UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DETENTION WATCH NETWORK, et al., Plaintiffs,	:	
-against-	:	14 Civ. 583 (LGS)
UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, et al., Defendants.	:	OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

By Opinion and Order dated July 14, 2016, Plaintiffs Detention Watch Network and the Center for Constitutional Rights' motion for partial summary judgment was granted. The Opinion held that Defendants U.S. Immigration and Customs Enforcement ("ICE") and U.S. Department of Homeland Security ("DHS") could not withhold certain contract terms between ICE and private detention contractors, including the GEO Group, Inc. ("GEO") and the Corrections Corporation of America ("CCA"), under the Freedom of Information Act ("FOIA"), Exemptions 4 and 7(E). 5 U.S.C. § 552, *et seq*. GEO and CCA now seek to intervene in this matter pursuant to Federal Rule of Civil Procedure 24(a) and (b) in order to appeal the July 14, 2016, Opinion and Order granting partial summary judgment in favor of Plaintiffs. Plaintiffs oppose the motion. For the reasons below, the motions to intervene to pursue an appeal are granted.

I. BACKGROUND

Familiarity with the allegations, claims, and procedural background is assumed. In summary, Plaintiffs filed a FOIA request with DHS and ICE on November 24, 2013, seeking a

range of records related to the "Detention Bed Mandate," which Plaintiffs define as a policy, since 2007, of maintaining a certain numerical level of detention. The requested records include executed agreements and contract renewals between ICE or DHS and private companies regarding detention facilities or detention beds. In January 2014, Plaintiffs filed this action to compel Defendants to search for and produce records sought in their FOIA request.

In a letter dated June 15, 2015, ICE reported that, pursuant to 6 C.F.R. § 5.8, it had mailed notices to private contractors that are counterparties to detention facility agreements with ICE to receive input from the private contractors regarding the records sought by Plaintiffs. On the basis of that input, ICE determined that it would continue to invoke FOIA Exemption 4, 5 U.S.C. § 552(b)(4), to withhold unit prices, "bed-day rates" and "staffing plans" from records of government contracts with private detention facilities. Movants GEO and CCA are two of the largest private immigration detention contractors in the country. As of December 2015, GEO operated 12 detention facilities for ICE, and CCA operated 8 facilities of various types for ICE.

In November 2015, Plaintiffs moved for partial summary judgment challenging the Government's withholding of information, pursuant to FOIA Exemption 4, that revealed unit prices, "bed-day rates" and "staffing plans" in government contracts with private detention facilities. ICE and DHS cross-moved for partial summary judgment. The Government submitted declarations from a GEO executive with its Opposition and Cross-Motion for Partial Summary Judgment and with its reply brief, and a declaration from a CCA executive with its Opposition and Cross-Motion brief.

Pursuant to the July 14, 2016, Opinion and Order granting Plaintiffs' motion for partial summary judgment, unit prices, bed-day rates and staffing plans in government contracts with private detention facilities were not protected from disclosure under Exemption 4 or Exemption

7(E). As a result, Defendants will be required to produce in unredacted form certain of GEO and CCA's contracts that are subject to disclosure and that were previously produced with redactions. On July 29, 2016, GEO filed a letter seeking to file a motion to intervene pursuant to Federal Rule of Civil Procedure 24 and to "protect its right to appeal from the Court's orders." On August 10, 2016, CCA filed a similar letter seeking to intervene in the event that the Government decided not to appeal. By letter dated August 18, 2016, Plaintiffs informed the Court that the Government had notified them that the Government does not intend to appeal.

II. LEGAL STANDARD

The Federal Rules of Civil Procedure allow intervention both as of right and by permission. Rule 24(a) governs intervention as of right:

> On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). Under Rule 24(a)(2), a district court must grant an applicant's motion to intervene if "(1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by other parties." *Laroe Estates, Inc. v. Town of Chester*, No. 15-1086-cv, 2016 WL 3615777, at *4 (2d Cir. July 6, 2016) (quoting *MasterCard Int'l. Inc. v. Visa Int'l Service Ass'n., Inc.*, 471 F.3d 377, 389 (2d Cir. 2006)). If any of these criteria are not met, the motion is denied. *See MasterCard*, 471 F.3d at 389.

Rule 24(b)(1) addresses permissive intervention and states, "the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24. "When considering a request for permissive intervention, a district court must 'consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'" *AT&T Corp. v Sprint Corp.*, 407 F.3d 560, 561–62 (2d Cir. 2005) (quoting Fed. R. Civ. P. 24(b)).

III. DISCUSSION

A. Intervention as of Right

GEO and CCA's motions to intervene pursuant to Rule 24(a) are granted as explained below.

1. Timeliness

First, the motions are timely. The determination of timeliness "is flexible and the decision is one entrusted to the district judge's sound discretion." *Floyd v. City of New York*, 770 F.3d 1051, 1058 (2d Cir. 2014) (internal quotation marks and citation omitted). "Factors to consider in determining timeliness include: (a) the length of time the applicant knew or should have known of its interest before making the motion; (b) prejudice to existing parties resulting from the applicant's delay; (c) prejudice to the applicant if the motion is denied; and (d) the presence of unusual circumstances militating for or against a finding of timeliness." *Id.* (internal quotation marks and citation omitted).

While post-judgment intervention is generally disfavored because of the delay and prejudice to existing parties that could result, even post-judgment intervention is not *necessarily* untimely. *See Dow Jones & Co. v. U.S. Dep't of Justice*, 161 F.R.D. 247, 253 (S.D.N.Y. 1995) (citing *United Airlines v. McDonald*, 32 U.S. 385 (1977)). In examining timeliness, a court

considers all of the circumstances of a case. *See Dow Jones, 161 F.R.D at 253*; *100Reporters LLC v. U.S. Dep't of Justice*, 307 F.R.D. 269, 274 (D.D.C. 2014). Here, the requests to intervene were filed only after the issuance of the Opinion and Order granting partial summary judgment in favor of Plaintiffs. Although GEO and CCA's requests were filed more than a year after they were notified that Plaintiffs sought their contracts with ICE, Defendants' interests have aligned with the Government's. Only now, with the issuance of an unfavorable decision that will compel the Government to release documents, are GEO and CCA's interests in the privacy of the documents at risk of diverging with the Government's because the Government appears to have decided not to appeal the Court's ruling.

Plaintiffs contend that the proposed intervenors should have moved to intervene after they were first notified of ICE's invocation of Exemption 4 in March 2015; that Plaintiffs will be prejudiced by intervention because CCA's request lacked an affirmative statement that it will not seek to supplement the record; that GEO and CCA will not suffer prejudice if intervention were denied because their lengthy declarations and arguments are part of the record; and that no unusual circumstances are at issue, as Plaintiffs contend were present in *Dow Jones*, 161 F.R.D. at 254. GEO and CCA would have been prudent to intervene after being notified that their documents were being contested in FOIA litigation because the "intervention clock start[s] to run from the moment the [purported intervenor] became aware or should have become aware that they had interests in the subject matter of the litigation not otherwise protected by the existing parties to the lawsuit." *Floyd v. City of New York*, 302 F.R.D. 69, 84-85 (S.D.N.Y. July 30, 2014), *aff'd in part, appeal dismissed in part*, 770 F.3d 1051 (2d Cir. 2014); *see also Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric. & Mkts.*, 847 F.2d 1038, 1044 (2d Cir. 1988) (Affirming denial of untimely application to intervene, noting that "[a]pellants should certainly have been aware . . . that the interests represented by the [Government] are not coterminous with

their own."). However, GEO and CCA's failure to move earlier does not necessarily make their request now untimely. "The mere passage of time, in itself, does not render a motion untimely; rather, the important question concerns actual proceedings of substance on the merits." 6-24 Moore's Federal Practice – Civil § 24.21. The *Dow Jones* case was a procedurally similar FOIA case from this district. There the court allowed intervention when the prospective intervenor realized post-summary judgment that the government might not appeal. 161 F.R.D. at 252-53. Here too, movants' interests aligned with the Government's until they were faced with the prospect that the Government would not appeal.

Plaintiffs also contend that they will be prejudiced because CCA's intervention could result in further delay. Unlike GEO, which stated at the August 9, 2016, court conference that it would not seek to expand the record on appeal, CCA has not disclaimed an interest in supplementing the record. Should CCA be permitted to cause further delay, Plaintiffs -- who have already been waiting more than two years for the requested information -- may be subjected to prejudice. However, district courts may impose conditions or restrictions upon an intervenor's participation in the action, which can ameliorate potential prejudice. *See 100Reporters LLC*, 307 F.R.D. at 284.

In contrast, the risk to the prospective intervenors is significant if the Government does not exercise its right to appeal, as appears to be the case, and the Government would be required to disclose material the prospective intervenors regard as confidential. Finally, no unusual circumstances exist favoring or disfavoring intervention.

Considering movants' requests in the factual context of this case and that the timeliness requirement is "meant to protect the rights of the existing parties to an action" and is "not a tool of retribution meant to punish tardiness," 6-24 Moore's Federal Practice - Civil § 24.21, the

motions to intervene, filed 15 and 27 days after the issuance of the summary judgment opinion, are timely.

2. Prospective Intervenor's Interest in the Transaction that is the Subject of the Action

Considering the second intervention-as-of-right factor, the movants have an interest in preventing the disclosure of commercial information that they regard as confidential. "[P]reventing the disclosure of commercially-sensitive and confidential information is a well-established interest sufficient to justify intervention under Rule 24(a)." *See 100Reporters LLC*, 307 F.R.D. at 275-278 (collecting cases within the FOIA and non-FOIA context). Plaintiffs argue in opposition that movants' interest in protecting the information at issue has already been evaluated through their submission of declarations in support of the Government's cross-motion for summary judgment. This argument misses the point. Plaintiff does not, and cannot, argue that the prospective intervenors have no interest in the previously redacted information contained in their contracts with ICE.

3. Impairment of the Prospective Intervenor's Ability to Protect its Interest

The third intervention-as-of-right factor is also satisfied. Disposition of this action may impede movants' abilities to protect their interest in preventing disclosure. Assuming the Government does not appeal the partial summary judgment Opinion and Order as it has represented, and perhaps even if it does, Defendants will be compelled to disclose detention contracts in unredacted form -- including the pricing and staffing information movants regard as confidential in contracts with ICE. Plaintiff argues that GEO and CCA will be able to protect any interest they have in the information because their lengthy declarations are part of the record in this case. However, if the Government does not appeal the summary judgment decision and

neither movant is permitted to intervene, their submissions will never be considered by an appellate body.

4. Adequacy of Representation of Prospective Intervenor's Interest by Other Parties

Fourth, until now, movants' and the Government's interests have been aligned in protecting the disclosure of information through the invocation of FOIA Exemptions 4 and 7(E). If the Government forgoes its right to appeal, movants' interests will be unrepresented in this litigation. Plaintiff again asserts the same point -- that GEO and CCA's interests are adequately represented in this case -- but fails to consider that, for the first time in this case, movants' interests, on one hand, and the Government's interests, on the other, may now diverge. *See H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 797 F.2d 85, 88 (2d Cir. 1986) ("Where issues relating to the appellate process create a divergence of interests between the party representing the would-be intervenor's interest and the would-be intervenor, intervention for the purpose of protecting the latter's appellate rights may be appropriate.").

Accordingly, GEO and CCA have met all four requirements for intervention under Rule 24(a). However, considering that the prospective intervenors' interests were represented by the Government through extensive declarations on the summary judgment motions, and in order to prevent prejudice to Plaintiffs due to the post-summary judgment requests to intervene, GEO and CCA's intervention is limited to appealing the June 2016 Opinion and future proceedings. GEO and CCA may not conduct discovery, which is in any case rare in a FOIA action, and may not supplement the record. *See* Fed. R. Civ. P. 24 (Advisory Committee Notes, 1966 Amendment) ("An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."); *Shore v. Parklane Hosiery Co.*, 606 F.2d 354, 356 (2d Cir. 1979) (Advisory

Committee's note that conditions may be imposed is "the recognition of a well-established practice.").

As intervention as of right is granted, the issue of permissive intervention under Rule 24(b), Fed. R. Civ. P., is not addressed.

IV. CONCLUSION

For the reasons stated above, GEO and CCA's requests to intervene in this case are GRANTED for the sole purpose of appealing the Court's July 14, 2016, Opinion and Order.

SO ORDERED.

Dated: September 1, 2016
New York, New York

LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE