

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

KEWEENAW BAY INDIAN COMMUNITY, Plaintiff, v. NICK A. KHOURI, et al. Defendants.	File No. 16-cv-00121 Hon. Paul L. Maloney <u>ORAL ARGUMENT REQUESTED</u>
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PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Concise Statement of Issues Presented

- 1) Should the Court confirm that certain highly confidential information that the Community will produce in discovery is not subject to disclosure in response to a Michigan Freedom of Information Act request?

Most Apposite Authority: Fed. R. Civ. P. 26(c); *Morgan v. United States Dep't of Justice*, 923 F.2d 195, 199 (D.C. Cir. 1991); *Wagar v. United States Dep't of Justice*, 846 F.2d 1040, 1047 (6th Cir. 1988).

INTRODUCTION

In this lawsuit, Plaintiff the Keweenaw Bay Indian Community (“the Community”) challenges Defendants’ imposition of Michigan sales, use, and tobacco taxes on the Community and its members with respect to transactions that take place on the Community’s Reservation and trust lands. The Community’s challenge includes several causes of action based on the balancing of interests analysis established in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (the “*Bracker* Balancing Test.”) *E.g.*, Third Amended Complaint, Counts II, IX (PageID.823, PageID.837). Under this analysis, if the balance of tribal, federal, and state interests weighs against the state’s interest in imposing the tax, the state may not impose the tax at issue. *Id.* Specifically, the *Bracker* Balancing Test requires “a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.” *Bracker*, 448 U.S. at 144-45. The relevant tribal interests include sovereignty, self-determination and governance, and economic development. *See id.*, 448 U.S. at 151. Presumably in the context of this analysis, Defendants have requested—and the Community intends to rely on—facts regarding the Community’s revenues used to fund and provide for governmental programs and services, as well as the Community’s economic development initiatives.

Some of the information relating to the Community’s revenues and other economic development initiatives is highly confidential, in particular information relating to the Community’s convenience stores and gaming enterprises, which operate in extremely competitive markets. Because of a peculiarity in Michigan’s Freedom of Information Act (“MFOIA”), the current Stipulated Protective Order (ECF No. 96) may not adequately ensure the confidentiality of such information after it is produced to Defendants’ counsel, the Michigan

Attorney General’s Office (“AG’s Office”). Any person—including the operator of a competing convenience store or casino—could submit an MFOIA request to the AG’s Office for the Community’s confidential business information. It is not clear that the AG’s Office would be required to withhold that information under the current protective order, or any protective order that does not specifically seal the documents from disclosure in response to a MFOIA request. For this reason, the Community seeks an order confirming that the AG’s Office cannot disclose certain documents, as described in detail below, in response to an MFOIA request.

BACKGROUND

I. The Stipulated Protective Order does Not Resolve Defendants’ Obligations with Respect to MFOIA.

Because the parties expected that discovery in this case would require disclosure of confidential information, early on they negotiated a stipulated protective order and submitted it for the Court’s approval. (ECF No. 94). On September 13, 2017 the Court issued a Protective Order incorporating the terms of the Parties’ Stipulation for Entry of Protective Order. (ECF No. 96, PageID.1246-1247). Under the Order, the parties can designate documents or information that they produce in the case as “Confidential” and the documents, including information contained therein, will then be subject to restrictions limiting disclosure by the receiving party to specific persons involved in this litigation, and those persons can only use the information for purposes of this litigation. PageID.1235-1236. If a party files documents labeled “Confidential” with the Court, the filing party must also file a motion to seal that information under Local Rule 10.6. PageID.1237.

While the Stipulated Protective Order establishes a basic framework for handling documents labeled as “Confidential”, one issue arose during the parties’ negotiation of the stipulation that was not resolved—the possibility that Defendants’ obligations under the Protective Order could

conflict with their obligations under MFOIA. It is possible that MFOIA could require Defendants to disclose a document labeled “Confidential” obtained from the Community in discovery, when such disclosure would not otherwise be permitted under the Stipulated Protective Order. Counsel for Defendants has advised that Defendants do not believe they can enter an agreement that would alter their obligations under MFOIA; indeed, the Stipulated Protective Order states “[n]othing in this stipulation is intended to prohibit a Party from complying with legal obligations or a court order requiring the disclosure of Confidential Information.” PageID.1239. Recognizing that the Community might need to ensure that certain documents or information would not be subject to MFOIA before producing it, the parties also agreed that a party may seek additional protections beyond those provided for in the Stipulated Protective Order. PageID.1240.

II. Discovery Related to the *Bracker* Balancing Test Implicates the Community’s Confidential Business Information.

As the parties expected, the Community must disclose highly confidential, competitive information as part of its discovery obligations. Defendants served discovery requests that appear to be related to the Community’s causes of action relating to the *Bracker* Balancing Test. These requests include “[d]ocuments that identify the source and amount of funds that the Community has spent providing essential governmental functions and services” to Community members and non-members for the five most current fiscal years. Nichols Decl. Ex. A (Pl.’s Resp. to Def.’s First Req. for Produc. ¶¶ 3-4). The Community has agreed to produce the requested information. *Id.* Indeed, the Community would want to produce that information even if Defendants had not served this request, because the information contained therein is part of the Community’s affirmative case. Of course, the Community included some qualifications in its

agreement to produce the requested information, including “entry of a protective order that adequately ensures the confidentiality of such information.” *Id.*

The Community has identified and collected government financial documents responsive to Defendants’ discovery request and that also support its *Bracker* Balancing Test claims. Denomie Decl. ¶¶ 7-8. These financial documents include detailed accounting of the source of the Community’s government funds, and the allocation of those funds among governmental programs. *Id.* The Community is willing to produce some of these documents subject to the protections of the Stipulated Protective Order, but some of the information is highly confidential, competitive information, and the Community needs to confirm that it will not be subject to MFOIA before producing it. Specifically, the Community has identified the following information that necessitates additional protection:

- The Community’s detailed profit and losses statements for various Community enterprises, including its casinos, radio station, convenience stores, and gas stations (“the Enterprise P&L Statements”); and,
- Detailed financial statements for each of the casinos, including data on the various revenue centers (table games, slots, bar, restaurant, etc.) and overhead expenses relating to its casinos (“the Gaming Financials”).¹

Denomie Decl. ¶ 8.

The Community considers all of its budget information to be confidential, but the Enterprise P&L Statements and Gaming Financials are especially sensitive; as explained in detail below, the potential harm to the Community from disclosure would be significant. *Id.*

¹ The Community is willing to submit the documents to the Court for an *in-camera* review, so that the Court can assess the sensitivity of the documents.

III. The Enterprise P&L Statements and Gaming Financials are Confidential and Commercially Sensitive.

The Community's economic enterprises, especially its casinos and convenience stores, operate in extremely competitive markets in the Upper Peninsula of Michigan. Denomie Decl. ¶ 11. There are at least ten competing casinos and resorts in the Upper Peninsula alone. *Id.* ¶ 11. As a gaming destination with a hotel, the Community's Baraga casino also competes against casino hotels in eastern Wisconsin and the northern portion of the lower peninsula of Michigan. *Id.* The Gaming Financials include detailed revenue breakdowns showing revenue and expenses for table games, slots, and other operations associated with the casinos. *Id.* ¶ 8. If competitors were able to obtain this information, they could discern the Community's hold percentages (the portion of expenditures retained by the casinos), which types of games or slots are most profitable, whether the Community is receiving more favorable prices from suppliers, and other valuable competitive information. *Id.* ¶ 12. Having this information would give competitors significant advantages that would allow them to compete more effectively against the Community. *Id.*

The Community's gas station and convenience stores in Baraga, MI and L'Anse, MI sell commodity products, like gasoline and food staples like milk, with slim profit margins. *Id.* ¶ 13. They compete against numerous other local stores that could use the Community's financial information to their competitive advantage. *Id.* For example, with knowledge of the Community's profit and loss details, the competing stores could determine whether they could lower prices to a point where the Community could not compete. *Id.*

If the Community's competitive position is harmed through disclosure of sensitive information, it would inflict a unique and severe injury. *Id.* ¶¶ 7-8, 14. The resulting loss of

revenue would undermine the Community's ability to continue providing the various government services that are funded by its gaming and other business enterprises. *Id.*

Competitors recognize the value of the Community's confidential business information. After the Community submitted confidential business plans for one of its gas stations to the Bureau of Indian Affairs ("BIA," an agency of the U.S. Department of the Interior), representatives of competing gas stations used federal FOIA requests to attempt to obtain the information. *Id.* ¶ 14. The BIA withheld the information under the federal FOIA provision protecting confidential business information.² *Id.*

For all of the foregoing reasons, the Community takes measures to protect its confidential business information from disclosure to third parties. *Id.* ¶ 9. While Community members have a right to access certain information about the Community's economic enterprises, they are not permitted make copies of, or otherwise retain, confidential business information like the Enterprise P&L Statements and Gaming Financials. *Id.* Community employees are bound by, and follow, confidentiality policies protecting the information. *Id.*

ARGUMENT

I. There is Good Cause to Protect the Community's Confidential Business Information Such As the Enterprise P&L Statements and Gaming Financials.

Courts have broad authority to issue protective orders under Federal Rule of Civil Procedure 26(c). *Encana Oil & Gas, Inc. v. Zaremba Family Farms, Inc.*, No. 1:12-cv-369, 2015 U.S. Dist. LEXIS 183801, at *3-4 (W.D. Mich. Oct. 15, 2015) (citing *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 476 (6th Cir. 1983)). Rule 26(c)(1)(G) allows the Court to require that "a trade secret or other confidential research, development, or commercial

² The federal FOIA, unlike MFOIA, broadly protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4)).

information not be revealed or be revealed only in a specified way.” Fed. R. Civ. P. 26(c)(1)(G). This rule has been “interpreted to protect from disclosure material that would harm the disclosing party by placing it at a commercial disadvantage. Moore’s Federal Practice - Civil § 26.105(8)(a) (2017); *see also Tropical Sails Corp. v. Yext, Inc.*, 2016 U.S. Dist. LEXIS 49029, at *10 (S.D.N.Y. Apr. 12, 2016) (“Internal documents and unpublished drafts that contain non-public strategies and financial information constitute ‘confidential commercial information’ under Federal Rule 26(c)(1)(G)”); *Eggerling v. Advanced Bionics, LLC*, 2013 U.S. Dist. LEXIS 30513, at *10 (N.D. Iowa Mar. 6, 2013) (Protection is available for “budgeting and finance issues ... and other matters that would not generally be released for public consumption.”). This Court’s authority to enter protective orders and seal documents includes the authority to protect documents from disclosure under freedom of information or public meeting laws, even if the documents do not otherwise fall under statutory exemptions from disclosure. *Morgan v. United States Dep’t of Justice*, 923 F.2d 195, 199 (D.C. Cir. 1991). For a protective order to have such effect, the Court must issue an order intended to operate as the “functional equivalent of an injunction prohibiting disclosure,” which would thus “justify an agency’s decision to withhold records that do not fall within one of the specific FOIA exemptions.” *Morgan v. United States Dep’t of Justice*, 923 F.2d 195, 199 (D.C. Cir. 1991); *Wagar v. United States Dep’t of Justice*, 846 F.2d 1040, 1047 (6th Cir. 1988) (district court sealing orders may limit disclosure of documents that might otherwise be subject to disclosure under FOIA) (citing *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983)).

There is no question that the Community is entitled to a protective order protecting its confidential business information from disclosure to third parties. *Encana*, 2015 U.S. Dist. LEXIS 183801, at *3-4; *Eggerling*, 2013 U.S. Dist. LEXIS 30513, at *10. The Community has

shown that the Enterprise P&L Statements and Gaming Financials are highly confidential and are treated accordingly by the Community. Denomie Decl. ¶¶ 7-9. The competitive harm from disclosure is especially significant because the Community relies on its economic enterprises to fund essential government services to its members; if the Community's economic enterprises are jeopardized, its ability to provide such government services will be jeopardized too. *See id.* ¶ 7. Moreover, the Community knows that at least some of its business competitors will try to obtain sensitive information through FOIA requests—they have done so in the past. *Id.* ¶¶ 10, 14. This is precisely the sort of information that the Court recognized should be protected by entering the Stipulate Protective Order, and the Community has shown that its Enterprise P&L Statements and Gaming Financials should be protected.

II. Only a Sealing Order, or the Equivalent, is Sufficient to Protect the Confidentiality of the Community's Confidential Business Information.

Unfortunately, the Community cannot be certain that its confidential information will be protected even if designated as such under the Stipulated Protective Order. Defendants are represented by the Michigan Attorney General's Office, an agency of the State of Michigan. Information held by the AG's Office—even information obtained through discovery in litigation—may be subject to disclosure in response to an MFOIA request unless the Court enters the “functional equivalent of an injunction prohibiting disclosure” to protect the Community's confidential business information. *Morgan*, 923 F.2d at 199.

While the Community believes that any documents labeled as “Confidential” pursuant to the Stipulated Protective Order should not be subject to MFOIA requests, the law on this issue is not settled in Michigan or in this Court—potentially creating an opening for an aggressive competitor to attempt to obtain the Community's confidential business information (though, as explained below, the Community does not believe that any such attempt should succeed). There

is a presumption that documents held by Michigan's government agencies, including the Attorney General's office, are subject to release under MFOIA unless an exemption applies. *See* Mich. Comp. Laws Serv. § 15.232(e) (definition of "public record" includes any writings possessed by a public body in the performance of an official function, unless otherwise exempt). Documents obtained in discovery by the Attorney General in its role as counsel to state officials in litigation are not specifically exempted from this definition of public record, even if such documents are subject to a general protective order.³ There are several Michigan statutes that clearly protect certain confidential documents and information, such as taxpayer information, from MFOIA requests. Mich. Comp. Laws § 205.28(1)(f). MFOIA also includes an exemption for trade secrets or commercial information that might protect the Community's Enterprise P&L Statements and Gaming Financials, but that exemption is a narrow one (narrower, for example, than the federal FOIA exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4)). Mich. Comp. Laws § 15.243(1)(f). Under MFOIA, trade secrets and commercial information only receive protection from disclosure if the information is voluntarily provided to an agency for use in developing governmental policy **and:**

- The information is submitted upon a promise of confidentiality by the public body;
- The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made; and,
- A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information

³ The Community is not aware of any Michigan court decision addressing this issue.

submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

Id.

There certainly is a strong argument that in litigation, like the Community's action here, that challenges a government policy, disclosure of any information is done at least partly for the purpose of "developing governmental policy" and thus subject to protection under § 15.243(1)(f). After all, the Community's goal in this litigation is to require that the State develop a tax policy that does not infringe on the federal law tax immunities of the Community and its members.

Unfortunately, the Community has no way to require Michigan to make that argument in response to a MFOIA request. MFOIA does not provide a mechanism for an entity whose documents are information are subject to a MFOIA request to object to public disclosure of its information. *See generally* Mich. Comp. Laws Serv. § 15.231, et seq. And even if the Community intervened and objected, there is no way to know whether a state court would agree that any of the MFOIA exemptions applies.⁴ Because there is uncertainty regarding the application of MFOIA to confidential information disclosed by the Community in this litigation, the Community needs an order clarifying in advance that its most sensitive information will be protected.⁵

⁴ The Community does not believe that any Court should permit disclosure under MFOIA of any document designated as Confidential, and does not waive any argument that might be raised to oppose such disclosure.

⁵ The Court should not be concerned that entering an order as requested by the Community would undermine the public policy in favor of access to court proceedings. The order would only result in affording the Community the protection afforded to other litigants that do not happen to be opposing a party subject to MFOIA. The ability of an interested party to challenge the sealing order is the same.

STATEMENT CONCERNING ORAL ARGUMENT

The Community believes that this motion can be resolved without oral argument, which is also likely to lead to a speedier decision that is desirable in light of ongoing discovery. The Community would, of course, offer argument if it would be of assistance to the Court.

CONCLUSION

The Community is asking for no more protection than that afforded by the current Stipulated Protective Order, except to clarify that the Enterprise P&L Statements and Gaming Financials may not be disclosed in response to an MFOIA request—the Community proposes that the designation “Highly Confidential” be applied to the documents to indicate the additional level of protection. To be clear, the Community does not believe that any of the documents or information that it has designated as “Confidential” may be disclosed in response to an MFOIA request, but the Enterprise P&L Statements and Gaming Financials are so sensitive that the Community cannot take the risk of disclosure. It therefore requests that the Court confirm, at least with respect to the Enterprise P&L Statements and Gaming Financials, that Defendants and their counsel may not disclose any such information in response to an MFOIA request.

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