

**UNITED STATES DISTRICT COURT
District of Maryland**

**William Connelly
United States Magistrate Judge**

**6500 Cherrywood Lane
Greenbelt, Maryland 20770
Office: (301) 344-0627
Fax: (301) 344-8434**

October 19, 2007

Debra M. Lawrence, Esquire
Supervisory Trial Attorney
EEOC
10 South Howard Street, 3rd Floor
Baltimore, Maryland 21201

Allan A. Noble, Esquire
Budow and Noble, P.C.
Suite 500 West, Air Rights Center
7315 Wisconsin Avenue
Bethesda, Maryland 20814

Steven M. Nemeroff, Esquire
Wortman & Nemeroff, P.A.
7700 Old Georgetown Road
Suite 520
Bethesda, Maryland 20814

**Re: *Equal Employment Opportunity Comm'n v. RRR Bowie, LLC*
Civil Action No.: RWT-05-2697**

Dear Counsel:

Pending before the Court and ready for resolution is Defendant's Motion for Protective Order (Document No. 66). Plaintiff filed an Opposition (Document No. 68) and Defendant a Reply (Document No. 70). No hearing is deemed necessary, *see* Local Rule 105.6 (D. Md. 2004); therefore, Defendant's Request for Hearing (Document No. 67) is **DENIED**.

By way of background, in the Order of July 13, 2007 (Document No. 64), the Court granted in part and denied in part Plaintiff's Motion to Compel. The Court ordered Defendant "to produce the 462 F&I Recaps for the two month period of August 1, 2004 through September 30, 2004. Defendant must redact customer privacy information such as names, telephone numbers and social security numbers." Document No. 64, at 7.

On August 9, 2007, Defendant transmitted to Plaintiff the F&I recaps pursuant to the Court's Order. Defendant disclosed that the F&I recaps did not total 462 deals and it was in the process of reconciling the difference. Defendant's counsel, Allan Noble, concluded the letter, stating:

This documentation is confidential. Accordingly, you are not permitted to show, provide, or disclose any of the documents or

confidential information contained therein to anyone outside your office. This includes Mr. Kennedy, Mr. Dyer, or Mr. Schrembs. If you intend to disclose any of this information to anyone outside your office, please advise us so that we may seek a ruling from the Court to determine whether you are authorized to do so. Should you have any questions concerning these matters, please feel free to call me.

Document No. 66, Ex. 1 (Letter from Noble to Lawrence of 8/9/07).

In her August 22, 2007 letter, Ms. Lawrence challenged the assertion that the F&I recaps are confidential.

[W]ithout a showing as to why these redacted F&I recap sheets are confidential, I cannot agree to their confidentiality. Though I have no intention of sharing them with Mr. Dyer, I may need to share them with others who have worked in F&I around the time these documents were generated.

Id., Ex. 2 (Letter from Lawrence to Noble & Nemeroff of 8/22/07, at 3).

In his response Mr. Noble reiterated his contention that the documents produced pursuant to the Court's Order are confidential.

These F&I documents are highly confidential. This confidentiality issue was specifically raised [i] in the discovery responses [ii] at the discovery hearing before Judge Connelly and [iii] in my letter dated August [9], 2007. At each turn, the EEOC was expressly warned against disclosing this confidential financial information to others. It is my recollection that at the discovery hearing, you represented to the Court you would agree to a protective order.

First, neither Mr. Kennedy nor Mr. Dyer is a party to this case and therefore, there is no legitimate basis for providing them with confidential and proprietary financial information belonging to RRR Bowie.

Second, Mr. Schrembs is not a party to this case. The EEOC is not even asserting any claim on behalf of Mr. Schrembs in this case. Therefore, there is clearly no legitimate basis for providing Mr. Schrembs with confidential and proprietary financial information belonging to RRR Bowie. Furthermore, Mr. Schrembs has expressed significant animus and vindictiveness towards RRR Bowie. He has brought claims against them twice in the past and has threatened to assert a third claim against them now. Therefore, providing Mr.

Schrembs with access to RRR Bowie's confidential and proprietary financial information is improper and highly prejudicial.

Third, as the Court correctly observed at the discovery hearing, the EEOC has no expert witness in this case. Neither Mr. Schrembs nor any other witness the EEOC seeks to show them to can offer their opinions or conclusions about these documents or information.

In light of the foregoing, please **do not** disclose this confidential and proprietary financial information belonging to RRR Bowie to anyone until there is a ruling from the Court on this issue. If you want to do so, please let me know in writing today and I will file a Motion for Protective Order with the Court.

Id., Ex. 3 (Letter from Noble to Lawrence of 8/27/07, at 1-2) (footnote omitted).

Ms. Lawrence responded the next day.

I certainly can agree to an arrangement whereby the F&I recap sheets are not publicly filed. They are only of value to me, however, if I can share them with individuals who may have been involved in the transactions reflected thereon. Please be assured that I will not disclose them before you have had the opportunity [to] raise this issue with the Court.

Id., Ex. 4 (Letter from Lawrence to Noble of 8/28/07).

Mr. Noble acknowledged receipt of Ms. Lawrence's letter.

Thank you for your letter of August 28, 2007 concerning the confidentiality of the F&I recap sheets. It is our intention to file a Motion for a Protective Order to prohibit disclosure of these confidential documents to anyone outside of the EEOC office. This prohibition would include, but not be limited to, Charles Dyer, Phillip Kennedy, and/or Jeffrey Schrembs. Based upon your letter of August 28, I understand that you will not disclose this documentation to anyone else other than personnel of the EEOC office until the Court has had an opportunity to rule on this matter. Should you wish to discuss this matter, please call me.

Id., Ex. 5 (Letter from Noble to Lawrence of 9/6/07).

Eleven days later Defendant filed a Motion for Protective Order. In addition to the arguments against disclosure raised in Mr. Noble's letter of August 27, 2007, Defendant asserts a

fourth basis for a protective order.

Fourth, if the EEOC is permitted to disclose this confidential and proprietary financial information to Mr. Schrembs so that he can comment on it and offer his conclusions, it will cause this case to digress into 462 mini-trials of disinformation [of] totally unrelated issues resulting in a 5 month trial. The EEOC has not offered any legitimate or valid reason as to why it needs to disclose this documentation to anyone other than its own personnel.

Def.'s Mem. P.&A. Supp. Mot. Protective Order, at 7.

In its Opposition the EEOC claims,

It is essential that Kennedy, as someone with personal knowledge of the work performed by him and his department, have access to these records. Similarly, the Commission also is entitled to share these records with Jeffrey Schrembs, initially head of the F&I department and then the second-level supervisor of that department. Simply put, for these documents to have any meaning . . . the Commission needs to share them with those who were part of the F&I department at the time they were generated.

Document No. 68, at 2.

In opposing the motion the EEOC argues Defendant has failed to show good cause for a protective order. No specific facts or affidavits have been offered in support of the motion and Defendant instead relies on conclusory assertions of harm. Next, the EEOC contends the F&I recap sheets contain no information which would hinder Defendant's competitive advantage in the industry. Third, the EEOC characterizes as disingenuous Defendant's assertion that Phillip Kennedy is merely a witness to the lawsuit and thus not entitled to review the documents. The EEOC notes it has brought the claims *on behalf of* Phillip Kennedy. Phillip Kennedy, a claimant, is not simply a witness. Finally, the EEOC asserts the documents are useless in a vacuum without the assistance of individuals involved in the transactions.

Just as Defendant has the ability to share the F&I recap sheets with anyone of its choosing, the Commission has the need to share information with its identified claimants. Plaintiff simply seeks an even playing field. Preventing the Commission from sharing such information with its identified classmember will directly hamper the Commission's ability to prosecute this lawsuit, exactly the outcome sought by Defendant.

A similar rationale applies to the Commission's entitlement to share

this information with Kennedy's supervisor at the time, Jeffrey Schrembs, a former high-level manager of Defendant who witnessed and tried, unsuccessfully, to correct Defendant's discriminatory behavior. Defendant's anger at Schrembs for his cooperation with the Commission has resulted in trashing him throughout this case. The Commission's sharing of information with Schrembs, a manager with the potential to authenticate and/or recollect the transactions reflected in the documents, also is essential to the Commission's trial preparation. That Defendant does not like or trust him has no bearing on the Commission's entitlement to share with him this information.

Id. at 5.

In its Reply Defendant notes it raised the issue of confidentiality during the July 6, 2007 motions hearing. The Court understood Defendant's concern. At the hearing the EEOC expressed a willingness to enter into a protective order. However, in its Opposition, the EEOC does not address this matter. Second, Defendant claims Phillip Kennedy lacks personal knowledge of the vast majority of the financial transactions and documents. Of the 462 recap files, Mr. Kennedy was involved in approximately 50 or less than 10%. He thus has or would have potentially personal knowledge about less than 10% of the transactions. Defendant further contends Mr. Kennedy cannot show that a single customer was assigned to him improperly. "Thus, there would be no basis to show him confidential financial data for these 462 customer files when he has no personal knowledge of them. He should not be able to change his sworn testimony and concoct new evidence for trial by using them." Document No. 70, at 4.

Similarly, Defendant asserts Jeffrey Schrembs lacks personal knowledge of the financial transactions and documents.

Jeffrey Schrembs did not have personal knowledge of most of this financial data for these 462 transactions. Mr. Schrembs was not an F & I Manager or F & I Director during most of this time period. In fact, the F&I Statements requested and produced to the EEOC in discovery demonstrate that Jeff Schrembs was the F&I Manager for only 10 of the 462 confidential customer files at issue. He did not receive each of these financial documents in these customer files in the ordinary course of his duties, especially on the approximately 400 customer files he did not personally handle. Like Mr. Kennedy, Mr. Schrembs was not even working at Toyota of Bowie during some of the period of these transactions.

* * *

Second, Jeffrey Schrembs' own sworn deposition testimony undermines the EEOC's entire argument. Mr. Schrembs was not an

F & I Manager or the F & I Director during most of this time period. Ed Trott was. In Jeffrey Schrembs' deposition, he testified that he only looked at the individual customer files and the financial data therein on those rare days when "Ed Trott was not in the dealership." Therefore, it is disingenuous for the EEOC to represent to this Court that Jeffrey Schrembs has personal knowledge of all this confidential financial information and actually looked at all of these documents in the course of his duties. This statement is demonstrably untrue.

Id. at 4, 5. These assertions about the lack of knowledge by Mr. Kennedy and Mr. Schrembs are based on the affidavit of Randy Whalen, the Vice-President of RRR Bowie, LLC t/a Toyota of Bowie. *See* Document No. 70, Ex. 10.

Defendant rejects the EEOC's assertion that Mr. Schrembs can authenticate the financial transactions. Defendant reiterates that Mr. Schrembs lacks personal knowledge of most of these transactions. Furthermore, Defendant contends the EEOC seeks to use Mr. Schrembs to provide expert opinion testimony.

[T]he EEOC wants to improperly use Mr. Schrembs to offer his opinions and conclusions on each of these 462 financial transactions. The EEOC has made it clear that it wants the assistance of Mr. Schrembs to offer his opinions and conclusions about these documents so that they are not "meaningless" to the EEOC. If the EEOC thought it was important to have someone give opinions on this financial information, they were more than able to comply with the Court's Scheduling Order and identify an expert who could do so. They chose not to in this case.

Id. at 6.

Finally, Defendant rejects the EEOC's assertion that Defendant seeks a protective order because Mr. Schrembs was unsuccessful in correcting Defendant's discriminatory behavior. Defendant does acknowledge that a protective order is needed because of Mr. Schrembs' animus or vindictiveness towards Defendant.

Based on the arguments outlined above, the Court must answer two questions before resolving this dispute. The first issue is whether the F&I recap sheets Defendant produced to the EEOC constitute proprietary financial and business data entitled to protection from public disclosures, *i.e.*, other than employees of the EEOC. Federal Rule of Civil Procedure 26 (c) allows such protection for good cause shown.

In his affidavit Randy Whalen describes who has and does not have access to the financial data.

2. The F&I Statements, and all of the back-up customer and financial data which was produced to the EEOC is confidential and proprietary financial and business information belonging to Toyota of Bowie. They are not generally shared with people outside of Toyota of Bowie's business.

3. This confidential and proprietary customer and internal financial information is also not known by all employees within our business. All of this back-up customer and financial data which was produced to the EEOC would not be shared with or known by Mr. Kennedy. Mr. Kennedy was a routine F & I Sales Manager who[se] job duties were limited [to] selling various financing, insurance and other warranty products in connection with the sale of motor vehicles. He did not have personal knowledge of most of these documents or financial transactions. He did not supervise these financial transactions or the data contained in these customer files. Mr. Kennedy was not even working at Toyota of Bowie during the period of most of these transactions.

* * *

5. As the GSM, Jeffrey Schrembs would not receive all of his confidential back-up customer and financial data in the course of his normal duties, especially on customer files and financial transactions he did not personally handle, which comprise at least 400 of the customer files at issue. Jeff Schrembs did not have personal knowledge of most of this financial data for these 462 transactions. Jeff Schrembs was **not** the F & I Manager or F & I Director during most of the time period of these 462 customer transactions. Like Mr. Kennedy, Jeff Schrembs was not even working at Toyota of Bowie during some of the period of these transactions. Jeff Schrembs was **not** the F & I Manager or F & I Director during most of this time period. Ed Trott was.

6. Toyota of Bowie takes significant measures to guard this confidential and proprietary customer and internal financial information. It is maintained within a Reynolds & Reynolds computer system to which only a handful of people have access and requires a 2 part code and password.

Document No. 70, Ex. 10.

Mr. Whalen's sworn statements are not rebutted by the EEOC. Based on Mr. Whalen's affidavit, the Court finds the financial data Defendant produced is confidential commercial

information and deserves protection.

The second question requiring resolution is whether Mr. Kennedy and/or Mr. Schrembs are permitted to view this confidential data. It is uncontested that Mr. Schrembs is not a party to the case, not a complainant to the case, and has not been identified as an expert witness by the EEOC. Mr. Whalen's affidavit contradicts the EEOC's contention that Mr. Schrembs could potentially authenticate or recollect the transactions reflected in the documents since Mr. Schrembs did not personally handle at least 400 of the 462 deals. The Court finds no basis for permitting Mr. Schrembs to examine the F&I recap sheets and thus the EEOC is *prohibited* from showing, providing, or disclosing these documents to Mr. Schrembs.

Mr. Kennedy, in contrast to Mr. Schrembs, is a complainant in this case. The EEOC has brought this lawsuit on behalf of Mr. Kennedy and other individuals. Mr. Kennedy has personal knowledge concerning approximately 50 of the F&I recap sheets, since he was involved in those transactions. Mr. Kennedy thus is entitled to review those 50 documents. For the remaining approximately 412 transactions where Mr. Kennedy was not personally involved and thus has no personal knowledge, and further considering his limited period of employment with Defendant, the Court finds there is no basis for Mr. Kennedy to examine these other transactions. The EEOC is *prohibited* from showing, providing, or disclosing the *approximately 412 transactions* to Mr. Kennedy.

If the EEOC seeks to show these 462 deals (F&I recap sheets) to individuals *other than* its employees, the EEOC must *first* seek the Court's approval by filing a motion.

For the above reasons, Defendant's Motion for Protective Order (Document No. 66) is hereby **GRANTED IN PART & DENIED IN PART.**

Although informal, this letter constitutes an Order of the Court and will be docketed accordingly.

Sincerely,

/s/

William Connelly
United States Magistrate Judge