

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Adam Steele, Brittany Montrois, and Joseph
Henchman, on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

United States of America,

Defendant.

Case No. 14-cv-01523-RCL

**REPLY IN FURTHER SUPPORT OF
PLAINTIFFS' MOTION TO SEAL (ECF 187)**

Accenture and the IRS respond to Plaintiffs' Motion to Seal, ECF 187, and ask the Court to maintain the seal on the documents filed in support of Plaintiffs' Opposition to the United States' Motion for Partial Summary Judgment. ECF 189; ECF 190. Pursuant to the Protective Order, ECF 114, and the Local Rules, Plaintiffs filed a "Motion to Seal" asking the court to seal personal identifying information,¹ but deny the remainder of the motion because the documents do not contain confidential information justifying the sealing. Accenture and the IRS have not overcome the presumption of public access, and Exhibits CE, CI, and CJ should be unsealed.

I. Designating documents as "Confidential" or "Highly Confidential" under the Protective Order does not justify sealing them.

The IRS and Accenture argue that the documents should be sealed because they were designated "Confidential" or "Highly Confidential" under the Protective Order in this case. ECF 190 at 2 ("The Court has *already ordered* that these documents are to be filed under seal, and thus, because the United States has followed the procedures outlined in the Protective Order, no further

¹ The IRS does not oppose sealing the personal identifying information contained in the named Plaintiffs' documents. ECF 190 at 3 n.2.

justification is needed to keep these documents sealed.”); ECF 189 at 13 (relying on the Protective Order for four out of the five factors that Accenture states are determinative to sealing). But whether a document is “subject to a protective order during discovery” is “irrelevant” to deciding a motion to seal. *Johnstown Feed & Seed, Inc. v. Cont’l W. Ins. Co.*, 2009 WL 866828, at *2 (D. Colo. Mar. 26, 2009); *United States v. All Assets Held at Bank Julius Baer & Co.*, 520 F. Supp. 3d 71, 78 (D.D.C. 2020) (“[E]ven where a protective order has been issued, a district court ‘cannot abdicate its responsibility to oversee the discovery process and determine whether filings should be made available to the public.’” (citation omitted)). As one court explained:

Documents subject to discovery are not customarily filed with the Court and thus are not available to the public. Consequently, the Court readily enters agreed-upon protective orders that govern the conduct of parties *vis-a-vis* each other, but such orders are not intended to, and indeed do not, purport to weigh the public's right of access. Unlike documents that are privately exchanged between the parties as part of the discovery process, documents filed with the Court for the purpose of obtaining an adjudication *do* invoke the public rights discussed above, and thus, such documents are presumptively available to the public.

Johnstown, 2009 WL 866828, at *2. “Thus, the mere fact that material may be subject to a protective order limiting disclosure does not mean that it must remain shielded from public disclosure.” *All Assets*, 520 F. Supp. 3d at 78. The Court still must independently “determine whether the evidence may be filed under seal.” *In re Press & Pub.*, 2021 WL 1946378, at *7 (D.D.C. May 14, 2021). The designations under the Protective Order, therefore, do not relieve Accenture and the IRS of their burdens to establish that sealing is appropriate in light of the strong presumption of public access.

II. Accenture and the United States have not satisfied their burdens of rebutting the presumption of public access in this class action against the government.

“The burden to rebut the presumption of disclosure rests with the objecting party. And, a party seeking to seal court documents must come forward with specific reasons why the record, or any part thereof, should remain under seal.” *In re McCormick & Co.*, 316 F. Supp. 3d 455, 464 (D.D.C. 2018) (internal quotation marks and citation omitted); *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 140-41 (D.D.C. 2012) (“[T]he burden is instead the respondent’s to demonstrate the *absence* of a need for public access because the law presumes that the public is entitled to access the contents of judicial proceedings.”). “The D.C. Circuit has explained that the common-law right of public access to judicial records is a fundamental element of the rule of law, important to maintaining the integrity and legitimacy of an independent Judicial Branch.” *United States v. Munchel*, 2021 WL 4709745, at *2 (D.D.C. Oct. 8, 2021) (Lamberth, J.) (cleaned up); *United States ex rel. Schewizer v. Oce, N.V.*, 577 F. Supp. 2d 169, 172 (D.D.C. 2008) (Lamberth, J.) (“[O]ur Court of Appeals has characterized public access to judicial records as fundamental to a democratic state.” (internal quotation marks and citation omitted)). In this case alleging the illegal exaction by the IRS of hundreds of millions of dollars from a class of over a million individuals, the need for public access is heightened. *In re McCormick*, 316 F. Supp. 3d at 464-65 (“[T]he fact that a case is a class action is not irrelevant under *Hubbard*.”); *All Assets*, 520 F. Supp. 3d at 81 (the presumption of public access is “particularly strong” where the government is a party); *Hyatt v. Lee*, 251 F. Supp. 3d 181, 184 (D.D.C. 2017) (Lamberth, J.); *Friedman v. Sebelius*, 672 F. Supp. 2d 54, 58 (D.D.C. 2009).

This need for public access is particularly acute where user fees are at issue, because the class members have a concrete interest in accessing this information. As with any user fee issued pursuant to the Independent Offices Appropriations Act, the public has a right to analyze and assess

how the fee was determined and what it includes. *Nat'l Ass'n of Broads. v. F.C.C.*, 554 F.2d 1118, 1133 (D.C. Cir. 1976) (stating an agency must provide “a public explanation of the specific expenses included in the cost basis for a particular fee, and an explanation of the criteria used to include or exclude particular items”); *Engine Mfrs. Ass'n v. Env't Prot. Agency*, 20 F.3d 1177, 1181-83 (D.C. Cir. 1994) (requiring the agency to provide a cost justification that was “in intelligible if not plain English”); *Diapulse Corp. of Am. v. Food & Drug Admin.*, 500 F.2d. 75, 79 (2d Cir. 1974). “By expressly requiring in the IOAA that fees be prescribed by regulation, Congress evidenced its concern that such fees be communicated in advance to those who would have to bear them, thus permitting them to take intelligent action to avoid undesired consequences.” *New Eng. Power Co. v. U.S. Nuclear Regul. Comm'n*, 683 F.2d 12, 16 (1st Cir. 1982).

Exhibits CE and CJ are task orders under or modifications of IRS's contracts with Accenture for Accenture's work on behalf of the Return Preparer Office. Exhibit CI is a summary of the no-cost contract between Accenture and the IRS for the PTIN system. The information in these documents is highly relevant to determining whether the PTIN fee “exceeds the costs to the IRS to issue and maintain PTINs.” *Montrois v. United States*, 916 F.3d 1056, 1058 (D.C. Cir. 2019). As Plaintiffs explained in their motion-to-compel briefing, “[t]he complaint challenges the entire PTIN fee return preparers were required to pay including the portion paid to AFS.” ECF 105 at 2; *see also* ECF 82 at 1 (“[T]he PTIN fee is comprised of an amount payable to the Internal Revenue Service and an amount payable to a third-party vendor, which processes initial and renewal PTIN applications.”). The Accenture contracts are particularly critical to the litigation because, as the vendor tasked with “administer[ing] the application and renewal process,” Accenture issued the PTINs and maintained the PTIN database. *User Fees Relating to Enrollment*

and Preparer Tax Identification Numbers, 75 Fed. Reg. 60,316, 60,319 (Sept. 30, 2010); ECF 177-30 ¶ 75. The IRS concedes the relevance of the Accenture fee, acknowledging that Plaintiffs can challenge “whether the product or service for which the IRS contracted is a direct or indirect cost of the PTIN Program that can be charged consistent with the IOAA and OMB Circular A-25.” IRS Opp. Br., ECF 183, at 28.

Exhibit CI is an analysis of the 2010 no-cost contract between Accenture and the IRS, and includes information about the costs included in Accenture’s portion of the PTIN fee. Accenture argues that this document is a “competitively-sensitive, internal draft slide deck that reveals highly confidential proposal strategy.” ECF 189 at 9. Accenture emphasizes its identity as a non-party in support of sealing the document, but “third party status, alone,” is not “dispositive of this inquiry.” *McConnell v. Fed. Election Comm’n*, 251 F. Supp. 2d 919, 939 (D.D.C. 2003). Particularly where, as here, the information “does not involve peripheral matters,” but is “highly probative” to the merits, the identity factor may be given less weight. *Id.* Accenture has not shown how disclosing this ten-year-old document would reveal trade secrets or cause it competitive harm in 2022 that would justify sealing the information.

Exhibits CE and CJ were produced by the IRS under “confidential” designations. Exhibit CE is the 2016 no-cost contract between Accenture and the IRS, and Exhibit CJ is a modification to the 2010 contract between Accenture and the IRS. The IRS has previously stated that it “has only designated documents as CONFIDENTIAL or HIGHLY CONFIDENTIAL in an attempt to respect third party designations as the IRS and third parties often produced duplicate or substantially similar documents. The United States has no objection to lifting these designations so long as the third parties have no objection.” ECF 181 at 2-3; *see also* ECF 192 at 2 (“We have not heard back from Accenture yet so we believe the other two documents must remain

confidential until we hear otherwise from Accenture.”). The IRS and Accenture have not provided any justification for sealing these documents, apart from stating they were properly designated under the Protective Order. ECF 189 at 11 (“[W]hile AFS did not produce the documents at Exhibits CE and CJ, they are properly designated Confidential pursuant to the Protective Order and should remain under seal.”); ECF 190 at 2 (“The Court has *already ordered* that these documents are to be filed under seal, and thus, because the United States has followed the procedures outlines in the Protective Order, no further justification is needed to keep these documents sealed.”). This is far from sufficient under *Hubbard* and the public, especially the return preparers who are forced to pay the PTIN user fee, is entitled to this information. *TIG Ins. Co. v. Firemen’s Ins. Co.*, 718 F. Supp. 2d. 90, 95 (D.D.C. 2010) (finding that a conclusory claim of confidentiality was “not sufficient to properly evaluate the instant motion under the six-part balancing test articulated by this Circuit.”).

Given the presumption of public access, the user fees at issue, the nature of the litigation, the relevance of the documents, and the lack of commercial sensitivity, Exhibits CE, CI, and CJ should be unsealed.

III. Plaintiffs did not violate the Protective Order or Local Rule 7(m).

Accenture and the United States claim that Plaintiffs violated the Protective Order by failing to follow the procedures set forth in Paragraph 13. ECF 189 at 7-8; ECF 190 at 2-3. Yet this provision only applies if a party publicly files the material. ECF 114 ¶ 13(i) (“If any party intends to introduce *or publicly file* any material designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL. . . .”) (emphasis added). Plaintiffs have not “publicly file[d]” any of these documents. Instead, Plaintiffs filed these documents under seal as required by the Protective Order to ensure the purported confidentiality was maintained pending a decision by the Court. *Id.* ¶ 13

(“Notwithstanding the foregoing, any material designated as ‘CONFIDENTIAL’ or ‘HIGHLY CONFIDENTIAL’ shall be filed under seal pursuant to Paragraph 3(ii) of this Protective Order.”). Plaintiffs have made every effort to respect the confidentiality designations of the documents and testimony throughout this litigation, even at times informing Accenture of its own Protective Order violations and providing it an opportunity to cure.² ECF 182 at 8-9.

Plaintiffs also have not violated Rule 7(m) as Accenture claims. ECF 189 at 8 n.4. “Rule 7(m). . . requires only that the parties ‘discuss the anticipated motion. . . in a good faith effort to determine whether there is any opposition to the relief sought.’” *Jackson v. Teamsters Loc. Union* 922, 991 F. Supp. 2d 65, 70 (D.D.C. 2013) (finding email containing brief summary of motion sufficient to satisfy Rule 7(m)). Plaintiffs reached out to Accenture a week before filing in an effort to narrow the areas of dispute. ECF 189-1 at 3. Plaintiffs specifically asked if Accenture “intend[ed] to defend all of its confidentiality designations.” *Id.* Accenture removed the designation from one document, but retained the other. *Id.* at 2. Contrary to Accenture’s assertion, ECF 189 at 8 n.4, Plaintiffs specifically informed Accenture that they were filing the remaining document under seal, but would “request that the Court unseal it.” ECF 189-1 at 1. Plaintiffs also offered to discuss the matter further, but Accenture did not respond. *Id.*

For the reasons set forth in Plaintiffs’ Motion and this Reply, the Court should order Exhibits CE, CI, and CJ unsealed.

² Accenture includes a footnote in its brief requesting expenses and fees due to the “significant and undue expense. . . associated with this Opposition and to negotiate and prepare the Protective Order.” ECF 189 at 14 n.10. No sanctions are warranted because Plaintiffs have not violated the Protective Order.

Dated: June 1, 2022

Respectfully submitted,

/s/ William H. Narwold

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2022 I electronically filed this Reply in Further Support of Plaintiffs' Motion to Seal. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Dated: June 1, 2022

/s/ William H. Narwold

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