

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

**Sup Court File No. 20220036
Burleigh County Civil No. 08-2020-CV-02788**

Energy Transfer LP and,)
Dakota Access LLC,)
)
Plaintiffs and Appellants,)
)
v.)
)
North Dakota Private,)
Investigative and Security)
Board and TigerSwan, LLC;)
)
Defendants and Appellees)
)
First Look Institute, Inc.,)
)
Intervenor.)

BRIEF OF TIGERSWAN, LLC

On Appeal from Order on Cross-Motions for Summary Judgment, Docket No. 359, entered by the District Judge Cynthia Feland, Burleigh County District Court, State of North Dakota, in Civil Case No. 08-2020-CV-2788. Order on Rule 54(B) Motion and Stay Pending Appeal was granted, Docket No. 385, by the District Judge Cynthia Feland, Burleigh County District Court, State of North Dakota, in Civil Case No. 08-2020-CV-2788 on January 20, 2022.

Oral Argument Requested

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Rules

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Rule 509 of the Rules of Evidence	¶17
Administrative Rule 41, Section 5, (f)(1)	¶17

¶1 Statement of the Issues

1. Whether the documents provided by TigerSwan are not “Public” Records.
2. Whether the Agreement between TigerSwan and the Board’s Counsel should be enforced and as such the records should have been immediately returned to TigerSwan and never be considered public records.
3. Whether First Look’s argument that ETP has an adequate remedy should be rejected and the court should dismiss ETP’s claim for damages against TigerSwan as a matter of law.

¶2 Statement of the Case

¶3 This case involves the Board filing an administrative action against TigerSwan, asserting that some of its activities in the state of North Dakota required licensure from the Board. TigerSwan disputed that any of its activities required it to be licensed in North Dakota because it was not performing private investigative or private security functions, as defined by state law, in the state of North Dakota. TigerSwan timely and appropriately objected to the discovery requests of the Board by filing a listing of specific objections, making a motion for protective order, and following the administrative law judge’s order requiring that the documents be provided (or TigerSwan’s Answer would be stricken and the Board would be authorized to move directly into the punishment phase), TigerSwan

attempted to protect ETP's interests by asking the administrative law judge to seal the documents that were being provided under protest.

¶4 Statement of the Facts

¶5 Despite an affidavit submitted by a TigerSwan executive (R:276:1) indicating that the documents include confidential and fiduciary matters – including information relating to confidential informants – the Administrative Law Judge denied TigerSwan's request to seal the documents. The steps taken by TigerSwan to protect the interests of ETP were proper, and any mischaracterization by ETP of TigerSwan's efforts is inappropriate and unwarranted. Significantly, TigerSwan had no knowledge of the electronically stored documents until a few days before they were required by court order to produce all documents. The following is the timeline and a delineation of the steps taken by TigerSwan to protect the documents and ETP's interest:

1. Prior to providing the documents at issue, TigerSwan had for many months – by motions and formal objections – objected to TigerSwan having to provide any documents to the Board on the grounds that the Board should be required to prove its case without compelling TigerSwan to provide evidence that could be used against TigerSwan.

2. TigerSwan was forced to provide the documents on June 1, 2020, based on the ALJ's order which provided that failure to substantially comply with her previous discovery order would result in TigerSwan's Answer being stricken.

3. On May 26, 2020, TigerSwan requested an extension from the ALJ of an additional week as to producing the documents (which were due on May 28). On May 27, 2020, the ALJ granted an extension of four extra days, and as such TigerSwan had only three days – over a weekend – to finalize the production of the documents by drop box.

4. A few days before the deadline for providing all documents in TigerSwan’s possession relating to DAPL, TigerSwan’s IT person discovered an electronic file containing thousands of documents relating to DAPL, almost all of which were technically owned by ETP.

5. In order to attempt to protect ETP’s interests – while nonetheless complying with the ALJ’s order – TigerSwan in conjunction with the production of the documents made a motion for the documents to be sealed until such time as the documents could be reviewed and any issues relating to the documents were resolved by the ALJ.

¶6 TigerSwan was required to provide the documents by court order. TigerSwan’s attorney professionally and competently objected to the discovery through substantive motions and briefs. But once the ALJ had ruled, TigerSwan was required to comply with the court’s order.

¶7 Argument

¶8 I. The Documents Provided by TigerSwan are not “Public” Records

¶9 First, the issue of whether documents provided in discovery to a state entity (which are appropriately considered to be private documents until provided to the public entity) is an issue of first impression. In our

view, the lower court mistakenly focused on the concept of whether the documents are “a record,” as opposed to whether the documents are *public* records. To this end, TigerSwan argued that the records we provided to the Board are not public records. In our view, the lower court incorrectly focused on defining the word “records” instead of whether they are public records.

¶10 We assert that ETP’s private records continue to be private records unless they were actually used by the Board in regards to an administrative action against TigerSwan, such as attaching a particular document to the complaint against TigerSwan, or using a particular document as exhibit at a public hearing against TigerSwan. There is no question that the documents and materials provided by TigerSwan to the Board were the private records of ETP. We asserted to the district court judge that “a monkey wearing a robe is still a monkey.” T. 1-12-22 at 26. The nature of these documents continued to be private documents regardless if they were sitting in a file in the Board's office or with the Board's attorney. TigerSwan argued to the district court that these records have always been private records, and unless they are used in conjunction with the public function, they remain private records. The lower court erred in not adopting this position.

¶11 This issue is of first impression as whether a private record “automatically” becomes a public record, even though it was never used as part of the administrative government function. To rule as the district court did here that every single document provided to any public entity automatically becomes a public document, regardless of its use or original nature, creates an absurd result that is contrary to the purpose of the open records laws; indeed, such an interpretation swallows in whole the entire rule and fails to take into account the use of these documents in conjunction with some public function. The process of discovery by a public entity should not be allowed to create wholesale disclosure of confidential and proprietary information, and most certainly not in a situation such as here where the information and materials provided were not used by the Board in any formal administrative matter. (The case against TigerSwan was settled with the Board a few months after the disclosure, without the Board actually using any of the documents in conjunction with its administrative function.)

¶12 II. The Agreement between TigerSwan and the Board’s Counsel Should be Enforced and as such the Records Should have been Immediately Returned to TigerSwan and Never be Considered Public Records

¶13 Without conceding to any of the allegations made by First Look Media against TigerSwan, TigerSwan asserts that the records should not be considered to have become public records based on the promise and assertion of the Board's counsel that the records would remain confidential and not be disclosed in any way to the public, and the ALJ's and TigerSwan's reliance on that promise and agreement made by the Board through its attorney. The documents should be considered as confidential and under seal upon their receipt and given the ALJ and TigerSwan's reliance on that promise, the discovery materials should not have ever been allowed by the Board to enter the public domain. The district court erred by not issuing an Order pro nunc tunc to the date the materials were provided to the Board; by doing so, the materials never would have reached the public domain and the open records provisions would not apply.

¶14 This Court should enforce that agreement by entering an Order Pro Nunc Tunc as of June 1, 2020 and order the immediate return of all the discovery provided to the Board on June 1, 2020. Such an Order would mean that the documents never became public records – resulting in this case being resolved in its entirety and upon the return of the documents to ETP closed.

¶15 The law understandably places great importance on the enforcement of contracts between individuals. Within the legal process itself, courts have universally placed even greater importance on the enforcement of agreements made by counsel as well as enforcement of settlements reached by and through the attorneys. Due to the desire to resolve issues and foster resolution of matters, there is a strong policy in favor of enforcing agreements made between parties as well as holding attorneys to their promises and commitments. In this case – in conjunction with a motion to seal the documents at issue at the time those materials were provided to the Board – the Board’s attorney asserted and promised that the materials would remain confidential and that sealing the documents was not necessary. The ALJ also relied on that commitment in deciding that sealing the documents and keeping them protected from the moment they were provided was unnecessary. Counsel for the Board subsequently unilaterally reneged on this commitment. This Court should enforce that promise, issue an Order sealing the materials upon receipt by the Board’s attorney (which retains full confidentiality, as promised), and then return the documents to ETP. Such an Order would also mean that the documents never became public records, resulting in this matter being resolved in its entirety and closed upon the return of the documents to ETP.

¶16 Any agreements made by a party by or through counsel should be enforced. The Board's attorney promised to keep the documents confidential; the ALJ relied on that promise. This Court should enforce that promise, issue an Order nunc pro tunc to June 1, 2020, declare the materials as retaining confidentiality, and require the Board to return the materials. It is axiomatic that clients are bound by their agreements (particularly in regards to settlement) and that parties are bound by the agreements of their attorneys. A lawyer's word is his bound, and if for any reason that lawyer decides to renege on any agreement, the other party must receive the benefits of that promise and placed back in the position had the promise been kept, which here would mean that the materials would retain their confidentiality and be returned. The public policy for such a result has been mentioned numerous times by the North Dakota Supreme Court:

[¶13] "A settlement agreement is a contract between parties, and thus contract law applies." *Lund v. Swanson*, 2021 ND 38, ¶ 9; see also *Kuperus v. Willson*, 2006 ND 12, ¶ 11, 709 N.W.2d 726. "In North Dakota, the law looks with favor upon compromise and settlement of controversies between parties, and where the settlement is fairly entered into, it should be considered as disposing of all disputed matters which were contemplated by the parties at the time of the settlement." *Kuperus*, at ¶ 10 (quoting *Vandal v. Peavey Co.*, 523 N.W.2d 266, 268 (N.D. 1994)); see also *Thomas C. Roel Assoc., Inc. v. Henrikson*, 295 N.W.2d 136, 137 (N.D. 1980). "When a settlement is fairly made before trial, it takes on the character of a contract between the parties and is final and conclusive, and based on good consideration." *Kuperus*, at ¶ 10 (quoting *Bohlman v. Big River Oil*

Co., 124 N.W.2d 835, 837 (N.D. 1963)). "A settlement will not be set aside absent a showing of fraud, duress, undue influence, or any other grounds for rescinding a contract." *Id.* (citing Bohlman, at 837-39).

Ryberg v. Nodak Insurance Co., 2021 ND 56.

¶17 TigerSwan and Reese made an expedited and emergency motion to seal discovery materials provided to the Board's counsel from TigerSwan on June 1, 2020. **ATTACHMENT 1 & 2 – Motion (R:323) and Brief in Support of Motion to Seal 6-1-21 (R:324).** Rule 26(c)(1)(G) allows the ALJ to seal or restrict access or distribution of confidential materials. This request was made because the documents provided to the Board include information that is highly confidential, including names of informants who provided information to law enforcement and Energy Transfer Partners. **ATTACHMENT 3 – Affidavit of James Reese 6-1-21 (R:325).** (We note that Rule 509 of the Rules of Evidence may be used by the State or governmental entities to prohibit the name of an informer.) Rule 3.4 subd. d and e of the Rules of Court allows the Court to limit distribution of material filed under seal, and require and allow redaction of items provided under seal when used in any public format. Administrative Rule 41, Section 5, (f)(1) allows this Court to prohibit access of otherwise public documents.

¶18 The Board asserted that an order was not necessary because the Board's attorney promised the Court that they would not disclose any information until the motion is resolved:

From: Monte Rogneby [<mailto:mrogneby@VogelLaw.com>]

Sent: Tuesday, June 02, 2020 9:23 AM

To: Hogan, Hope L.; lynnbughey

Cc: Wetzel, Louise M.; Chelsey J. Ternes

Subject: RE: TIGERSWAN discovery compliance

Judge:

I intend to respond. I do not think there is any emergency. We will agree to not disclose any of the materials, except to the Court, between now and when the motion is resolved, unless we first obtain this Court's permission. That stipulation should eliminate any need to proceed on an expedited basis.

Because there is no emergency, I request the normal 14 days to respond. I need time to review the materials so I can determine the basis of the request. Sincerely,

Monte Rogneby

ATTACHMENT 4 - TIGERSWAN Emails re nondisclosure of

documents and information supplied by TigerSwan – Rogneby Email 6-

2-20 9:23 AM (R:326:2). Mr. Boughey immediately and properly argued

that an Order should be in place since the Board through its attorney agrees

not to disclose any of the information:

Based on the statement and agreement of Mr. Rogneby, I attach a proposed Temporary Order implementing that agreement and applying it to not only counsel to the board but the board itself. If his words are to have any legal effect, they must be placed in an Order. Without the issuance of the attached Temporary Order, the emergency exists and continues to exist.

ATTACHMENT 4 - TIGERSWAN Emails re nondisclosure of documents and information supplied by TigerSwan – Boughey Email to Judge Hogan 6-2-20 1025 am (R:326:2-3). At 1047 am Attorney Rogneby once again asserted his promise and asked the Court to relay on his honor:

The Board does not consent to entry of any order at this time. If Counsel's representation is not sufficient for Respondents, then Respondents must wait until the motion can properly be considered on the merits before an order is proper.

ATTACHMENT 4 - TIGERSWAN Emails re nondisclosure of documents and information supplied by TigerSwan – Rogneby Email to Judge Hogan 6-2-20 1025 AM (R:326:3).

¶19 The ALJ unfortunately decided NOT to issue the emergency order based on the assertion of the Board's attorney that no information would be disclosed:

. . . The Board has also agreed not to disclose any of the materials, except to the administrative law judge, until this motion is resolved.

Based on these representations, the Board will have until June 16, 2020 to respond to the motion.

ATTACHMENT 5 – Judge Hogan Letter to Attorneys Boughey and Rogneby 6-2-20 (R:327). This Court chose to rely on Mr. Rogneby's agreement.

¶20 On June 10, 2020, Mr. Boughey sent a fax to Attorney Rogneby responding to an email received on Saturday, June 6, 2020, and after relaying the message that needed to be relayed, stated “I do not have access internet this week.” **ATTACHMENT 6 – Fax of 6-10-20** faxed 1:47 PM Central Time (**R:328**). The very next day Attorney Rogneby – by email– advised the Court that despite his agreement he has unilaterally decided not to abide by his agreement and will, the very next day at 5 pm, consider the documents as public records because, supposedly, he has discovered that the open records law requires this action:

I am withdrawing the Board’s voluntary agreement to hold as confidential the records produced by TigerSwan, as of the close of business tomorrow, June 12. After that, the Board will treat the records as required by North Dakota’s open records laws.

ATTACHMENT 4 - TIGERSWAN Emails re nondisclosure of documents and information supplied by TigerSwan – Attorney Rogneby to Judge Hogan Email of June 11, 2020 208 PM (R:326:3).

¶21 TigerSwan (and ETP through the enforcement of the promise made to TigerSwan) should receive the benefit of the promise of confidentiality made by the Board’s counsel and relied upon by the ALJ. As such, this Court should enforce that promise, issue an Order sealing the materials as of June 1, 2020 (which would require full confidentiality, as

promised), and then return the documents to ETP forthwith. Such an Order would also mean that the documents never became public records – resulting in this case being resolved in its entirety and upon the return of the documents to ETP closed.

¶22 III. First Look’s Argument that ETP has an Adequate Remedy should be Rejected and the Court Should Dismiss ETP’s Claim for Damages Against TigerSwan as a Matter of Law

¶23 First Look argues that ETP has an adequate remedy by its contract claim against TigerSwan. This argument should be rejected as a matter of law. The assertion that there is an adequate remedy afforded to ETP by suing TigerSwan is in reality nonexistent because there can be no damages against TigerSwan because TigerSwan was required by court order to provide the documents and therefore under the terms of the contract, the contract was not breached. See Exhibit A, Doc. No. 269, Para. 11.1 at pages 13-14: **(R:269:13-14)** “Confidential information shall not include information which . . . (iv) is required to be disclosed by law, rule, regulation, legal process or order of any court or government body having jurisdiction over the same.” As such, any claim for damages against TigerSwan is not a viable claim given the language of the contract.

¶24 This issue can be determined as a matter of law because there is no dispute that the documents provided were “required to be disclosed by law, rule, regulation, legal process or order of any court or government body having jurisdiction over the same.” ETP-TigerSwan contract Para. 11.1(iv) **(R:269:14)**. (The issue of whether TigerSwan complied with the notice requirements of the contract is not relevant to the motions made below and therefore was not addressed as a factual point of inquiry.

¶25 **Conclusion**

¶26 For the reasons listed above, TigerSwan asks for the following relief:

1. That this Court reverse the district court and determine that the records provided were not public records, or in the alternative rule that the agreement between TigerSwan and the Board’s attorney prevents the records from becoming public records and as such the records should be immediately returned to ETP; and

2. That this Court rule that the district court erred in not overruling the ALJ’s decision not to seal the file pro nunc tunc as of the date the records were received by the Board, or iin the alternative issue a protective order as to all of the documents provided by TigerSwan.

¶27 **CERTIFICATE OF COMPLIANCE**

¶28 The undersigned, as attorney for the Appellant in the above matter, and as the author of the above brief, hereby certify, in compliance

with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face in 14-point font and equals 19 pages.

¶29 ORAL ARGUMENT REQUESTED

¶30 Oral argument is requested because the open records issue is one of first impression. In addition, the facts of this case are complicated and the Court may have questions regarding some of those facts.

¶31 Dated: March 4, 2022.

Respectfully Submitted,

/s/

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CERTIFICATE OF SERVICE

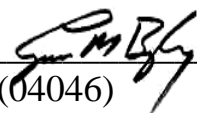
¶1 I hereby certify that the following document (s):

1. TigerSwan's Brief.

were served upon the above-named Plaintiffs and Defendants, by filing and serving true and correct copies of the above-listed document on the 4th day of March, 2022, via odyssey to:

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¶2 Dated this 4th day of March, 2022.



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