

CSEA's exceptions restate the arguments which it presented to the ALJ in support of its motion to seal documents. Lengthy discussion of these arguments is unnecessary, as the Board finds that the ALJ's ruling is well founded.

Additionally, CSEA asserts that the ALJ erroneously refers to a memo from Michael Hersh (Hersh) dated March 15, 1995. CSEA states that the memo in question was actually from Rosmaire Duffy to Hersh, and claims that this error affected the ALJ's legal analysis of the document.

The Board has read the memo in question, and it is evident that the ALJ merely switched the name of the recipient and sender. This inadvertent error does not affect the substance of the ALJ's analysis, in which he concludes that the document does not qualify for protection under the attorney-client privilege, as a trade secret, or under any other theory offered by CSEA. In discussing the March 15, 1995 memo, the ALJ correctly notes that the memo does not involve or contain attorney advice; he describes it as the writer's speculation about whether persons who attended a certain meeting were members of Caucus for a Democratic Union. This description is accurate and the ALJ's legal conclusion is unaffected by the fact that the memo was written to an attorney rather than by an attorney. The Board, therefore, adopts the ALJ's denial of the motion to seal documents.²

²The Board adopts the entire Order Denying Motion to Seal Documents with the exception of the following text: the last paragraph on page 14 and the first 6 lines on page 15. The Board

Request for Order to Re-open Record

CSEA also requests the Board to re-open the record to take judicial notice of the Board's own records under PERB Regulation 32320³. That regulation permits the Board to "order the record re-opened for the taking of further evidence, or take such other action as it considers proper." Although this regulation provides the Board with broad discretion, there is no compelling reason to exercise that discretion here. The ALJ thoroughly considered a voluminous factual record, and his legal conclusions are consistent with precedent. CSEA presents no persuasive reason that "further evidence" of any kind will assist the Board in resolving this case.

The Board, therefore, denies CSEA's request to re-open the record.

ORDER

The Board hereby AFFIRMS the ALJ's Order Denying Motion to Seal Documents and DENIES California State Employees Association's Request to Re-open the Record in Case No. SA-CO-211-S.

Members Dyer and Baker joined in this Decision.

makes no ruling with regard to PERB's ability to seal documents which are in wide circulation.

³PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



JIM HARD AND CATHY HACKETT,)
)
Charging Parties,) Unfair Practice
) Case No. SA-CO-211-S
v.)
) ORDER DENYING MOTION
CALIFORNIA STATE EMPLOYEES) TO SEAL DOCUMENTS
ASSOCIATION,)
)
Respondent.)
_____)

Appearances: Jim Hard and Cathy Hackett, in pro per; Michael P. White, Attorney, for California State Employees Association.

NOTICE hereby is given that the motion of the California State Employees Association (CSEA) to seal certain documents filed as attachments to the above unfair practice charge and introduced as exhibits in the hearing is DENIED.

Throughout this proceeding, CSEA has sought an order to seal certain documents contained in the record. These documents were attached to the charge and then became exhibits during the hearing. CSEA made its initial motion on May 24, 1999, to seal certain documents attached to the charge. This motion was denied by the undersigned on July 15, 1999. The motion was renewed at the hearing and expanded to include Charging Party Exhibit 4. The motion was again denied.¹ CSEA refiled the motion in a much abbreviated form on November 8, 1999.

Described below is each of the documents identified in CSEA's November 8, 1999, motion to seal, together with a summary of the testimony of CSEA's custodian of documents, Controller

¹See Reporter's Transcript, Volume I, at pp. 43-48.

Patrick Haagensen, about the documents:

---Memo from Barbara Glass to Mr. Haagensen, dated December 3, 1992, authorizing and setting out justification for Perry Kenny's housing allowance.² Mr. Haagensen testified that the document is a business record, not available to the membership because it concerns "the reimbursement or expense transaction which, by CSEA policy, is confidential." The memo is not marked "confidential."

---Memo from Ms. Glass to Mr. Haagensen, dated November 9, 1994, authorizing an increase in Mr. Kenny's housing allowance.³ Mr. Haagensen testified that the document is a business record, not available to the membership because it concerns a "confidential transaction, monetary transaction." The memo is not marked "confidential."

---Memo from Ms. Glass to Mr. Haagensen, dated June 7, 1996, discontinuing Mr. Kenny's housing allowance.⁴ Mr. Haagensen testified that the document is a business record, not available to the membership because it concerns a "confidential monetary transaction." The memo is not marked "confidential."

---Memo from Mr. Kenny to the Executive Committee of the CSEA Board of Directors, dated October 19, 1998, by which he transmitted copies of the contracts of two prior CSEA general managers, a proposed contract for Mr. Haagensen and certain other

²Charging Party Exhibit 4 at p. 47.

³Charging Party Exhibit 4 at p. 48.

⁴Charging Party Exhibit 4 at p. 51.

related documents.⁵ Mr. Haagensen testified that the document is a business record, not available to the membership because it concerns a "confidential personnel transactions." The memo is marked "confidential."

---Memo from Jim Hard to the Civil Service Division Council, dated October 22, 1998, by which he analyzed and critiqued the proposed contract of Mr. Haagensen to secure his service as general manager of CSEA.⁶ Mr. Haagensen testified that the document is a business record, not available to the membership because it concerns a "confidential personnel transactions." The memo is not marked "confidential."

---Memo from Bill Cook, CSEA staff employee, to Tut Tate, CSEA Civil Service Division Administrator, dated July 24, 1992, describing the distribution of leaflets in front of a State building.⁷ Mr. Haagensen testified that the document is a business record, not available to the membership because it "[h]as to do with internal strategies, with regard to CSEA and its bargaining units." The memo is not marked "confidential."

---Memo from Mr. Cook to Bob Zenz, former CSEA general manager, dated August 24, 1992, describing conversations with

⁵Charging Party Exhibit 4 at p. 60. The documents described in the memo as attachments are not a part of Exhibit 4.

⁶Charging Party Exhibit 4 at pp. 61 and 62.

⁷Charging Party Exhibit 4 at p. 69. The leaflet discussed in the memo is a Caucus for a Democratic Union (CDU) flier and is p. 70 of Exhibit 4.

various CSEA managers about the distribution of a CDU flyer.⁸ The memo is marked "confidential." Mr. Haagensen testified that the document is a business record, not available to the membership because it is marked confidential and because it "is about the Caucus for a Democratic Union and suspicions on the staff that this is a decertification effort."

---Memo from Virginia Guadiana, CSEA manager, to CSEA area managers, dated October 29, 1992, directing the staff to perform closer surveillance of CDU activity.⁹ The memo is marked "confidential." Mr. Haagensen testified that the memo is not available to membership because it is marked "confidential" and "also addresses some internal organizing that was going on by the Caucus for a Democratic Union and the staff's concern about it being a decertification effort."

---Memo from "Committee Assigned to CDU" to Ms. Tate, dated December 15, 1992, in which CSEA staff managers on the committee set out their analysis of CDU, its operation and goals and appropriate responses from CSEA.¹⁰ The memo is marked "confidential." Mr. Haagensen testified that the memo is not available to the membership because "[i]t's marked confidential and addresses CSEA's concern that . . . there was a move by CDU to decertify."

⁸Charging Party Exhibit 4 at p. 73.

⁹Charging Party Exhibit 4 at p. 74.

¹⁰Charging Party Exhibit 4 at pp. 75-82.

---Memo from Rosmarie Duffy, a CSEA staff employee, to Mr. Zenz, dated January 13, 1993, reporting an increase in member questions about allegations made in CDU publications.¹¹ The memo is marked "confidential." Mr. Haagensen testified that the memo is not available to the membership because "it is marked confidential and addresses the activities of CDU, which CSEA believed was attempting to decertify it."

---Memo from the "Know Your Union" Committee to Ms. Tate, dated January 25, 1993, reporting on plans to increase CSEA educational efforts with members as a way of combatting CDU.¹² The memo is marked "confidential report." Mr. Haagensen testified that the memo is not available to the membership because it is "identified as a confidential report, and similarly addresses CDU activities within CSEA, and CSEA's suspicion that the CDU was attempting to decertify it."

---"Confidential Report," dated April 26, 1993, by "an ad hoc committee" that met to deliberate about activities of the CDU.¹³ Neither author(s) or recipient(s) of the report are identified. Mr. Haagensen testified that the report is a business record of CSEA but also acknowledged the possibility that it is not a business record.

---Memo from Ed Hernandez, CSEA staff, to Mr. Zenz, dated April 27, 1993, recommending the preparation of a legal analysis

¹¹Charging Party Exhibit 4 at p. 83.

¹²Charging Party Exhibit 4 at pp. 84-88.

¹³Charging Party Exhibit 4 at pp. 89-90.

in order to "formulate a just and proper method to combat the actions of CDU."¹⁴ The memo is marked "confidential." Mr. Haagensen testified that the memo is not available to the membership because "[i]t's addressed -- marked confidential and the subject matter of CDU activities, CSEA believed CDU was attempting to decertify it."

---Ideas from CSEA central area office staff meeting, of March 22, 1993.¹⁵ The document consists of brief statements, most of them six words or fewer consisting of ideas for improving the visibility and internal operations of CSEA. Neither the author(s) nor the recipient(s) is (are) identified. The document is not marked "confidential." Mr. Haagensen testified the document is not available to the membership because "[i]t addresses the subject of CDU activities; CSEA believed CDU was attempting to decertify it, it's a strategy related to that."

---Ideas from CSEA coastal area office staff meeting, of March 26, 1993.¹⁶ The document consists of brief statements, most of them six words or fewer consisting of ideas for improving the visibility and internal operations of CSEA. Neither the author(s) nor the recipient(s) is (are) identified. The document is not marked "confidential." Mr. Haagensen testified the document is not available to the membership because it

¹⁴Charging Party Exhibit 4 at pp. 91-93.

¹⁵Charging Party Exhibit 4 at pp. 94-96.

¹⁶Charging Party Exhibit 4 at pp. 97-98.

"[p]ertains to CSEA's perception that CDU was attempting to decertify it and its strategies related to that."

---Ideas from CSEA joint meeting of staff members from Fullerton and Los Angeles, January 23, 1993.¹⁷ The document consists of brief statements, most of them six words or fewer consisting of ideas for improving the visibility and internal operations of CSEA. Neither the author(s) nor the recipient(s) is (are) identified. The document is not marked "confidential." Mr. Haagensen testified the document is not available to the membership because it "[p]ertains to CSEA's perception that CDU was attempting to decertify it and its strategies related to that."

---Memo from CSEA staff employee Anna Kammerer to Mr. Cook dated May 26, 1993, and forwarding memo to Mr. Zenz regarding CDU leafleting activities outside a State building in Sacramento.¹⁸ The forwarding memo is marked "confidential" although the memo from Ms. Kammerer is not so marked. Mr. Haagensen testified the Kammerer memo and cover memo to Mr. Zenz were not available to the membership because "[i]t's marked confidential and we don't distribute things to the membership at large marked confidential. It also has a reference to CDU activity; CSEA believed CDU was attempting to decertify it."

---Memo from Karen Cole to Mr. Cook, dated June 24, 1993, regarding questions she was asked during a meeting with State

¹⁷Charging Party Exhibit 4 at p. 99.

¹⁸Charging Party Exhibit 4 at pp. 102-103.

employees about statements made in CDU flyers.¹⁹ The memo is not marked "confidential." Mr. Haagensen testified that the memo is not available to the membership because it "[h]as to do with CSEA's strategy with regard to opposing what it perceived to be an effort by CDU to decertify it."

---Letter dated September 14, 1993, from Frank Guilelmino to Burton Oliver, executive director of the State Board of Equalization (BOE), complaining about the distribution of literature by Mr. Hard and Cathy Hackett in the lobby of the BOE building.²⁰ The letter is not marked "confidential." Mr. Haagensen testified that CSEA would not consider the letter public although he acknowledged that Mr. Oliver might do so. Mr. Haagensen also testified that he did not know if the letter would be available to CSEA members. But he said it was "a strategy and could be lumped with those others . . . where we are not prone to disclose our strategy with regard to stopping decertification efforts."

---Memo from Ms. Tate to Mr. Zenz, dated October 26, 1993, entitled "Preparation for Meeting with Loren McMaster," an attorney who had been hired to represent CSEA in dealings with CDU.²¹ The memo is not marked "confidential." Mr. Haagensen testified that the memo is not available to the membership because it "[h]as to do with preparation for a meeting with

¹⁹Charging Party Exhibit 4 at p. 114.

²⁰Charging Party Exhibit 4 at pp. 123-124.

²¹Charging Party Exhibit 4 at pp. 125-126.

counsel." He said its release to members would reveal CSEA strategies.

---Notes from executive session of the CSEA Board of Directors, May 1, 1993, setting out a motion adopted by the board regarding discipline or legal action against any member whose activities "could adversely affect CSEA."²² The notes are not marked "confidential." Mr. Haagensen testified that the notes were a record of what occurred at an executive session of the Board of Directors which are confidential and are not reported in the detail of the document.

---Memo from Judie O'Nan-Roth to Ms. Guadiana, dated February 14, 1994, which describes events at a CDU meeting held on February 8, 1994, at a State building in Sacramento.²³ The memo, which is not marked "confidential," quotes Mr. Hard as stating that CDU did not want to replace CSEA but supported CSEA and wanted to reform CSEA. Mr. Haagensen testified that the memo is a business record, not available to the membership because it "has to do with CSEA's strategy in watching CDU for a potential decertification attempt."

---Memo from Isaac Gonzalez to Ms. Guadiana, dated February 15, 1994, which describes events at a CDU meeting held on February 10, 1994, at a State building in Sacramento.²⁴ The memo was not marked "confidential." Mr. Haagensen testified that

²²Charging Party Exhibit 4 at p. 128.

²³Charging Party Exhibit 4 at p. 143.

²⁴Charging Party Exhibit 4 at p. 144.

the memo is a business record, not available to the membership because it "[p]ertains to CSEA's strategy regarding opposing CDU's decertification attempt."

---Memo from Jeff Young to Ms. Guadiana and Mr. Guilelmino, dated February 24, 1994, which describes events at a CDU meeting held on February 9, 1994, at a State building in Sacramento.²⁵ The memo was not marked "confidential." Mr. Haagensen testified that the memo is a business record, not available to the membership because it "[p]ertains to CSEA's strategy with regard to opposing CDU as a potential decertification."

---Memo from Maria Basulto to Ms. Guadiana and Mr. Guilelmino, dated March 1, 1994, about a conversation she had with a member about comments by Mr. Hard at a CDU meeting on February 15, 1994, at a State building in Sacramento.²⁶ The memo was not marked "confidential." Mr. Haagensen testified that the memo is a business record, not available to the membership because it "[h]as to do with CSEA's strategy in opposing CDU as a potential decertification attempt."

---Memo from Mike Hirsch, CSEA staff attorney, to Ms. Duffy, dated March 15, 1995, regarding whether certain persons who attended a CSEA committee meeting on February 10, 1995, were members of CDU.²⁷ The memo was marked "confidential." Mr. Haagensen testified that the memo is a business record, not

²⁵Charging Party Exhibit 4 at p. 145.

²⁶Charging Party Exhibit 4 at p. 146.

²⁷Charging Party Exhibit 4 at p. 147.

available to the membership because "it's marked confidential" and is a "communication between a staff member and an attorney."

---Memo from Ms. Duffy, to Joan Bryant, CSEA manager of bargaining services, dated June 16, 1995, regarding positions on collective bargaining proposals that Ms. Duffy expected unit 1 negotiators to take at a forthcoming meeting.²⁸ The memo was marked "confidential." Mr. Haagensen testified that the memo is a business record, not available to the membership because "it's marked confidential" and "has to do with bargaining strategy."

---Letter from CSEA attorney Loren McMaster to Caucus for a Democratic Union, dated November 2, 1993, asking CDU to respond to certain questions and make a specific financial accounting.²⁹ The letter was not marked "confidential." Mr. Haagensen testified that although in his opinion the letter was not a business record, it would not be available to the membership because "[p]ertains to CSEA's concerns and strategy with regard to keeping the Caucus for a Democratic Union from participating in activities which it believes is not within the SEIU constitution and other matters."

CSEA argues that the documents identified above are trade secrets which CSEA is entitled to keep confidential under Evidence Code section 1060. CSEA asserts that the Public Employment Relations Board (PERB or Board) is permitted to seal the documents under section 6254 of the California Public Records

²⁸Charging Party Exhibit 4 at p. 149.

²⁹Charging Party Exhibit 4 at pp. 150-151.

Act. Citing an opinion of the California Attorney General³⁰ CSEA argues that a public record may be withheld "where, on the facts of the particular case, the public interest served by not making the record public clearly outweighs the public interest served by disclosure."

Citing the testimony of Mr. Haagensen, CSEA argues it must keep the documents private in order "to effectively maintain its membership base and its competitive position in the labor representation market, and in order for it to better serve its members." CSEA describes the documents and private records of individual members, privileged communications between itself and its attorneys and confidential internal correspondence and business records between management and staff. CSEA characterizes the documents as "relating to business strategies to defend itself against what it believes to be competitive threats to its continued effectiveness or existence."

When such information is submitted as part of a public record, CSEA contends, it may be sealed upon a proper showing, pursuant to a countervailing public policy or statute. Citing the Uniform Trade Secrets Act,³¹ CSEA argues PERB like a court is required to preserve the secrecy of "an alleged" trade secret by reasonable means including the sealing of the records. CSEA argues that the documents at issue have "economic value to any competitor of CSEA, a value which CSEA will lose if it is

³⁰53 Ops.Atty.Gen 258.

³¹Civil Code section 3426 et seq.

subjected to public disclosure." CSEA argues that as a corporation CSEA has the right to determine which documents merit confidentiality as legitimate business records and which can be released publicly.

CSEA argues that at the time many of the documents were prepared, it feared that it was facing a decertification threat. The documents reveal the actions CSEA took to counter that threat and, CSEA argues, would therefore be valuable information to any competitor who might in the future seek to decertify CSEA.

In their opposition to the supplemental motion to seal, Mr. Hard and Ms. Hackett quote heavily from the decision of the administrative law judge (ALJ) in unfair practice case SA-CO-201-S, Jim Hard and Cathy Hackett v. California State Employees Association. There, the ALJ refused a similar request by CSEA to seal these very same documents and other documents.

Reasserting arguments originally made in response to CSEA's original request to seal, the charging parties argue that "even the most cursory review" will reveal that the documents are neither confidential nor trade secrets. "These documents are merely embarrassing to CSEA," Mr. Hard and Ms. Hackett argue. Moreover, they continue, CSEA has failed to meet the requirements of the cases it has cited. CSEA has not demonstrated "exceptional circumstances," the charging parties assert. "Respondent has merely established that revealing these documents would be embarrassing."

Furthermore, Mr. Hard and Ms. Hackett continue, the documents do not meet the statutory definition of a trade secret because they have no economic value. Even if they did, the charging parties continue, the documents "were disclosed and known in the public domain and therefore lost any trade secret value they might have had."

CSEA offers differing reasons for sealing the 28 documents identified in the motion. It describes the documents pertaining to Mr. Kenny's housing allowance and Mr. Haagensen's proposed contract as confidential personnel information. It describes the documents pertaining to the approval by CSEA officers of Mr. Kenny's housing allowance as confidential business records. It describes various memoranda pertaining to the activities of CDU as confidential business records. It describes every memo and letter written by an attorney as a communication protected the attorney-client privilege. Collectively, it describes all the documents as trade secrets.

Even if I found merit to CSEA's arguments, which I do not, I do not believe PERB can or should seal documents which already are in wide circulation. As the charging parties observe, the "spy memos" and the Perry Kenny house documents were widely distributed at the 1998 CSEA General Council. All or parts of them were incorporated into the record in other PERB cases. At least one of the documents first was introduced into PERB files nearly five years ago in the hearing that led to the Board's decision in California State Employees Association (Hackett, et

al.) (1995) PERB Decision No. 1126-S. In addition, CSEA itself re-circulated all of the documents when it attached them to the charges filed against Mr. Hard by Mr. Alari and Ms. Glass. To claim at this late date that CSEA will suffer harm if PERB does not seal them ignores the fact that the documents already are irretrievably in circulation.

I conclude, moreover, that none of the documents identified by CSEA in its motion qualify for protection under the attorney-client privilege or as trade secrets. There are two documents written by an attorney, a March 15, 1995, memo from CSEA staff attorney Hirsch to Ms. Duffy, and a November 2, 1993, letter from attorney McMaster to CDU. The Hirsch memo contains no attorney advice to a client; it is an attorney staff member's speculation about whether persons who attended a certain meeting were members of CDU. The McMaster letter was sent to CDU, not to the client CSEA and thus is not an attorney-client communication.

It is equally apparent that the disputed documents do not qualify as trade secrets. A "trade secret" is defined in Civil Code section 3426.1(d) as information,

including a formula, pattern, compilation, program, device, method, technique, or process that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Plainly, the documents at issue here contain no "formula, pattern, compilation, program, device, method, technique or process.". They are internal CSEA commentary and observations about CDU and expressions of how CSEA should respond to CDU. The alleged fear that CSEA has about circulation of the documents is that they reveal how CSEA would respond to a decertification attempt. CDU already is in possession of the documents and no protection will come to CSEA from CDU by sealing PERB's records.

There is no evidence either that the various internal memoranda have any economic value to some other union or group. CSEA makes generalizations about how the information would assist another organization that might at some future date attempt to decertify CSEA. How this might be is entirely unclear. Most of the documents are five to seven years old and they reveal nothing about current CSEA plans or strategies. What they show is that when faced by a possible decertification attempt CSEA seeks to gather information about the potential adversary and those who belong to it. That CSEA would take such steps hardly qualifies as a trade secret.

Neither does the alleged personal information about Mr. Kenny and Mr. Haagensen qualify as a protected trade secret. CSEA would find some trade secret in how it compensates its managers. Such information, while obviously of personal interest to the affected employees, does not qualify under the statutory definition of a trade secret.

Accordingly, the motion for an order sealing confidential documents contained in Charging Party Exhibit 4 is denied. The documents will remain in PERB files as open public records in accord with the provisions of the California Public Records Act. (Section 6250 et seq.)

Pursuant to California Code of Regulations, title 8, section 32305, this Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Order. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last

day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit.8, sec. 32135(d); provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

DATED: January 28, 2000

RONALD E. BLUBAUGH
Administrative Law Judge