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United States District Court,
S.D. New York.

Elsa GULINO et al., Plaintiffs,
v.
THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and the New York State Education Department, Defendants.

No. 96 Civ. 8414(CBM). | April 11, 2003.

Employees of school district sued board of education and state education department under Title VII and state laws, alleging that rights of African-American and Latino teachers were violated through imposition of requirement that they pass test to receive or retain teaching license. On department's motion to seal several hundred documents, the District Court, Motley, J., held that right of public access weighed in favor of not sealing documents.

Motion denied.

Opinion

MEMORANDUM OPINION AND ORDER

MOTLEY, J.

***1** Defendant State Education Department ("SED") has asked the court to seal several hundred documents that have been received into evidence. To leave them accessible to the public would, it asserts, compromise proprietary information and trade secrets belonging to National Evaluation Systems ("NES") the company that developed the Liberal Arts and Sciences Test ("LAST"), one of the two tests at issue in this case. Plaintiffs object to having these documents sealed, arguing that they have already been received into evidence, that there has been significant testimony about them and that the public has a right to have access to these documents since their contents are of public concern. For the reasons that follow, the court has decided not to seal these documents.

BACKGROUND

In January, 2002, the court signed a protective order pursuant to Fed.R.Civ.P. 26(c) limiting access to documents produced by NES in response to discovery demands by plaintiffs and designated as "confidential" by SED to the litigation teams working on this case, the court, and those persons with prior knowledge of the documents or the information contained therein. Stipulation and Order of Confidentiality ("Protective Order"), ¶ 10. The Protective Order explained that the documents were protected because they contained "confidential, proprietary, and/or sensitive information, and/or commercially private data, and that any disclosure of the contents of the NES [documents would] severely and irreparably damage NES and destroy the confidentiality of the information included...." *Id.* at 1. Many documents were produced and marked as confidential pursuant to the Protective Order.

The Protective Order left open the issue of whether these documents would remain unavailable to the public should they be received into evidence at trial, stating that the "specification of appropriate safeguards concerning the confidentiality of evidence at trial is specifically reserved for action by the Court or written agreement between counsel for the parties prior to or at trial." *Id.,* ¶ 28.[1] Many of the documents marked "confidential" by SED were offered and received into evidence and were the subject of extensive testimony in open court. In contrast to the few documents offered and received concerning actual test questions, *see supra,* n. 1, these confidential documents were not received under seal, and the gallery of the court was not cleared during testimony concerning them.

The parties conferred during the time the court was recessed, and agreed to a stipulation providing for the admission of all trial exhibits. The parties were unable to agree, however, on which of the exhibits should be received under seal.

DISCUSSION

The Stipulation and Order Admitting Trial Exhibits submitted for the court's consideration lists roughly 650 exhibits, and SED requests that about half of them be kept under seal. "Neither the prior confidentiality [Protective] order nor the reasons for confidential treatment for these materials expired upon commencement of the trial, and the need for confidentiality remains as valid now as when

the Court entered its order," SED asserts. Letter from Bruce McHale, April 2, 2003.

***2** It is certainly true that the Protective Order did not contain a "sunset" clause; as noted *supra,* however, it explicitly left open the issue of whether the documents originally protected as confidential would remain so once the trial began. Protective Order, ¶ 28. In reference to the need for confidentiality, while NES's position has not changed since the trial commenced, the weight of legal authority on the question within the federal courts generally, and this Circuit specifically, has shifted.

In *Seattle Times Co. v. Rinehart,* 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), the Supreme Court held that when "a protective order is entered on a showing of good cause as required by Rule 26(c), *is limited to the context of pretrial discovery,* and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." *Id.* at 37 (emphasis added). The implication of that holding, however, is that when protective orders are not "limited to the context of pretrial discovery," they may offend the First Amendment. *Id.* The Second Circuit has held that "a sub-species of sealed documents in civil cases—so called 'judicial documents'—deserve a presumption *in favor of access." Securities and Exchange Commission v. TheStreet.com ("TheStreet"),* 273 F.3d 222, 230 (2d Cir.2001) (citing *United States v. Amodeo ("Amodeo I"),* 44 F.3d 141, 145 (2d Cir.1995) (emphasis in original). " 'Judicial documents,' ... are items filed with the court that are relevant to the performance of the judicial function and useful in the judicial process." *TheStreet,* 273 F.3d at 231 (citation and quotation marks omitted). Since this is a bench trial and since the documents SED seeks to have sealed are being received into evidence, they are decidedly "judicial documents." Moreover, when documents have been received into evidence, "the public has an 'especially strong' right of access...." *Id.* at 232 (quoting *United States v. Amodeo ("Amodeo II"),* 71 F.3d 1044, 1049 (2d Cir.1995)).

Despite the "especially strong" right of public access, the court is required to make its final decision regarding whether to seal such judicial documents only "*after weighing competing interests." TheStreet,* 273 F.3d at 231 (emphasis in original). In this case, the balance tips in favor of the right of public access. This lawsuit is not between two private companies claiming patent infringement, where trade secrets are of little public concern. Rather, this case involves a company hired by a state agency to create a high stakes test for use in determining whether public school teachers and teacher candidates should be eligible for full certification. Moreover, the tests in question appear to have a disparate racial impact, disqualifying a disproportionate number of African Americans and Latinos from obtaining full licenses to teach in New York. The processes by which the tests were developed are clearly of interest to the public.

***3** For the foregoing reasons, the documents produced by NES and offered for admission into evidence by stipulation between the parties (with the exception of those containing actual test questions) will be received into evidence without restriction on the public's right of access. Parties are hereby ordered to submit a second Stipulation and Order Admitting Trial Exhibits marking as "sealed" only those exhibits which contain actual test questions.

Footnotes

1 This opinion does not address those documents received into evidence under seal, namely those containing test questions actually used on the tests at issue. Those documents and the testimony concerning them remain under seal.