Dlott
	:	
v.	:	Order Denying in Part Motions for Order
	:	Determining Certain Documents Should
Lockheed Martin Corporation,	:	Continue to be Treated as Confidential
	:	
Defendant.	:	
	:	

Relators have objected to Lockheed’s designation of certain documents as subject to the Amended Confidentiality Agreement and Protective Order (“Protective Order”) (Doc. 145). Pursuant to the procedure outlined in the Protective Order, Defendant Lockheed Martin filed Motions for Order Determining Certain Documents Should Continue to be Treated as Confidential (“Confidentiality Motions”) (Docs. 371, 384, and 414) so that the disputed documents could remain under seal. Relators oppose those Confidentiality Motions. (Docs. 399, 425.) The Government also has filed a Response (Doc. 430) to the Confidentiality Motions. For the reasons that follow, Lockheed’s Confidentiality Motions will be **DENIED IN PART**.

I. THE PROTECTIVE ORDER

The Protective Order in this case was signed by the Court on May 21, 2009. (Doc. 145 at PageID 2033.) The Protective Order at paragraph 4 allows the parties to designate materials as subject to the Protective Order as follows:

Documents and other tangible things that constitute a risk of imposing serious competitive or financial harm to the designating party if made public or private personnel data may be designated by a party as “Subject to Protective Order,” either by a stamped legend if it is produced in hard copy, by other means if the

data is produced in electronic form, or by counsels' statement on the record if the information is elicited in oral form.

(*Id.* at PageID 2036.) At paragraph 5, the Protective Order states that “[c]ertain documents and other tangible things produced by Defendant may be first reviewed by the United States for approval for release pursuant to the restricted release requirements applicable to certain documents and things related to the F-22 program.” (*Id.*) It then gives the United States authority to designate materials as subject to the Protective Order. (*Id.*) Any document to be filed with the Court that contains material subject to the Protective Order must be filed under seal pursuant to paragraph 9 of the Protective Order. (*Id.* at PageID 2039.)

The Protective Order states at paragraph 14 that any party can object to the designation of a document or exhibit as subject to the Protective Order with written notice to the designating party. (*Id.* at PageID 2041.) If the parties are unable to reach an agreement about a contested designation, the designating party can file an application to the Court that the designated material be treated as subject to the Protective Order. (*Id.*) The party making the designation shall have the burden of proving that the material should be treated as subject to the Protective Order. (*Id.*)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 26 authorizes the Court, “for good cause,” to issue a protective order “requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.” Fed. R. Civ. P. 26(c)(1)(G). The Court’s discretion to shield court-filed documents from public scrutiny “is circumscribed by a long-established legal tradition’ which values public access to court proceedings.” *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (quoting *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983)). A party’s fear of embarrassment or harm to reputation generally is not sufficient to justify the

sealing of court records. *See Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179–80; *Jacobs v. Lambda Research, Inc.*, No. 1:10-cv-536, 2012 WL 748578, at *2 (S.D. Ohio Mar. 8, 2012). Nor is simple harm to a business’s commercial self-interest sufficient to justify keeping court records under seal. *See Proctor & Gamble*, 78 F.3d at 225. “Where a business is the party seeking protection, it will have to show that disclosure would cause significant harm to its competitive and financial position.” *Tinman v. Blue Cross & Blue Shield of Mich.*, 176 F. Supp. 2d 743, 745 (E.D. Mich. 2001) (quoting *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653 (D. Md. 1987)). This showing must be made with particularized facts, not conclusory allegations. *See id.* at 745–46. In a business context, the facts should be proven with concrete examples and by affidavits when possible. *See id.* at 746; *Waite, Schneider, Bayless & Chesley Co. L.P.A. v. Davis*, No. 1:11-cv-0851, 2012 WL 3600106, at *5 (S.D. Ohio Aug. 21, 2012).

III. ANALYSIS

A. Air Force Review of All Documents

Preliminarily, Lockheed has argued that the disputed documents should be treated as confidential because they were deemed subject to the Protective Order by the United States Air Force or they were being reviewed by the Air Force. Lockheed submitted the disputed documents to the Air Force for review pursuant to paragraph 5 of the Protective Order and to Defense Federal Acquisition Regulations Supplement (“DFARS”) 252.204-7000. Paragraph 5 of the Protective Order gives the Government the right to review documents to be produced by Lockheed and to deem qualifying documents as subject to the Protective Order. (Doc. 145 at PageID 2036.) DFARS 252.204-7000 states as follows:

- (a) The Contractor shall not release to anyone outside the Contractor’s organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless--

(1) The Contracting Officer has given prior written approval;

(2) The information is otherwise in the public domain before the date of release;

* * * *

(b) Requests for approval under paragraph (a)(1) shall identify the specific information to be released, the medium to be used, and the purpose for the release. The Contractor shall submit its request to the Contracting Officer at least 10 business days before the proposed date for release.

(c) The Contractor agrees to include a similar requirement, including this paragraph (c), in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor to the Contracting Officer.

48 C.F.R. § 252.204-7000. The Government has completed its review of the disputed documents.

The Government chose not to intervene in this case, but it has been a limited participant in the proceedings. Prior to the instant matter, the Government had filed at least two Statements of Interest (Docs. 85, 312) in this case. The Government attended the final pretrial conference held on September 4, 2014. The Government now has asserted the interests of the United States regarding the confidentiality of the disputed documents via its Response to the Confidentiality Motions.¹ The Government Response is supported by the Affidavit of Sheila Henderson-Gibbs, a Contract-Negotiator Supervisor at the Air Force Life Cycle Management Center, Wright-Patterson Air Force Base, Ohio for the F-22 program. (Doc. 430-1.)

Henderson-Gibbs has asserted that fifteen documents should be protected under the Arms Export Control Act, 22 U.S.C. § 2778, and 22 C.F.R. § 120.10(a)(1), as “technical data.” (Doc. 430-1 at PageID 36296.) She identified the technical data documents as follows:

¹ In fact, the Supreme Court has recognized that only the Government, and not a private party, can assert a formal claim of privilege against divulging military or national secrets. *U.S. v. Reynolds*, 345 U.S. 1, 7–8 (1953). The claim of privilege must be made by the head of the appropriate department or agency after personal consideration by that officer. *Id.*; *Jabara v. Kelley*, 75 F.R.D. 475, 491 (E.D. Mich. 1977).

- LMC-HOWARD Documents 2 of 3.pdf, file dated 07/23/2014
- LMC-HOWARD-1980357–1980369
- LMC-HOWARD-2047596
- LMC-HOWARD-0809492–0809508
- LMC-HOWARD-0809509–0809524
- LMC-HOWARD-0004582–0004610
- LMC-HOWARD-0004582 (Pages 5 and 16)
- LMC-HOWARD-2372764–855
- LMC-HOWARD-0811241–49
- LMC-HOWARD-1973138–46
- LMC-HOWARD-1973147–55
- LMC-HOWARD-1973156–71
- LMC-HOWARD-1978603–72
- LMC-HOWARD-1983026–67
- LMC-HOWARD-0004582–610

(Id.)

Additionally, Henderson-Gibbs also has asserted that two other documents should be protected as “critical information” as defined by the F-22 Operational Security Plan dated February 4, 2011. (*Id.* at PageID 36297.) She asserted that if such information was revealed to an adversary through its public release it could “prevent or complicate mission accomplishment, reduce mission effectiveness, or cause loss of lives or damage to friendly [U.S., allied, and/or coalition] resources.” (*Id.*) She has identified the critical information documents as follows:

- LMC-HOWARD-1965717

- LMC-HOWARD-1965717-26

(*Id.*)

The Government has not identified where in the record the Court can find the above-cited bates-stamped documents. The documents identified by the Government in its Response cannot be easily correlated with the lists of disputed documents set forth as exhibits to the Confidentiality Motions. For example, the Court could not locate LMC-Howard-004582. Accordingly, the Court orders that the Government file copies of the documents it has identified in its Response no later than September 19, 2014 at 5:00 p.m. so the Court can review the documents before ruling.

B. Additional Objections as to Only Certain Documents

Lockheed raises additional objections as to the public disclosure of other disputed documents.

Lockheed asserts that certain contract documents should be treated as confidential because the Court previously stated in a January 22, 2014 Order (Doc. 356) that contract documents would be subject to the Protective Order. The Court's rationale in the January 22, 2014 Order was that the parties had treated contract documents as subject to the Protective Order during the pendency of the suit. (*Id.* at PageID 29793.) However, that rationale has been undercut since the Court issued the January 22, 2014 Order.

The Court issued the Summary Judgment Order (Doc. 358) under seal on March 24, 2014. In the Summary Judgment Order, the Court quoted from and summarized contract documents. Nonetheless, the parties agreed on or before April 22, 2014 that the Summary Judgment Order could be filed publicly without redactions. Therefore, the parties implicitly have conceded that the contract documents do not need to remain under seal *in toto*.

Additionally, the Government has not requested that the bulk of the contract documents remain subject to the Protective Order. Lockheed's Confidentiality Motions will be denied to the extent that Lockheed seeks to maintain contractual documents under seal solely because they previously were treated as subject to the Protective Order. The EMD Statement of Work, LMC-Howard-2372764-855, will remain subject to the Protective Order for now because it is among the documents identified by the Government. (Doc. 430 at PageID 36293; Doc. 414-3 at PageID 34111-34202.)

Next, Lockheed objects to the disclosure of certain documents addressing interchangeability/replaceability ("I/R") requirements. Lockheed asserts that the documents should remain confidential because non-disclosure is "important from both a proprietary and strategic military standpoint." (Doc. 371 at PageID 29964; Doc. 384 at PageID 31607.) Regarding the former standpoint, this unsupported assertion does not satisfy Lockheed's duty to present specific facts which prove that non-disclosure is necessary to protect Lockheed's financial or competitive interests. Regarding the latter standpoint, the Government is in a better position than Lockheed to assert which documents should remain subject to the Protective Order for "strategic military" reasons. The Court will not maintain the disputed I/R documents as subject to the Protective Order, except that LMC-Howard-0811241-49 will remain under seal for now because it is among the documents identified by the Government. (Doc. 430 at PageID 36293; Doc. 414-3 at PageID 34233-34241.)

Finally, Lockheed objects to the disclosure of certain designs and drawings documents for similar reasons. The Court's analysis is the same. The Court cannot assume, without a showing supported with specific facts, that the disclosure of these designs and drawings

documents poses a substantial financial or competitive risk to Lockheed or a national security risk to the United States.

IV. CONCLUSION

For the foregoing reasons, the Court will **DENY IN PART** Defendant Lockheed Martin's Motions for Order Determining Certain Documents Should Continue to be Treated as Confidential Under the Parties' Agreed Confidentiality and Protective Order (Docs. 371 and 384).

The following documents only shall remain subject to the Protective Order until the Court has a chance to review them:

- LMC-HOWARD Documents 2 of 3.pdf, file dated 07/23/2014
- LMC-HOWARD-1980357–1980369
- LMC-HOWARD-2047596
- LMC-HOWARD-0809492–0809508
- LMC-HOWARD-0809509–0809524
- LMC-HOWARD-0004582–0004610
- LMC-HOWARD-0004582 (Pages 5 and 16)
- LMC-HOWARD-2372764–855
- LMC-HOWARD-0811241–49
- LMC-HOWARD-1973138–46
- LMC-HOWARD-1973147–55
- LMC-HOWARD-1973156–71
- LMC-HOWARD-1978603–72
- LMC-HOWARD-1983026–67

- LMC-HOWARD-0004582-610
- LMC-HOWARD-1965717
- LMC-HOWARD-1965717-26

IT IS SO ORDERED.

S/Susan J. Dlott
Chief Judge Susan J. Dlott
United States District Court