UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON FEDERATION OF TEACHERS, LOCAL 2415, *ET AL.*, *Plaintiffs*,	§	
vs.	§	CIVIL ACTION H-14-1189
HOUSTON INDEPENDENT SCHOOL DISTRICT, *Defendant*.	§	

ORDER

This case is before the court on plaintiffs' motion (Dkt. 51) for interpretation of the protective order entered September 28, 2015 (Dkt. 47-1). After considering the parties' submissions and argument of counsel at a hearing on March 9, 2016, the motion is granted as set forth below. In accordance with this ruling, plaintiffs' related motions to seal (Dkts. 52, 56) are denied, and SAS's motion for contempt sanctions (Dkt. 54) is denied.

Background

Houston Federation of Teachers (HFT) and individual plaintiffs are suing the Houston Independent School District (HISD) alleging, among other things, that HISD's use of EVAAS to make important employment decisions, including termination and bonus decisions, violates teachers' rights under the Fourteenth Amendment. EVAAS is a proprietary value-added methodology owned by SAS Institute, Inc., a non-party to this suit. Plaintiffs allege that EVAAS uses a "complex and opaque methodology," and that without specific information regarding the rules

and methodology used by EVAAS, information not available even to HISD, "it is impossible for a teacher to be able to examine or replicate the analysis, verify the analysis and the resulting score, establish that an alternative value-added model would show that the teacher's students showed academic growth, establish that the assigned score is an unreliable measure, or effectively challenge the analysis performed by SAS® or the resulting EVAAS® score."[1]

The Protective Order

SAS and HFT negotiated a protective order to facilitate discovery in this case. The protective order permits SAS to designate certain information for "Attorney Eyes Only."

> 'Attorney Eyes Only shall be reserved for SAS information that is deemed to constitute trade secrets and/or proprietary information. For purposes of this order, so-designated information of SAS includes, but is not limited to, source code, models or modeling, analysis of models, programming, design information, methodologies, financial data, operational data, business plans, competitive analyses, personnel files, personal information that is protected by law, and other sensitive information that, if not restricted as set forth in this order, may subject SAS to competitive or financial injury or potential legal liability to third parties.[2]

The protective order further provides:

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[1] Dkt. 1 at 13, 22.

[2] Dkt. 47-1 at 1-2.

> Attorney Eyes Only Information shall not be disclosed outside of the context of this litigation, and experts and attorneys may not, outside of the context of this litigation, present observations or conclusions that could not have been made in the absence of their review of Attorney Eyes Only Information.[3]

The Alleged Violations

After entry of the protective order, plaintiffs' expert, Dr. Jesse Rothstein, was allowed to view SAS source code on a lap top in the office of SAS legal counsel in San Francisco in October 2015. Another plaintiffs' expert, Dr. Audrey Beardsley, did not review the source code. Plaintiffs served the expert reports of Rothstein and Beardsley on HISD in November 2015; the reports have not been filed with the court.

In January 2016, HFT published an "EVAAS Litigation Update."[4] This update summarized a portion of Rothstein's expert report in which he concludes that "[a]t most, a teacher could request information about which students were assigned to her, and could read literature -- mostly released by SAS, and not the product of an independent investigation -- regarding the properties of EVAAS estimates. HISD teachers do not have the ability to meaningfully verify their EVAAS scores."[5]

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[3] Dkt. 47-1 at 8. For an unexplained reason, this language is contained in a section labeled "Conclusion of Litigation."

[4] Dkt. 52-2.

[5] *Id.* at 7.

On January 10, 2016, Beardsley posted an update on her blog "Vamboozled" summarizing what she considered the twelve key highlights of HTF's January 2016 Litigation Update.[6] Highlight 12 summarizes Rothstein's conclusion regarding the inability of teachers to verify scores.[7]

Analysis and Conclusion

SAS concedes that no "Attorney Eyes Only Information" was revealed in the Litigation Update or Beardsley's blog post. However, SAS contends that the publications wrongfully disclose observations or conclusions that could not have been made in the absence of the review of Attorney Eyes Only Information.

SAS interprets the protective order too broadly in this instance. Rothstein's opinion regarding the inability to verify or replicate a teacher's EVAAS score essentially mimics the allegations of HFT's complaint. The Litigation Update made clear that Rothstein confirmed this opinion after review of the source code; but it is not an opinion "that could not have been made in the absence of the review" of the source code. Rothstein has testified by affidavit that his opinion is not based on

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6 Dkt. 52-3.

7 *Id.* at 20.

anything he saw in the source code, but on the extremely restrictive access permitted by SAS.[8]

In order to prevent further disputes of this type, HFT proposes the addition of the following sentence in the protective order: "Nothing in this Order shall prevent the plaintiffs, their experts and attorneys, from disclosing the conclusions or findings of experts, provided that no Attorney Eyes Only Information is disclosed."

SAS objects that adoption of this language is inappropriate, and would eliminate the negotiated provision of the protective order covering conclusions and observations that could not have been reached without review of Attorney Eyes Only Information. The court disagrees.

A protective order is appropriate to protect proprietary, trade secret information from disclosure. FED. R. CIV. P. 26(c)(1)(G). This particular protective order was drafted to protect conclusions and observations "that could not have been reached without review" of proprietary, trade secret information. The evident purpose of this provision was to guard against the competitive harm that even implicit disclosure of a trade secret might cause. That is a legitimate purpose, but even SAS concedes that neither the Litigation Update nor the related blog post disclosed anything that might legitimately be called trade secret or proprietary, either explicitly or by necessary

[8] Dkt. 56-1.

implication. On the other hand, the overly broad interpretation urged by SAS would inhibit legitimate discussion about the lawsuit, among both the union's membership and the public at large. In order to avoid that unfortunate result, the court agrees that the clarification proposed by HFT, as slightly modified, is appropriate.

The court therefore orders that the following sentence be inserted at the end of section 8 of the protective order:

> Nothing in this order shall prevent the plaintiffs, their experts, and attorneys from disclosing the conclusions or findings of experts, provided that no Attorney Eyes Only Information is disclosed, either explicitly or by necessary implication.

Signed at Houston, Texas on March 10, 2016.

Stephen Wm Smith
United States Magistrate Judge