IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN GAFFNEY, in her official capacity as Inspector General, U.S. Department of Housing and Urban Development, Petitioner, v. THE HAMILTON SECURITIES GROUP, INC., and HAMILTON SECURITIES ADVISORY SERVICES, INC., Respondents.	:	Misc. No. 98-92 (SS)

PETITIONER'S REPLY TO HAMILTON SECURITIES' RESPONSE CONCERNING THE PROTECTION OF PROPRIETARY INFORMATION

Petitioner, the Inspector General of the United States Department of Housing and Urban Development ("HUD"), through her counsel, hereby replies to Hamilton Securities' Response Concerning the Protection of Proprietary Information ("Response").

This is a summary proceeding upon a Petition for Summary Enforcement of Administrative Subpoenas, filed on March 3, 1998, by the Inspector General pursuant to section 6(a)(4) of the Inspector General Act of 1978, 5 U.S.C. App. 3. The Petitioner seeks the enforcement of three distinct administrative subpoenas duces tecum issued to each of Respondents on August 6 and 22, 1996, and October 24, 1997. The background is set forth in Petitioner's Memorandum of Points and Authorities in Support of Petition for Summary Enforcement, filed on March 3, 1998, and

Petitioner's Status Report, filed on September 24, 1998, which Petitioner incorporates herein by reference.

In its Status Report, Petitioner identified one of the principal pending issues awaiting judicial resolution as Respondents' claim for protection of alleged proprietary information, and the Special Masters' request that Petitioner's employees sign a non-disclosure agreement stating that they had not and would not disclose to non-government personnel allegedly proprietary information of Respondents contained in the records of Respondents which are in the possession of the Special Masters.[1] At page 4 of the Joint Statement of Petitioner and Respondent Concerning Pending Issues Awaiting Resolution by the Court, filed September 30, 1998, Petitioner asked for an immediate ruling on this issue, pointing out that until this issue is resolved, Petitioner is unable to continue its review of any of Respondents' records in the possession of the Special Masters; for all intents and purposes, the review process came to a halt in August 1998.

As set forth in Petitioner's Status Report, the proposed non-disclosure agreement does not require Respondents to identify the claimed "proprietary business secrets," yet would forbid Petitioner to discuss the unidentified materials with anyone outside the government. Thus, Petitioner has no way of knowing what materials are claimed to be proprietary. Further,

---

[1] A copy of the Special Masters' proposed non-disclosure agreement is attached as Exhibit 3 to Petitioner's Status Report.

Petitioner believes that at least some of what Respondents may consider "proprietary business secrets" (now referred to by Respondents as "cutting-edge methodologies and tools") is already known to Petitioner, either as the result of information developed by the Petitioner in the course of its investigation, independently of Respondents, or through information previously provided by Respondents, not subject to any non-disclosure agreement. Petitioner does not want to be in the position of having to defend against endless allegations that it has somehow violated a non-disclosure agreement any time Petitioner attempts to question a witness about matters related to the non-HUD business ventures of Respondents, or other matters Respondents consider "proprietary business secrets," which may well evidence conflicts of interest, when the questions and information derive from sources other than the records yet to be reviewed or received by Petitioner. Petitioner must be able to use the information responsive to its subpoenas in conducting its legitimate investigatory efforts, including witness interviews of non-government personnel and the issuance of subpoenas to third parties for additional information.

Further, Petitioner believes that there is no reason for the Court to require a non-disclosure agreement at this time since the reason the Special Masters proposed such a requirement in their Second Report to the Court of April 27, 1998--their anticipation that the government would be reviewing <u>all</u> the records in the custody of the Special Masters, not just those

determined to be responsive to the subpoenas and non-privileged--has not come to pass.[2] Respondents' counsel have been reviewing the records and clearing only responsive, non-privileged records for release to the government. In their Response, Respondents do not even address this issue.

Instead, Respondents continue to claim entitlement to protection for any alleged proprietary information, whether responsive to the subpoenas or not, and continue to refuse to identify what the proprietary information might be, other than to refer to it vaguely as "cutting-edge methodologies and tools."[3]

---

[2] As noted in Petitioner's Status Report, the parties did not receive the Special Masters' Second Report and proposed order until after the Court had already entered it (Petitioner received its copy on April 30, 1998; the Court had already signed the Order on April 29, 1998). Thus, Petitioner did not have an opportunity to address any concerns to the Court prior to the entry of the Order. When Petitioner received the Special Masters' Second Report and the Court's Order of April 29, 1998, Petitioner advised the Special Masters of its objections, by letters of May 7 and June 19, 1998, and proposed a particular non-disclosure Stipulation and Agreement to be employed in the event Petitioner was permitted access to records of Respondents prior to any review by Respondents' counsel for relevancy and privilege (see Exhibit 4 to Petitioner's Status Report). The Special Masters did not adopt Petitioner's proposed Stipulation and Agreement. Instead, in August 1998, when certain representatives of Petitioner went to the Special Masters' offices to review Respondents' records, they were asked by representatives of the Special Masters to sign a non-disclosure agreement (Exhibit 3 to Petitioner's Status Report). When counsel learned of the proposed non-disclosure agreement, counsel advised the Special Masters' representatives that Petitioner's representatives could not sign the proposed non-disclosure agreement for the reasons previously described to the Special Masters.

[3] Respondents claim that "[s]ome of the principals of Hamilton hope that once this seemingly endless investigation is behind them, they will be able to utilize and market their cutting-edge methodologies and tools in the private market, and thus rebuild their careers," Response at 6, suggesting that there are

Further, while we previously understood Respondents to be asserting their claim only as to materials not related to their work as a contractor for HUD, Respondents do not now seem to be placing any such limitation on the information they claim needs protection.

Further, Respondents attempt to justify their refusal to identify the alleged proprietary information by claiming "Hamilton no longer has the financial resources or staff to designate protected materials on a document-by-document basis." Response at 4, note 1. Respondents make this claim despite the fact that after this issue arose, and after Petitioner pointed out Respondents' failure to even identify the alleged proprietary information, Respondents' counsel spent several weeks this past summer engaging in just such a document-by-document review for privileged documents, and produced a privilege list. Obviously, if Respondents were truly concerned about the alleged proprietary information contained in the records in the Special Masters' possession, their counsel could have identified it at the same time they made the document-by-document review for privileged

---

several "principals of Hamilton" asserting the present claim for protection of alleged proprietary data. Elsewhere, however, Respondents describe their status as "nearly non-existent" and state that Ms. Fitts is the only employee, and that she "remains (without pay) merely to wind down the Company and . . . to clear the Company's name and her own." Hamilton Securities' Supplemental Opposition to the Petition for Summary Enforcement, filed October 14, 1998, at 11.

materials.[4]

Respondents attempt to accentuate their alleged concern about the disclosure of the unidentified proprietary information by claiming, without benefit of any affidavit or other support, that "the OIG already has shared information with one of Hamilton's most direct competitors," Response at 5, arguing that the government is engaged in "active and inexplicable collaboration with counsel for Ervin and Associates," id. at 6.[5]

---

[4] As for Respondents' claim that they cannot afford the attorney costs that would be involved to assert their proprietary claims, it has been the government's understanding, based upon representations made by Respondents' present counsel, that the cost of representation in this matter was being borne by Respondents' insurer. Further, as discussed infra, Respondents themselves have disclosed many of the records in the Special Masters' possession to the very "competitor" they claim to fear the most, and thus none of that material would even be subject to review for proprietary claims.

[5] Respondents state that "[i]n a separate filing, Hamilton objects to the OIG's involvement in and collaboration with the *qui tam* plaintiffs. Hamilton adopts and incorporates the facts of that argument herein." Response at 6. Respondents do not identify the "separate filing." Petitioner has inquired of Respondents' counsel and been told that the reference is to Respondents' Reply to Petitioner's Opposition to Motion for Leave to Conduct Discovery, filed on October 9, 1998.

A review of that pleading reveals no "facts" supporting Respondents' claim. Respondents allege only that "Hamilton suspects that the OIG is liberally sharing the fruits of its investigation with Ervin & Associates, the plaintiffs in the Bivens Complaint . . ." (emphasis added). This serious charge is levelled based solely on the fact that the attorney for Ervin and Associates referred to the Counsel to the Inspector General, Judith Hetherton, by her first name during a deposition by Ervin and Associates in the Bivens case of Chris Greer, the former Assistant Inspector General for Audit who later served as HUD's Deputy Assistant Secretary for Multifamily Housing Programs. The passage in the deposition to which Respondents refer concerns a discussion of what matters Mr. Greer had been authorized to testify about by the Inspector General during his deposition. By letter of February 17, 1998 (attached hereto as Exhibit 1), in response to the request of

Respondents' counsel previously inquired of the government as to "what information the OIG has been passing on to Ervin & Associates," and was advised by Petitioner as follows:

> The OIG has provided documents to Ervin and Associates only as required under the law. With respect to the pending lawsuit by Ervin and Associates against HUD, Ervin and Associates, Inc., et al. v. Dunlap et al., D.D.C., C.A. No. 96-1253 (WBB) ("Bivens action"), the OIG has responded to discovery requests and produced a limited number of responsive documents not covered by the investigatory files privilege, the deliberative process privilege, or other relevant privilege or objection. Such production was made through the HUD Office of General Counsel and the Department of Justice, which are defending the Bivens action. None of the records produced by Hamilton to the OIG in response to the OIG subpoenas were provided to Ervin and Associates.

Letter of July 22, 1998, from Judith Hetherton to Michael J. McManus (attached hereto as Exhibit 2). In sum, Petitioner has not provided documents to Ervin and Associates other than as required to under the law, and specifically has not provided to Ervin and Associates any of the records produced to it by Respondents in response to the OIG subpoenas.

More importantly, however, Respondents themselves, through their former counsel, Jenner & Block, did provide Ervin and Associates, Respondents' claimed "competitor," with all of the records they produced to the OIG in response to the OIG subpoenas

---

Daniel Hawke, the attorney for Ervin and Associates, and in accordance with federal regulation, Ms. Hetherton had informed Mr. Hawke that the Inspector General had approved his request to depose Mr. Greer but only as to certain matters relating to his employment with the OIG, as detailed in the letter. There is nothing improper about this contact, and hardly anything unusual in Mr. Hawke's reference to Ms. Hetherton by her first name during Mr. Greer's deposition.

provided to the OIG prior to the entry of the Court's order on April 29, 1998, and without any claimed need for protection, can be subjected retroactively to the proposed non-disclosure agreement.

None of the cases cited by Respondents support the proposition that the OIG should be required to enter into the proposed non-disclosure agreement under the circumstances in this case as a precondition to obtaining access to the records deemed responsive to the OIG subpoenas. None of the cited cases involved a situation in which the party claiming entitlement to protection of alleged proprietary information refused to identify the information it claimed was entitled to confidential treatment.[7] In Adair v. Rose Law Firm, 867 F. Supp. 1111 (D.D.C. 1994), the issue was the protection of a law firm's client list, where it was conceded that most of the names on the client list would have no relationship to the Inspector General's investigation. In FTC v. Owens-Corning Fiberglas Corp., 626 F.2d 966 (D.C. Cir. 1980), the FTC's procedures required it in the first instance to determine whether data constituted trade secrets or other confidential information, and generally to provide the company with ten days' notice before releasing the data to anyone outside the FTC in response to a FOIA or other request; the Court refused to require the FTC to do so in advance

---

July 1998, and did not seek comment of counsel on the proposal prior to the request that the OIG employees sign the agreement.

[7] In RTC v. KPMG Peat Marwick, 779 F. Supp. 2 (D.D.C. 1991), there was no claim concerning alleged proprietary data.

of a request for the information from a member of the public under FOIA. Id. at 973. In U.S. Internat'l Trade Comm'n v. Tenneco West, 822 F.2d 73, 74 (D.C. Cir. 1987), the parties agreed that the information at issue was the confidential, proprietary, and other information that Tenneco, who was not a party to the investigation, would give in response to an ITC questionnaire. In United States v. Exxon Corp., 628 F.2d 70, 78 (D.C. Cir.), cert. denied, 100 S.Ct. 2940 (1980), which involved a study of subsidization of wholesale and retail motor fuel sales by vertically integrated oil companies, the companies designated the trade secret or proprietary information at the time of production. Here, the government has no idea what information Respondents are claiming to be confidential proprietary data, and Respondents' new description of it as "cutting-edge methodologies and tools" sheds no light on the subject.

Further, none of the cases involved a situation in which the party claiming entitlement to protection had itself already disclosed much of the information to its competitor. Further, the cited cases generally involve the question of under what circumstances the government might release to third parties or to the Congress information that was concededly proprietary[8]; none of the cases involve a situation such as that here, where the only claimed "threat" is that the proprietary data (if there is any such) will be used as appropriate to further legitimate

---

[8] E.g., FTC v. Owens-Corning Fiberglas Corp.; U.S. Internat'l Trade Comm'n v. Tenneco West.

investigatory inquiries.[9] Yet as this Court stated in RTC v. KPMG Peat Marwick, supra note 7, "[s]o long as the agency is carrying out a legitimate agency purpose, pursuant to statute, agency rule or otherwise, it will not be limited in its use of the subpoenaed information." 779 F. Supp. at 4.[10] Nor do any of the cited cases involve a situation where much of the subpoenaed data has been produced to the government and used by the government in the course of its investigation long before any claim to proprietary status was made.

More than five months ago, the OIG proposed a Stipulation and Agreement that would require Respondents to articulate what they claim to be their "proprietary business secrets" unrelated to their performance as a HUD contractor, would require them to assert that such "secrets" have not previously been disclosed to anyone other than the officers, employees, and agents of Respondents, and would limit the OIG's use of such business secrets to legitimate investigatory purposes, unless the OIG

---

[9] During the pendency of the investigation, the OIG would decline to release any records in response to a FOIA request on the basis of the law enforcement investigatory files privilege.

[10] In RTC v. KPMG Peat Marwick, the RTC had several investigations underway, and had issued four subpoenas to KPMG Peat Marwick. The concern was that the materials KPMG Peat Marwick might produce in connection with one investigation might be used by the RTC for another investigation. This Court ordered enforcement of the subpoenas, requiring only that if the RTC wanted to use the records in connection with a different investigation from the one in which they had been subpoenaed, the RTC should issue process for the materials in that other investigation. This Court also refused to force the RTC to issue a protective order to set up an "internal fire wall," holding that "such a restriction could unduly hamper the RTC in the discharge of its mission," and refused to order the RTC not to share the information with the Department of Justice.

already had knowledge of such matters (either through previous production by Respondents or through other means). Any protection accorded to any legitimate "proprietary business secrets" of Hamilton should nevertheless allow for the OIG to use the information in furtherance of its legitimate investigative efforts, which include an exploration of the potential conflicts of interest Hamilton had between its role as HUD's financial advisor and its efforts to develop other private business. In order to carry out its investigation, the OIG will need to interview witnesses and possibly issue additional subpoenas to third parties with relevant information. The language of the non-disclosure agreement proposed by the Special Masters, which would limit the OIG to disclosing any proprietary business secrets only to government personnel, may result in the OIG being unable to investigate the relevant information it obtains, and has the potential to chill the OIG's investigation of information it already has. By definition, if the "proprietary business secrets" relate to non-HUD business (undertaken perhaps in conflict with Hamilton's role as HUD's financial advisor), the persons with knowledge about it are likely <u>not</u> to be government employees.

Respondents did not respond to the agreement proposed by the OIG on May 7, 1998, and never proposed an alternative agreement. Instead, by letter of July 31, 1998 to the Special Masters (not provided to the OIG), Respondents' counsel apparently identified to the Special Masters certain "categories" of information that

Respondents deemed proprietary.[11] The Special Masters, however, apparently determined that for any of Respondents' proprietary documents to be protected, they must all be individually identified, listed, and justified by Hamilton. See Third Report of Co-Special Masters Irving M. Pollack and Laurence Storch, filed September 8, 1998, at pages 2-3; see also letter of September 8, 1998, from Michael J. McManus to Irving Pollack and Laurence Storch (attached hereto as Exhibit 3).

Respondents' counsel refused to comply with the Special Masters' directive, and in a letter to the Special Masters on September 8, 1998, proposed the following "solution" instead:

> When and if the government determines and justifies that is has a need to show particular documents in any of the categories we have identified to third-parties, it can produce those documents and identify them to Hamilton. If Hamilton believes that they are proprietary information, Hamilton would be willing to, at that time, provide justification for its assertion that any given documents should be subject to a protective order. This solution relieves Hamilton from the unauthorized and financially onerous burden of reviewing and listing hundreds of thousands of documents, and protects the government from its fear of inadvertently producing proprietary documents. This process should not in any way interfere with the government's investigation: if the documents are proprietary, according to the Court's Order, they cannot be shown to third-parties; if the documents are not, then the mere fact that documents already produced by Hamilton to the government have been identified as documents the government wants to show to a third-party will give Hamilton no particular insight into the

---

[11] The government was not provided with the July 31, 1998 letter from Respondents' counsel to the Special Masters, and was not party to the conversations between the Special Masters and Respondents' counsel on this issue. The government became aware of the communications by the letter of September 8, 1998 from Respondents' counsel to the Special Masters, which refers to the prior communications.

required to identify the proprietary data within ten days of any order entered by the Court, certify that such data has not been previously disclosed to the OIG or otherwise, and sign the proposed Stipulation and Agreement. Respondents should not be permitted to hamper this "summary" subpoena enforcement proceeding with further delay caused by their claim for the need for protection for unidentified "proprietary" data.

CONCLUSION

WHEREFORE, Petitioner requests that the Court vacate its order of April 29, 1998, insofar as it directs government personnel not to disclose Respondents' proprietary information to non-government personnel and to execute a non-disclosure agreement acceptable to the Special Masters restricting disclosure of Respondent's proprietary information to non-government personnel.

Respectfully submitted,

Wilma A. Lewis/dwh
WILMA A. LEWIS, D.C. Bar #358637
United States Attorney

Mark E. Nagle/dwh
MARK E. NAGLE, D.C. Bar # 416364
Assistant United States Attorney

Daniel F. Van Horn
DANIEL F. VAN HORN, D.C. Bar #924092
Assistant United States Attorney
(202) 514-7168

OF COUNSEL:

JUDITH HETHERTON
Counsel to the Inspector General
BRYAN P. SADDLER
Associate Counsel to the Inspector General
U.S. Department of Housing and Urban Development
451 7th St., S.W. -- Room 8260
Washington, D.C. 20410
(202) 708-1613