

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

EQUAL EMPLOYMENT )  
OPPORTUNITIES COMMISSION, )

Plaintiff, )

v. )

FISERV, INC. and FISERV )  
SOLUTIONS, INC., )

Defendants. )

CAUSE NO. 3:05-CV-469 AS

**ORDER**

On April 28, 2006, Defendants filed a motion for a protective order. In their motion, Defendants request a protective order in order to protect confidential employee records that contain social security numbers, home addresses, and work related evaluations. Defendants do not request that this protective order be entered to prevent disclosure of this information to Plaintiff, but rather that the confidential information only be used for litigation purposes and filed under seal when submitted to this Court.

Plaintiff objects to Defendants' motion asserting that Defendants have not complied with the local rules regarding discovery disputes, that any objections have already been waived, and that Defendants have not articulated good cause. Plaintiff is correct in asserting that Defendants have not met the meet and confer obligation of N.D. L.R. 37.1. Such a failure would typically result in a denial of Defendants' motion. However, in order to avoid further delay, Plaintiff states in its response that it does not object to this Court addressing the merits of Defendants' motion. Therefore, because this case is quickly developing a rather detailed history of discovery

disputes, this Court will address the merits of the motion so that discovery in this case may proceed.

Plaintiff's second objection is that this Court has already determined that Defendants waived their objections when they failed to timely provide answers to the discovery requests. In its April 18, 2006 order granting Plaintiff's motion to compel, this Court did state that "because Fiserv failed to timely respond to the discovery requests, any objections are now waived." However, there is a significant problem with using this Court's language from its April 18, 2006 order to object to Defendants' current motion for a protective order.

There are two types of protective orders. The first type of protective order does not prevent the disclosure of relevant information to the opposing party, but rather limits who can see the documents once produced and the method by which they are filed with the court. This type of protective order is routinely entered to protect proprietary business information, as well as personal and confidential information. When a party applies for this type of protective order, this Court must examine the protective order in light of the standard set forth in Citizens First National Bank of Princeton v. Cincinnati Insurance Co., 178 F.3d 943, 944 (7th Cir.1999) and Pierson v. Indianapolis Power & Light Co., 205 F.R.D. 646, 647 (S.D. Ind. 2002).

The second type of protective order completely prevents disclosure to the opposing party. Typically, these protective orders are issued when the moving party has established a privilege such as attorney-client privilege or work product doctrine. In objecting to Plaintiff's discovery requests, it appeared from the motion to compel filings and the hearing that Defendants were attempting to assert a privilege. If successful, Defendants would have been allowed to completely withhold the information that the Plaintiff was seeking in its discovery requests. In

its April 18, 2006 order, this Court found that Defendants had withdrawn their attorney-client privilege and work product objections and had waived any other objections to Plaintiff's discovery requests because they had failed to timely raise those objections. Thus, this Court ordered Defendants to provide Plaintiff with the responsive information.

Defendants' current motion, however, is entirely different. Defendants, having read this Court's April 18, 2006 order granting the motion to compel, acknowledge that they must produce the requested information to Plaintiff. However, Defendants wish to protect confidential personal identifying factors such as social security numbers, home addresses, and personnel file work evaluations from public disclosure. Defendants are willing to produce these documents to Plaintiff as long as access to the documents is restricted to Plaintiff, Plaintiff's counsel, and those individuals engaged by Plaintiff's counsel. In addition, Defendants request that the information be used solely for the purpose of this litigation. Consequently, Plaintiff's second objection is not relevant to Defendants' current motion because Defendants do not wish to completely prevent the disclosure of the discovery information.

Plaintiff's last argument is that the Defendants have not established good cause for the entry of a protective order. This Court does not agree. It is important that the personal identifying factors contained in the personnel files do not fall into the wrong hands. Employers routinely seek to protect their employees' or former employees' personnel files which contain social security numbers, home addresses, and other personal identifying features. As a result, Defendants have established good cause for seeking the protective order.

Merely establishing good cause for a protective order is not sufficient. This Court must independently examine Defendants' proposed protective order to ensure that it complies with the

requirements found in Citizens First National Bank of Princeton v. Cincinnati Insurance Co., 178 F.3d 943, 944 (7th Cir.1999). This Court must not grant parties *carte blanche* to seal or protect whatever they desire. Id. at 944.

When reviewing an agreed protective order seeking to seal documents produced in discovery, this Court must ensure that “(1) the information sought to be protected falls within a legitimate category of confidential information, (2) the information or category sought to be protected is properly described or demarcated, (3) the parties know the defining elements of the applicable category of confidentiality and will act in good faith in deciding which information qualifies thereunder, and (4) the protective order explicitly allows any party and any interested member of the public to challenge the sealing of particular documents.” Pierson, 205 F.R.D. at 647 (citing Citizens, 178 F.3d at 946).

Defendants’ proposed protective order fails two prongs of the above test. First, while Defendants have articulated that the information sought to be protected falls within a legitimate category of confidential information, i.e. personal identifying factors, Defendants then state that “the Defendants anticipate that future discovery in this action may lead to requests for, and production of, other documents containing Confidential Materials.” (Def. Motion pg. 2). The additional language makes the protective order overly broad. Although the personnel files may be properly protected, allowing the Defendants to classify any future materials they deem confidential without specifying what those documents are or what type of information they contain runs afoul of Citizens.

In addition, Defendants’ proposed protective order does not satisfy the fourth prong. “The right to intervene to challenge a closure order is rooted in the public's well-established right

of access to public proceedings.” Jessup v. Luther, 227 F.3d 993, 997 (7th Cir. 2000). In granting protective orders, judges are thus “the primary representative[s] of the public interest in the judicial process” and must require that a “protective order explicitly allows any party and any interested member of the public to challenge the sealing of particular documents.” Pierson, 205 F.R.D. at 647 (citing Citizens, 178 F.3d at 945-46). In paragraph nine, Defendants outline the process for filing sealed documents with the court. However, Defendants have failed to include in this paragraph any provision which would explicitly allow any party and any interested member of the public to challenge the sealing of particular documents. As a result, Defendants’ proposed protective order does not comply with the requirements set forth in Citizens.

This Court is not opposed to granting Defendants’ motion for a protective order in order to protect the personal identifying factors if the proposed protective order is narrowly drawn and complies with Seventh Circuit authority. However, Defendants’ current protective order does not meet that standard. Therefore, Defendants’ motion for a protective order [Doc. No. 34] is **DENIED WITHOUT PREJUDICE**. Defendants may refile their motion for a protective order in accordance with Seventh Circuit precedent.

**SO ORDERED.**

Dated this 11th Day of May, 2006.

S/Christopher A. Nuechterlein  
Christopher A. Nuechterlein  
United States Magistrate Judge