

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA, <i>et al.</i> ,)	
)	
Plaintiffs,)	Civil Action No. 2:07-cv-00461-NBF
)	
v.)	Hon. Nora Barry Fischer
)	
EDUCATION MANAGEMENT LLC, <i>et</i>)	Electronically Filed Document
<i>al.</i> ,)	
)	
Defendants.)	

**REPLY IN SUPPORT OF PROJECT ON PREDATORY STUDENT LENDING’S
MOTION FOR CLARIFICATION OR MODIFICATION OF PROTECTIVE ORDER**

INTRODUCTION

Neither the United States nor Education Management Corporation (“EDMC”) disputes that EDMC’s confidentiality designations must be supported by good cause. Nor is there any dispute that EDMC has not actually made the required good cause showing. Instead, the Government and EDMC argue that it should not have to do so. They are wrong. There is no basis for permitting either the Government or EDMC to avoid its obligations under the law.

ARGUMENT

I. THE PROJECT SHOULD NOT BE FORCED TO WAIT FOR THE FOIA LITIGATION TO CONCLUDE TO BEGIN THE PROCESS OF CHALLENGING THE CONFIDENTIALITY DESIGNATIONS.

EDMC’s argument is primarily logistical. It contends that it produced a lot of documents in discovery and that it should not be required to move for a further protective order over every single document it produced until it knows that the Government intends to disclose them.

1. EDMC is half-right. The Project agrees that there is no reason to require the corporation to guess which documents are responsive to the Project’s FOIA request. EDMC

should not have to move for a protective order covering all of the documents it produced in discovery and marked confidential, just because the Project has requested a small portion of them.¹ But this problem is easily solved. The Government has already responded to the Project's FOIA request, which means it should already have identified which information is responsive to the request and the bases upon which each document is being withheld. *See Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1051 (3d Cir. 1995) (“[W]hen an agency seeks to withhold information, it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.”).² There is, therefore, no reason that the Government cannot inform EDMC now of which documents it has withheld based on the corporation's confidentiality designations.

The Project, therefore, requests that in clarifying or modifying the protective order, this Court order the Government to inform EDMC of what documents are responsive to the Project's FOIA request and marked confidential by the corporation.

2. EDMC is wrong, however, that the Project should have to wait until its FOIA litigation concludes to challenge the Government's reliance on the protective order and EDMC's confidentiality designations. At most, this argument can only apply to information that the Government claims is exempt *and* is designated confidential—it does not apply to any information the Government has withheld *solely* based on the protective order or EDMC's confidentiality designations thereunder. At the very least, the Project should not have to wait to challenge the Government's withholding of *this* information, until it has litigated the

¹ The Project requested only a small percentage of the discovery materials—only 22 of the Government's 165 written discovery requests, as well as the “admissions employee emails” the district court ordered EDMC to prioritize producing. *See* Doc. 459-3; EDMC Br. 4.

² Internal quotation marks and citations omitted throughout.

Government's claim that *other* information the Project seeks is exempt from FOIA. Therefore, the Project requests that, at minimum, the Court clarify: (1) that the Government may not withhold information based on the protective order alone; and (2) that with respect to any information the Government has withheld based solely on EDMC's confidentiality designations, EDMC must move for a further protective order demonstrating good cause within 10 days if it wishes to keep those documents secret.

With respect to information that the Government has withheld because it is both designated confidential and, in the Government's view, subject to a FOIA exemption, the Project recognizes that determining the best method of proceeding is a more difficult question. On the one hand, allowing EDMC to wait to show good cause for its confidentiality designations until the FOIA litigation has concluded will significantly delay the Project's access to information, and therefore the ability of the students it represents to seek debt relief. And, for much of the information, this delay will provide no benefit. While the FOIA exemptions—which cover, essentially, private personal information and confidential business information—almost certainly justify *redacting* some of the information the Project seeks, they almost certainly do not justify withholding the information the Project seeks in its entirety. *See* Doc. 459, at 11-12 (describing the Government's obligation under FOIA to segregate and disclose nonexempt information).

On the other hand, the Project acknowledges EDMC's concern that failing to wait for the FOIA litigation to conclude might cause it to waste effort demonstrating good cause to withhold information that is exempt from FOIA anyway. Of course, the Government could make a similar argument—that EDMC's confidentiality designations should be litigated first to prevent the Government from wasting effort justifying its FOIA exemptions on information that turns out to be designated confidential for good cause.

The Project recognizes that it is difficult to weigh these concerns—the delay imposed on the students seeking loan forgiveness and the possible waste of effort by either the Government or EDMC—without more information about the documents responsive to the Project’s FOIA request. Therefore, with respect to any information that is marked confidential and that the Government contends is exempt from FOIA altogether, the Project withdraws its request that the Court order EDMC to move for a further protective order within 10 days. The Project has now filed a lawsuit challenging the Government’s denial of its FOIA request, and it has sought to have that lawsuit related to this case, so that the adjudication of the Project’s request need not occur piecemeal. *See* Complaint, *Project on Predatory Student Lending of the Legal Servs. Ctr. of Harvard Law School v. U.S. Dep’t of Justice*, No. 2:17-cv-210-NBF (W.D. Pa. Feb. 14, 2017).

To help the parties, the Project, and the Court evaluate the best way to proceed, the Project requests that the Court order the Government to provide further information about the documents being withheld—in particular, how many documents are being withheld because of both a confidentiality designation and one (or more) FOIA exemptions, the approximate number of documents being withheld in each category of FOIA exemption the Government cites, and how many of the documents that are being withheld based on both a FOIA exemption and a confidentiality designation may only be shielded in part by the FOIA exemption. Again, the Government should already have this information.

This information will allow the parties, the Project, and the Court to determine how best to proceed. For example, if there are few documents being withheld on both grounds, any wasted effort caused by challenging the confidentiality designations and the FOIA exemptions at the same time will be minimal. Alternatively, if there are numerous documents in this category, it may make sense to proceed at the same time only with respect to some of them—such as, for

example, documents that the Government claims are exempt because they contain confidential business information and that EDMC claims there is good cause to keep secret for the same reason. Once the Project and EDMC have more information about the documents the Government is withholding, it is possible that the parties and the Project could come to an agreement about how best to proceed. Therefore, the Project requests that this Court order the parties and the Project to submit a joint proposal—or separate proposals, if they cannot agree—within 10 days of receiving information about the documents from the Government.

II. THE GOVERNMENT MAY NOT ESCAPE ITS OBLIGATIONS UNDER FOIA SIMPLY BECAUSE IT BELIEVES THEY ARE UNFAIR.

The Government suggests that the Project should not be permitted to “free-ride” on Government litigation by obtaining through FOIA documents the Government received in discovery. Gov’t Br. 9. This is not an argument that the law does not require EDMC to demonstrate good cause for its confidentiality designations or that it somehow permits the Government to withhold documents based on designations that have never been supported by good cause. It is not even an argument for why the FOIA litigation should precede any adjudication of EDMC’s good cause designations (or vice versa). This is a policy argument that the statute itself should be different. But that argument is for Congress to decide. The Government cannot escape its obligations under FOIA simply because they seem unfair.

Indeed, the Third Circuit has explicitly recognized the tension “between the governmental entity’s interest as a litigant” in agreeing to keep information secret “and its public disclosure obligations” under freedom of information laws. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 791 (3d. Cir. 1994). And in response, the court made clear that this tension is to be resolved, wherever possible, in favor of disclosure. *See id.* The Government’s status as a litigant does *not* somehow alter its obligations under FOIA. *See id.* To the contrary, the Third Circuit

held that there should be a “strong presumption . . . *against*” any protective order that would permit the Government to withhold litigation documents. *Id.* (emphasis added). As the Third Circuit has recognized, “Congress enacted FOIA in 1966 to promote greater public disclosure of documents in the Government’s possession,” and in doing so, “sought to promulgate a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” *E.E.O.C. v. Kronos Inc.*, 694 F.3d 351, 368 (3d Cir. 2012). To the extent the Government disagrees, it must take up its argument with Congress.

The Government puts forth a parade of horrors, ending in an assertion that if this Court requires EDMC to fulfill its obligation to demonstrate good cause for its confidentiality designations in this case, the Government will be less able to deter and remedy fraud in the future. Gov’t Br. 11-12. The Government does not cite a single shred of evidence for this outlandish speculation. And, more importantly, it’s not relevant. This is simply another policy argument that the law is wrong. But the Government cannot avoid its legal obligations simply because it believes they are unwise.

Nor does the Project’s request that EDMC be required to demonstrate good cause to keep secret any documents designated confidential “upset the settled expectations” of the parties. Gov’t Br. 11. FOIA provides for broad disclosure of documents that are in the possession of the Government and that came to be there through the Government’s lawful function—here, the Government’s litigation of a False Claims Act case. *See U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). And the parties clearly contemplated that the documents exchanged in discovery would be subject to FOIA requests—and that EDMC would then be required to demonstrate good cause in support of its confidentiality designations: The parties “heavily litigated” the umbrella protective order, including the specific terms of the provision

regarding FOIA. Gov't Br. 2; EDMC Br. 3-4; *see also* Doc. 251, at 4 (“Plaintiffs argue that [the original FOIA provision’s] approach is appropriate because it enables [EDMC] to make an effort to protect their confidential material, but does not inhibit a third party’s judicially enforceable right [created by FOIA] to access certain information held by the government.” (third brackets in original)). And that order required precisely what the Project requests here—that where a third party submits a FOIA request for documents marked confidential, EDMC must move for a further protective order demonstrating good cause to keep the documents secret. *See* Doc. 257 ¶ 7. The Project’s request cannot possibly upset the parties’ “settled expectations.” The Project is attempting to follow the process the parties themselves designed.

As the Third Circuit has recognized, “[n]either the interests of parties in settling cases, nor the interests of the federal courts in cleaning their dockets, can be said to outweigh the important values manifested by freedom of information laws.” *Pansy*, 23 F.3d at 792. Granting the Project’s motion is essential to vindicating these values in this case.

CONCLUSION

For the reasons stated above, the Project respectfully requests that this Court: (1) clarify that the Government may not rely on the umbrella protective order, in and of itself, to withhold information; (2) require the Government to, within 10 days, inform EDMC of any documents that are responsive to the Project’s request that EDMC marked confidential; (3) require the Government to, within 10 days, inform this Court, the parties, and the Project of how many documents are being withheld because of both a confidentiality designation and one (or more) FOIA exemptions, the approximate number of documents being withheld in each category of FOIA exemption the Government cites, and how many of the documents that are being withheld based on both a FOIA exemption and a confidentiality designation may only be shielded in part

by the FOIA exemption; (4) for any information that the Government does not contend is exempt from FOIA but is marked confidential, require EDMC to move for a further protective order within 10 days of the Government identifying the information, if it wishes to continue to keep that information confidential; and (5) require the parties and the Project to submit a proposal, within 10 days of the Government submitting information about the number of documents it has withheld and on what basis, for how to proceed with respect to the documents that are both marked confidential and that the Government asserts are exempt from FOIA.

Respectfully submitted,

PROJECT ON PREDATORY STUDENT
LENDING

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2017, I electronically filed the foregoing Reply in Support of Project on Predatory Student Lending's Motion for Clarification or Modification of Protective Order using the CM/ECF system, which will send notification of such to all counsel of record.

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