

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS
Houston Division

HOUSTON INDUSTRIES INCORPORATED,
Plaintiff—Cross—Respondent,

vs.

DANIEL C. KAUFMAN, *et al.*,
Defendants—Cross—Petitioner.

Civil Action No. H-95-5237

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
THE GOVERNMENT'S MOTION FOR RECONSIDERATION OF
MAGISTRATE JUDGE CRONE'S APRIL 25, 1996, PROTECTIVE
ORDER**

The instant proceeding arises out of an investigative subpoena, Civil Investigative Demand No. 13591 (the "CID"), which was served on Houston Industries Incorporated ("HII") on October 25, 1995. After denying HII's Petition to Set Aside the CID on March 6, 1996, the Court referred HII's Petition to Modify the CID and Request for Protective Order to Magistrate Judge Crone. Although the parties were able to resolve HII's objections to the CID, HII refused the government's offer to provide a confidentiality letter to address its concerns about confidential/trade secret documents. After hearing arguments on HII's Request for Protective Order on April 16, 1996, Magistrate Judge Crone granted HII's Request for Protective Order and adopted the protective order proposed by HII. The government respectfully objects both to the granting of said Protective Order and to certain terms contained in it.

**Requiring the Government to Identify with
Specificity the Third Party to Whom it Intends to
Disclose Protected Materials Constitutes Clear
Error**

Although it is the government's position that HII is not entitled to any protective order due to its failure to meet its burden of proof, the government recognizes HII's interest in maintaining

the confidentiality of its sensitive business information. The government is entrusted by the Antitrust Civil Process Act (“ACPA”), *primarily codified at* 15 U.S.C. §§1311 *et seq.* (1994), with respecting the confidentiality concerns of all CID recipients, which includes both those from whom documents are sought and those from whom testimony is demanded. Therefore, the government primarily objects to the Protective Order because it seeks to protect HII’s confidential documents at the expense of the confidentiality of potential CID deponents. Requiring the government to notify HII of a CID deponent’s identity during an on-going investigation contravenes the policy underlying both the informer’s privilege and the investigatory files privilege. Such a requirement also undermines the clear statutory intent of the ACPA.

When Congress amended the ACPA in 1976, it recognized that “the inflexible application of post-complaint, civil discovery standards to pre-complaint investigations might be inappropriate in certain instances.” H.R. Rep. No. 94-1343, 94th Cong., 2d Sess. 11 (1976). Therefore the ACPA does not require the government to provide prior notice of a witness’ oral examination to anyone except the witness himself. *Id.* at 12. The only persons allowed to be present during a CID oral examination are the antitrust examiner, the court reporter, the witness and the witness’ counsel. 15 U.S.C. §1312(i)(2) (1994). Congress recognized that giving non-witnesses the right to prior notification and attendance at the deposition would compromise the confidentiality of the investigation and expose the witness to “economic retaliation from the targets of the investigation.” H.R. Rep. No. 94-1343 at 13.

The informer’s privilege, which is applicable in civil as well as criminal cases, *Hodgson v. Charles Martin Inspectors of Petroleum*, 459 F.2d 303, 305 (5th Cir. 1972), protects the “public interest in effective law enforcement.” *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The privilege encourages citizens to communicate their knowledge of statutory violations to law enforcement personnel by preserving their anonymity, *id.*, and thereby protecting them from economic and social, as well as physical retaliation. *Hodgson*, 459 F.2d at 306.

Among the persons most likely to have information concerning the government's investigation are employees of HII's competitors and customers. These are also parties that may wish to prevent the government from disclosing their identity to HII. The Protective Order effectively prevents the government from designating any CID deponent as a confidential informer should the government decide that disclosure of HII designated "Protected Materials" would aid its investigation. This is especially burdensome in light of the Protective Order's failure to limit HII's ability to designate "Protected Materials."

The investigatory files privilege extends beyond the informer's privilege, and prevents disclosure of law enforcement techniques and procedures and other interference with ongoing investigations. *In re Dep't of Investigation of New York*, 856 F.2d 481, 483 (2d Cir. 1988). "Government documents are the outstanding example of matter which is privileged and which is not subject to disclosure." *Brown v. Thompson*, 430 F.2d 1214, 1215 (5th Cir. 1970). Congress recognized the importance of this privilege by incorporating a similar provision as Exemption 7 to the Freedom of Information Act ("FOIA"). 5 U.S.C. §552(b)(7) (1994).

Because CIDs are part of the government's investigatory files, the government relies on Exemption 7 to deny FOIA requests for CIDs during on-going investigations. The government's decisions as to who to depose and when to do so are central to its investigative process. Providing the notice required by the Protective Order will provide HII with detailed information about where the government's investigation is headed.

As the government suggested to HII, these problems would be somewhat alleviated by requiring the government to indicate the classification (*e.g.* competitor or customer) of the deponent, rather than requiring the government to reveal the actual identity of the deponent. This method was used by the United States District Court for the District of Columbia in *Aluminum Co. of America v. United States*, 444 F. Supp. 1342, 1347 (D.D.C. 1978). The *Alcoa* protective order was itself overly broad in this respect, and the Court's order should not go beyond *Alcoa*.

**Magistrate Judge Crone's Failure to Limit HII's
Discretion to Designate Materials for Protection
to Documents which HII Determines in Good
Faith to be Sensitive, Commercial, and
Proprietary Constitutes Clear Error**

During the April 16th hearing, Magistrate Judge Crone found that some documents produced in response to the CID were likely to warrant protection as trade secret or confidential commercial information pursuant to Federal Rule of Civil Procedure 26(c)(7), and that HII is in the best position to determine what documents are sensitive and require protection. Unfortunately, the Protective Order proposed by HII and adopted by Magistrate Judge Crone does not limit HII's discretion to designate materials to documents which it determines in good faith to be trade secret or confidential commercial information. Paragraph 1(a) of the proposed order states that HII's discretion to designate materials for protection shall "include but not be limited to (a) documents or data which HII determines in good faith to be sensitive, commercial and proprietary."

HII responded to the government's concern about HII's ability to designate documents not covered by FED. R. CIV. P. 26(c)(7) by claiming that the Protective Order provides adequate means for the government to challenge any designation it feels is overreaching. Although Paragraph 8 of the Protective Order provides a procedure by which the government may challenge HII's designation of materials, use of that procedure will force the government to put HII on notice of documents in which it is particularly interested and thus potentially impede the government's investigative process. Moreover, this provision allows HII to avoid its burden of selectively designating documents and showing good cause for each such designation and imposes a burden on the government to challenge improperly designated documents.

Should this Court determine that a Protective Order is warranted in this matter, the scope of that order should be limited to materials protectible under FED. R. CIV. P. 26(c)(7).

**Magistrate Judge Crone's Failure to Require HII
to Show Good Cause for its Request for
Protective Order Constitutes Clear Error**

The government does not dispute this Court's authority to enter an order restricting disclosure to third parties of documents produced in response to a CID. The ACPA incorporates "the standards applicable to discovery requests under the Federal Rules of Civil Procedure," so long as the application of such standards "is appropriate and consistent with the provisions and purposes" of the ACPA. 15 U.S.C. § 1312(c)(2)(B)(1994). In determining the necessity of an order protecting the confidentiality of documentary material and interrogatory answers produced under compulsion of a CID, the Court should consider the protection from public disclosure provided within the ACPA. The ACPA generally prohibits the "examination, without the consent of the person who produced [such documents and interrogatory answers] by any individual other than a duly authorized official or employee of the Department of Justice" and exempts them from disclosure under the Freedom of Information Act. 15 U.S.C. §§1313(c)(3) & 1314(g) (1994). The ACPA specifically provides that the government may use documents produced in response to a CID in depositions taken pursuant to a CID, 15 U.S.C. §1313(c)(2) (1994); it limits the disclosure in such a deposition to the antitrust investigators conducting the deposition, the court reporter, the witness, and the witness' counsel. 15 U.S.C. §1312(i)(2) (1994). The ACPA also prohibits the deponent from retaining a copy of any document used during the deposition which was not produced by the deponent himself. 15 U.S.C. §1313(C)(3) (1994).

Protective orders going beyond ACPA's restrictions are not to be entered as a matter of course, but only upon "a demonstration that extraordinary protection should be afforded to designated materials because of their special confidential nature or in other interests of justice." *United States v. GAF Corp.*, 596 F.2d 10, 16 n. 10 (2d Cir. 1979). The party seeking additional protection for documents produced in response to a CID must designate with particularity the

specific categories of documents for which extraordinary protection is sought and demonstrate “the confidential nature of the documents and the irreparable competitive injury that would arise as a result” of using them in taking depositions. *Aluminum Co. of America v. United States*, 444 F. Supp. at 1347-48.

Federal Rule of Civil Procedure 26(c), which provides for various kinds of protective orders, also requires the party seeking a protective order to “show some plainly adequate reason” for the protection it seeks. *In re Equal Employment Opportunity Commission*, 709 F.2d 392, 402 n. 7 (5th Cir. 1983) quoting 8 C. Wright & A. Miller, *Federal Practice and Procedure* §2035, at 264-65 (1970). The moving party has the burden of identifying the particular documents whose confidential or trade secret status justifies the additional protection of a court order. See *Proctor & Gamble v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996).

While trade secret and other confidential business information is afforded special protection under FED. R. CIV. P. 26(c)(7), such information is not entitled to an absolute privilege. 8 C. Wright & A. Miller, *Federal Practice and Procedure* §2043, at 554 (1994). The rule was intended to reflect existing case law, which recognizes courts should take special care to control discovery of such information when the litigation at issue is between competitors. *United States v. United Fruit Co.*, 410 F.2d 553, 556 (5th Cir. 1969). The government’s interest in this material is clearly different from the interests of HII’s competitors. Moreover, the government’s mission and its prime interest in this and any antitrust investigation is to protect competition. The antitrust investigators entrusted with custody of HII’s documents will carefully consider the nature of a document and the possible effect on HII and on competition before deciding that revealing it to a third party is necessary to the investigation.

HII’s only attempt to show “good cause” for a protective order can be found in its Memorandum in Support of Petition to Set Aside or Modify Civil Investigative Demand No. 13591, filed on November 14, 1995. (HII Memorandum). In that memorandum, HII claimed that

it was “difficult to assess at this point exactly how much confidential information or the types of confidential information that may be contained in the requested documents -- but unquestionably a large amount of confidential information has been requested.” HII Memorandum at p. 39. The government recently learned that HII had gathered approximately 400 boxes of responsive documents at the time it filed its Petition. Almost five months passed between the filing of HII’s Request for Protective Order and the April 16, 1996, hearing on its Request, during which time HII could have reviewed those documents, designated the documents it believes qualify for protection under Rule 26(c), and prepared affidavits explaining the need for such protection. As of the April 16th hearing, HII had failed to identify with any specificity the documents requiring the additional protection of a court order.

Instead HII proposed a protective order, adopted by Magistrate Judge Crone, which allows HII to designate any documents it chooses as Protected Material and requires the government to request a change in designation. In effect, this Order removes the burden to show “good cause” from HII, “the moving party,” and requires the government to demonstrate HII’s lack of “good cause.”

Conclusion

For the forgoing reasons, the Court should set aside Magistrate Judge Crone's Protective Order. To this end, the government has supplied a proposed order vacating said Protective Order. In the alternative, the Court should modify Magistrate Judge Crone's Protective Order as set forth in the government's second proposed order.

Respectfully submitted,



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Certificate of Service

The undersigned hereby certifies that true and correct copies of the foregoing document were, on this 8th day of May, 1996, served by overnight courier for next business day delivery to the counsel of record listed below.

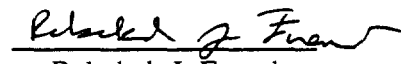
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Rebekah J. French

Certificate of Negotiation

After good faith negotiations, the parties have been unable to reach agreement on the issues set forth herein.


Rebekah J. French

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ORDER

The United States of America has moved the Court for reconsideration of Magistrate Judge Crone's April 25, 1996, Protective Order. Having considered the memoranda filed by the parties,

It is HEREBY ORDERED that:

The Government's Motion for Reconsideration is GRANTED, and the April 25, 1996, Protective Order is SET ASIDE.

SIGNED at Houston, Texas, on this the ____ day of _____, 199__.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE