

STATE OF NORTH CAROLINA

WAKE COUNTY

IN A MATTER
BEFORE THE COMMISSIONER OF BANKS
DOCKET NO: 05:008:CF

IN RE:)
)
ADVANCE AMERICA, CASH)
ADVANCE CENTERS OF NORTH) **FINAL CONFIDENTIALITY ORDER**
CAROLINA, INC.)
_____)
)

FINDINGS

1. The Commissioner of Banks has previously ruled in this matter that:
 - A. All records and material relating to the investigatory hearing commenced on August 26, 2004, would be held confidential under N.C. Gen. Stat. § 53-99(b)(2). (Transcript of hearing; April 26, 2005)
 - B. Evidence in the contested case hearing commenced on February 1, 2005, which is designated as confidential in good faith by counsel for either party would enjoy such protection during the pendency of the contested case. (*Ibid.*)
 - C. Future protection of material so designated as confidential would be determined by the Commissioner on the basis of motion and argument of counsel as a part of the disposition of the contested case. (*Ibid.*; also, letter from Commissioner to counsel, dated August 25, 2005)
2. Counsel for Advance America, Cash Advance Centers of North Carolina, Inc. (“AANC” or “Respondent”) by their memorandum of September 12, 2005, and at other earlier times during the course of this contested case proceeding has requested that dozens of documents, stipulations, affidavits and memoranda previously submitted as evidence in this case be afforded confidential treatment. (Respondent’s Memorandum (“Memo”) in Support of Continuing Confidentiality)
3. Counsel for AANC concedes that the State has a general policy of openness in the transaction of agency business, citing N.C. Gen. Stat. § 132-1. (Memo at 4)
4. Counsel for AANC argue that many of their client’s evidentiary submissions are entitled to confidential treatment on the basis of the exception for trade secrets found in N.C. Gen. Stat. § 132-1.2(a). (Memo at 4)

5. AANC's executives have submitted affidavits stating that the documents for which they have requested confidentiality contain valuable business information and that release of the documents would cause them competitive harm.
(Appendages to Memo)
6. The evidentiary record in this case arises in part from an investigation of whether AANC is in compliance with the law of North Carolina and also from litigation of the issue.
7. The Office of the Commissioner of Banks and the Attorney General of North Carolina as intervenor (collectively, "Petitioner"), has proposed confidential treatment for two classes of items of evidence: certain consumer complaints sought by AANC during discovery (the confidential nature of which was removed by the simple expedient of obliterating therefrom any portion that could be personally identifiable financial information); and certain records of examination of certain check-casher licensees. The bases for Petitioner's assertion of confidential treatment were, respectively, N.C. Gen. Stat. § 53-99(b)(6) and § 53-99 (b)(2).
8. Respondent has claimed confidential treatment for the following items:
 1. Documents
 - a. Petitioners' Pre-Hearing Stipulations, Sec. B. ¶¶ 1, 3, 4, 6, 11, 12, 25-29;
 - b. Petitioners' Supp. Pre-Hearing Stipulations, ¶¶ 1-4, 7-9, 24.
 2. Stipulations of Fact and Affidavit Fact Testimony
 - a. Rodriguez Aff., ¶ 34;
 - b. Hollis Aff., ¶¶ 13 & 52;
 - c. Hill Aff., ¶¶ 9, 11-16 & 24;
 - d. Kenzy Aff., ¶¶ 30 & 33-34;
 - e. Allie Aff., ¶¶ 29 & 68; and
 - f. Hendrick Aff., ¶¶ 15, 53, 57 & 59-60.
 3. Inter-Company Policy/Procedure Memoranda and Communications
 - a. Petitioners' Supp. Pre-Hearing Stipulations, ¶¶ 24-37;
 - b. Respondent's Pre-Hearing Stipulations, ¶¶ 55-69 & Exhibits, ¶ 40;
 - c. Rodriguez Aff., ¶¶ 29, 58;
 - d. Hollis Aff., ¶¶ 35-48, 105, 106;
 - e. Allie Aff., ¶¶ 51-64, 121-122.

4. Deposition Transcripts and Related Stipulations
 - a. Sterling Laney;
 - b. Leigh Anna Hollis;
 - c. Monica L. Allie;
 - d. John Hill;
 - e. Otis Meacham;
 - f. Sheila Cassady;
 - g. George Kenzy;
 - h. Petitioners' Supp. Pre-Hearing Stipulations, ¶¶ 40-45

CONCLUSIONS

1. Judicial and agency proceedings are presumed open to the public. This presumption arises from both constitutional and statutory foundations. The North Carolina Constitution requires that courts be open. N.C. Const. art. I, § 18; *see also, Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 462 (1999).
2. The Constitution permits the General Assembly to vest judicial powers in administrative agencies. N.C. Const. art. IV, § 3. The grant of judicial powers to the administrative agencies by the legislature as set forth in the Administrative Procedure Act includes a provision that hearings should be open to the public. N.C. Gen. Stat. § 150B-23(e); N.C. Gen. Stat. § 150B-38(e).
3. Chapter 132 of the North Carolina General Statutes, the Public Records Law, also demonstrates a strong bias in favor of disclosure. N.C. Gen. Stat. § 132-1.
4. The Banking Laws of North Carolina require that the Commissioner keep records of "his official acts, rulings and transactions," and make those records open to the public. N.C. Gen. Stat. § 53-99(a).
5. The presumption of openness is not absolute but rebuttable, however, and there are statutory exceptions to the general openness called for in the Administrative Procedure Act, the Public Records Law, and the Banking Law.
6. The State also has a strong public policy interest in keeping certain agency records confidential which conflicts with the general presumption of openness. One such policy interest is the encouragement of private entities to produce information which is useful to public officials in making well-informed decisions. *See, e.g., National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 770 (1974) (applying a trade secrets and commercial information exception to the federal Freedom of Information Act). Another interest is the need to protect the provider of the information from being competitively disadvantaged in the marketplace. *Id.* North Carolina has enacted laws which address both of these policy interests. A general rule which applies to all agencies permits them to withhold trade secrets from public dissemination. N.C. Gen. Stat. § 132-1.2(a).

7. The sensitivity of the records of banks and financial institutions, whether they are trade secrets or not, is recognized in N.C. Gen. Stat. § 53-99(b)(2). This statute requires the Commissioner to keep confidential records prepared for an investigation, or in anticipation of litigation. N.C. Gen. Stat. 53-99(b)(2). The OCOB has on this basis, for a number of years, vigorously protected the confidentiality of examinations and all other records of investigations it conducts concerning banks, consumer finance companies, and other regulated financial service providers in order to achieve its statutory mission.
8. Documents are considered trade secrets in North Carolina when “the documents at issue [1] contain valuable business information” and [2] the party seeking to protect the information “contends [the] information would be of actual value to . . . its . . . competitors and would cause irreparable competitive harm to [it].” If the party seeking to protect the information submits an affidavit from a consultant and “a verified complaint,” the evidence is considered sufficient to establish that the information is a trade secret. *North Carolina Elec. Membership Corp. v. North Carolina Dep’t of Economic & Community Dev.*, 108 N.C. App. 711, 718 (1993).
9. The Commissioner of Banks is not bereft of guidance in this matter with respect to how confidential materials are to be handled in the course of these proceedings. If evidence is ruled “confidential,” it is not subject to the Public Records law’s mandate of openness. This would mean that a confidential document or piece of evidence is kept secure and is not published voluntarily by the agency adjudicating the case, nor is it to be made available upon request as other public records would be. If protected evidence is relied upon in arriving at a decision in a given case, then it becomes a part of the record of the case, and, in the event of an appeal, the document is forwarded, the confidential portion being under seal, along with the rest of the record on appeal in the matter to the reviewing court or other appellate body, which in turn likewise holds the material in confidence absent a specific ruling contra.
10. If the document or other evidence ruled by the Commissioner in this case to be confidential were hereafter needed by a party to other litigation, then the forum court conducting that litigation could determine whether and under what circumstances the information previously held confidential by the Commissioner would be revealed pursuant to a valid order of that court.

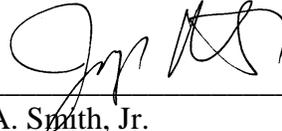
ORDER

It is therefore ordered that:

1. The materials in the evidentiary record in this case previously designated as confidential by action of counsel for either party shall be held as confidential and will not be released to the public, other than as required by law, absent the consent of the proponent of confidentiality. This continued treatment extends to all materials for which confidentiality is claimed by Respondent and to all reports of examination of licensees submitted by Respondent (if any).

2. The portions of the record for which a party in this proceeding has sought confidentiality which are relied upon by the Commissioner in his findings shall be carried forward on a confidential basis under seal, in the event of an appeal, as a part of the record on appeal.

This the 19th day of December, 2005.



Joseph A. Smith, Jr.
Commissioner of Banks

CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that he has this day served a copy of the foregoing Order by facsimile and by placing a copy of the same in the mail, at Raleigh, first class mail, postage prepaid and addressed to the persons listed below:

This the 19th day of December, 2005.



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