

Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552



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IN RE BANK OF AMERICA CORP.))
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2019-MISC-Bank of America Corp.-0001))
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**SUPPLEMENTAL DECISION AND ORDER ON BANK OF AMERICA CORP.'S
REQUEST FOR CONFIDENTIAL TREATMENT OF PETITION TO SET ASIDE OR
MODIFY CIVIL INVESTIGATIVE DEMAND**

Bank of America Corp. (BAC or Bank) has submitted a request that the Bureau keep confidential a petition that it filed on March 28, 2019 seeking to set aside or modify a civil investigative demand (CID). I grant that request in part and deny it in part, as explained further below.

FACTUAL BACKGROUND

Bank of America Corp. (BAC or Bank) filed a petition (Petition) with the Bureau seeking to set aside or, in the alternative, modify a civil investigative demand (CID) on March 28, 2019. BAC also requested confidential treatment of the Petition. I denied the Petition by order dated July 19, 2019, but deferred deciding the request for confidential treatment to give BAC an opportunity to submit additional information to support that request. In particular, in its request for confidential treatment, BAC had argued that certain information in the Petition should be kept confidential consistent with Exemption 4 of the Freedom of Information Act, which exempts from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential,” 5 U.S.C. § 552(b)(4). After BAC had submitted its Petition and request for confidentiality, the Supreme Court issued a decision that clarified the standard for determining what information may be withheld under Exemption 4, *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019). Because the Supreme Court had not yet announced that decision at the time BAC filed its confidentiality request, I gave BAC an opportunity to make an additional submission to establish that information that it seeks to keep confidential meets the standard that the Supreme Court articulated. BAC filed a supplemental submission in support of its request for confidential treatment (Supplemental Submission) on August 2, 2019.

LEGAL DETERMINATION

BAC requests that its Petition be kept confidential in its entirety or, in the alternative, that certain portions be redacted. I grant that request in part and deny it in part.

I. Legal Standard for Requests for Confidential Treatment of a CID Petition

The Bureau's regulations governing investigations provide that CID petitions and the Bureau's orders in response to those petitions are "part of the public records of the Bureau unless the Bureau determines otherwise for good cause shown." 12 C.F.R. § 1080.6(g). This standard mirrors that of the Federal Trade Commission. *See* 16 C.F.R. § 4.9(c)(1); *see also* FTC, Disclosure of Investigations, 42 Fed. Reg. 64135, 64135 (Dec. 22, 1977) (explaining, with respect to the FTC's similar CID petition process, that "the administrative interpretations of [the Commission's] laws and rules embodied in the motions and the applications, and the Commission's response thereto should be disclosed"). It is also consistent with the "general policy favoring disclosure of administrative agency proceedings." *FCC v. Schreiber*, 381 U.S. 279, 293 (1965) (affirming agency authority to promulgate a rule generally requiring public disclosure of investigative information). As the Bureau has explained, a petitioner bears the burden of demonstrating good cause that a petition should not be made public. *See In re Firstsource Advantage, LLC*, 2017-MISC-Firstsource Advantage, LLC-0001 (July 23, 2018), at 6-7¹; *In re Great Plains Lending, LLC*, 2012-MISC-Great Plains Lending-001 (Sept. 12, 2013), at 2²; *cf. also Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 40 n.4 (D.D.C. 1997) ("In 'reverse-FOIA' cases, the party seeking to prevent a disclosure the government itself is otherwise willing to make assumes that burden."). A petitioner must make the required showing of good cause "no later than the time the petition is filed." 12 C.F.R. § 1080.6(g).

In evaluating whether a petitioner has shown "good cause" under 12 C.F.R. § 1080.6(g) to warrant withholding a petition and responsive order (or portions thereof) from the public record, the Bureau generally looks to the standards for withholding material from public disclosure established by the Freedom of Information Act (FOIA). *See In re Heartland Campus Sols., ECSI*, 2017-MISC-Heartland Campus Solutions, ESCI-001 (Sept. 8, 2017), at 9.³ Accordingly, the Bureau will publicly disclose a petition to modify or set aside a CID unless either (i) the petitioner has made a factual showing that the information in the petition falls within one of the FOIA exemptions or (ii) the Bureau determines that other good cause exists to withhold all or a portion of the petition from public disclosure and the withheld information is not otherwise required by law to be made public.

II. Analysis

BAC offers four reasons why the Petition, or portions of it, should be kept confidential. I address each in turn.

¹ https://www.consumerfinance.gov/documents/6675/bcfp_firstsource-advantage-llc_decision-order-on-petition_2018-07.pdf.

² http://files.consumerfinance.gov/f/201309_cfpb_decision-on-confidentiality-greatplainslending-0001.pdf.

³ https://www.consumerfinance.gov/documents/5566/201709_cfpb_heartland-campus-solutions_decision-and-order-on-petition.pdf.

A. Exemption 4

BAC first contends that portions of its Petition should be kept confidential consistent with Exemption 4 of FOIA, which exempts from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential,” 5 U.S.C. § 552(b)(4). In particular, BAC identifies five categories of information in its Petition that it claims should be kept confidential under Exemption 4: (1) information about its internal controls, (2) information about its customer complaint process, (3) proprietary business information developed in the course of responding to regulatory inquiries, (4) information about what resources it allocates to regulatory inquiries, and (5) information about its incentive compensation plans.

BAC does not contend that any information in its Petition is a trade secret, so it can establish that Exemption 4 applies only if it can show that information is “(1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential.” *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Information qualifies as “commercial” under the first prong of this Exemption so long as “the provider of the information has a commercial interest” in it. *Baker & Hostetler LLP v. U.S. Dep’t of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006). And the “obtained from a person” prong is satisfied where the information was supplied by an outside party rather than having “been generated within the Government.” *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 148 (2d Cir. 2010). As for the third prong, the Supreme Court recently clarified that information is “confidential” for purposes of this Exemption only if, at a minimum, “it is customarily kept private, or at least closely held, by the person imparting it.” *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019). In addition, under 2016 amendments to FOIA, there is now an additional requirement before information can be withheld: An agency can withhold information under any FOIA exemption “only if ... the agency reasonably foresees that disclosure would harm an interest protected by” the exemption or “disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A)(i). Finally, where some information falls within an exemption, FOIA obligates an agency to “take reasonable steps necessary to segregate and release nonexempt information.” *Id.* § 552(a)(8)(A)(ii)(II).

Commercial or financial. Four of the five categories of information that BAC identifies as protected by Exemption 4 straightforwardly satisfy the requirement that information be “commercial.” BAC clearly has a commercial interest in the information about its internal controls, customer complaint process, resource allocation, and incentive compensation plans. It is less clear whether business information developed in the course of responding to regulatory inquiries would qualify as “commercial” information. But, as explained further below, that information is protected by Exemption 7, so I need not determine whether it would also be exempt from disclosure under Exemption 4.

Obtained from a person. Each of the categories of information that BAC identifies as protected by Exemption 4 satisfies the “obtained from a person” requirement. BAC submitted all of the information it identifies; none was generated within the government.

Confidential. As explained above, information is “confidential” for purposes of Exemption 4 only if, at a minimum, “it is customarily kept private, or at least closely held, by the person imparting it.” *Food Mktg. Inst.*, 139 S. Ct. at 2363. BAC has adequately established that each category of information that it identifies as protected by Exemption 4 meets this minimum requirement: The Bank has submitted a sworn declaration establishing that this information is customarily kept private, or at least closely held by, the Bank. I note, however, that the Supreme Court in *Food Marketing Institute* raised the possibility that information could be considered “confidential” for purposes of Exemption 4 only if a second requirement was met—namely, that the government have provided the submitter “some assurance that [the information] will remain secret.” 139 S. Ct. at 2363. The Court, however, declined to resolve whether such an additional requirement exists. *Id.* I need not resolve that here either, because I conclude that, in the circumstances here, there is “good cause” within the meaning of the Bureau’s regulations to keep confidential the information that BAC customarily keeps private, regardless of whether any “assurances” of confidentiality were made.

Reasonably foreseeable harm or disclosure prohibited by law. Under 2016 amendments to FOIA, an agency can withhold information under any FOIA exemption “only if ... the agency reasonably foresees that disclosure would harm an interest protected by” the exemption or “disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A)(i). Under D.C. Circuit precedent, the Trade Secrets Act prohibits disclosure of information protected by Exemption 4. *See Canadian Commercial Corp. v. Dep’t of Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008) (“[U]nless another statute or a regulation authorizes disclosure of the information, the Trade Secrets Act requires each agency to withhold any information it may withhold under Exemption 4 of the FOIA.”). Disclosure of BAC’s confidential commercial information is therefore “prohibited by law,” and can be withheld without establishing foreseeable harm. *Accord Rosenberg v. U.S. Dep’t of Defense*, 342 F. Supp. 3d 62, 73 n.1 (D.D.C. 2018) (explaining that “[i]nformation that is prohibited from disclosure,” including information whose disclosure is prohibited by the Trade Secrets Act, is “not subject to the foreseeable harm standard”).

Segregation of nonexempt information. Although the five categories of information that BAC identified can properly be withheld, the redactions that BAC has proposed are overbroad. Under FOIA, an agency must “take reasonable steps necessary to segregate and release nonexempt information.” *Id.* § 552(a)(8)(A)(ii)(II). Taking such steps is warranted in the context of keeping confidential a petition to set aside a CID as well. Petitions are presumptively “part of the public record,” 12 C.F.R. § 1080.6(g), and making petitions public helps the public better understand the agency’s activities and decisionmaking. I accordingly decline BAC’s suggestion to redact large blocks of text that contain the protected information. Instead, narrower redactions will be applied to protect only the limited information that actually reveals BAC’s confidential information. The narrower redactions will enable the public to understand the essence of the arguments without disclosing BAC’s private commercial information.

B. Exemption 7

Next, BAC argues that the Petition falls under FOIA Exemption 7(A), which exempts from disclosure “records or information compiled for law enforcement purposes” to the extent that producing those records “could reasonably be expected to interfere with enforcement

proceedings.” 5 U.S.C. § 552(b)(7)(A). At the outset, I note that BAC does not have standing to seek confidentiality on the basis of Exemption 7, as that is a discretionary privilege that belongs to the Bureau, not to any regulated entity or outside party. In particular, Exemption 7 protects the “legitimate needs” of “law enforcement agencies” like the Bureau “to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their case.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). Thus, Exemption 7 is not designed to protect the interests of regulated entities, so BAC cannot claim it is entitled to keep certain information confidential on the basis of Exemption 7.

Nonetheless, I have determined that certain information in the Petition is protected under Exemption 7(A) as well as Exemption 7(E), and I accordingly order that certain portions of the Petition, as well as the July 19 Decision and Order and BAC’s Supplemental Submission, be redacted under these exemptions.

Exemption 7(A) protects from disclosure “records or information compiled for law enforcement purposes” where disclosure “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A). Disclosing certain information in the Petition could interfere with other ongoing investigations and law enforcement proceedings by revealing to other entities the focus and scope of the Bureau’s law enforcement efforts relating to particular practices. *See, e.g., Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996) (“The records could reveal much about the focus and scope of the Commission’s investigation, and are thus precisely the sort of information exemption 7(A) allows an agency to keep secret.”); *Suzhou Yuanda Enter., Co. v. U.S. Customs & Border Protection*, 404 F. Supp. 2d 9, 14 (D.D.C. 2005) (approving withholding under Exemption 7(A) where disclosure “could inform the public of the evidence sought and scrutinized in this type of investigation”). In addition, disclosing certain information in the Petition could give other people and entities—including subjects of other actual or potential investigations—notice of what kinds of materials the Bureau might request from them, which would enable them to suppress or fabricate evidence. Such risks justify withholding documents under Exemption 7(A). *See, e.g., Juarez v. Dep’t of Justice*, 518 F.3d 54, 58 (D.C. Cir. 2008) (authorizing withholding documents where disclosure “could lead to destruction of evidence”).

Exemption 7(E) protects from disclosure “techniques and procedures for law enforcement investigations.” 5 U.S.C. § 552(b)(7)(E). Keeping “confidential the procedures by which the agency conducted its investigation and by which it has obtained information” is “necessary for effective law enforcement.” *Frankel v. SEC*, 460 F.2d 813, 817 (2d Cir. 1972). I will therefore keep confidential portions of the Petition and this Decision and Order that would reveal the Bureau’s law enforcement techniques or procedures. Revealing those techniques or procedures could enable other entities to obscure unlawful conduct from the Bureau or otherwise to circumvent the law.

C. Exemption 8

BAC next argues that the Petition includes materials protected by FOIA Exemption 8, which exempts from disclosure matters that are “contained in or related to examination,

operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.” 5 U.S.C. § 552(b)(8). One purpose of this exemption is “to safeguard the relationship between the banks and their supervising agencies.” *Consumers Union of U.S., Inc. v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978). Congress adopted this exemption out of “concern that banks would cooperate less than fully with federal authorities” if “details of the bank examinations were made freely available to the public and to banking competitors.” *Id.* The Petition, as well as the July 19 Order and BAC’s original confidentiality request, contains some information “related to examination ... reports” prepared by the Bureau or other regulators “responsible for the ... supervision of financial institutions.” This information obtained in the supervisory context is exempt from disclosure under Exemption 8 and will be redacted.

D. Prejudice to the Bank

Finally, BAC argues that the Petition should be kept confidential because there is a “significant risk that the Bank could be prejudiced by public disclosure of the petition.” Req. for Confidential Treatment at 2. In particular, BAC expresses concern that the Petition reveals that the Bureau is investigating possible improper sales practices and therefore could cause the Bank reputational harm by erroneously suggesting that the Bank had systemic issues with sales misconduct. BAC does not, and could not, suggest that this is a basis for withholding information under the standards established by FOIA. Further, I do not find that any potential prejudice to the Bank otherwise constitutes “good cause” to keep the Petition confidential, particularly given the public’s interest in accessing and understanding the Bureau’s orders on petitions to modify or set aside CIDs. I emphasize, however, that the issuance of a CID or the existence of an investigation is not a finding that a company has actually violated the law.

CONCLUSION

For the foregoing reasons, BAC’s request for confidential treatment of its petition to modify or set aside the CID is granted in part and denied in part. The Petition and the July 19 Order, as well as BAC’s original request for confidentiality and its supplemental submission in support of its request for confidential treatment, will be redacted to prevent disclosure of information I have determined should be kept confidential.

This Supplemental Decision and Order, as well as the July 19 Decision and Order, the Petition, BAC’s original request for confidential treatment, and BAC’s supplemental submission in support of that request, will be published on the Bureau’s website no fewer than five business days after service of this Supplemental Decision and Order on BAC.

September 4, 2019


Kathleen L. Kraninger, Director