

# EXHIBIT B

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RYAN MCFADYEN, et al.,

~~EDWARD CARRINGTON, et al.,~~ )

Plaintiffs, )

v. )

DUKE UNIVERSITY, et al., )

Defendants. )

1:07CV953

~~1:08CV119~~

confidential medical records protected by the Health Insurance Portability and Accountability Act ("HIPPA"), educational records protected by the Family Educational Rights and Privacy Act ("FERPA"), trade secrets, or other confidential research development, or commercial information

**CONSENT PROTECTIVE ORDER ON CONFIDENTIALITY  
AND PROSPECTIVE SEALING ORDER F d R Ci P 26**

**IT IS HEREBY STIPULATED BY THE P**

**COURT** as follows:

The Court finds that certain information sought to be produced during discovery in this action likely will represent or contain ~~sensitive, confidential or proprietary business information, or other confidential personal, financial, medical, educational, or personnel records, and/or technical or commercial information~~ within the meaning of Rule 26(c) of the Federal Rules of Civil Procedure. Accordingly, the Court finds good cause for entry of this Protective Order ("Protective Order").

**IT IS THEREFORE ORDERED** as follows:

1. Parties To The Protective Order. The parties to this Protective Order are Plaintiffs and the Duke University Defendants (collectively, the "Parties"). The Parties

execute the Confidentiality Agreement or agree to abide by the terms of this Protective Order through verbal acknowledgement on the record or in written form.

or provide the Parties with either verbal assurances on the record or written acknowledgment of their agreement to abide by the terms of this Protective Order.

Robert C. Ekstrand and Stefanie A. Smith of Ekstrand & Ekstrand LLP

consent to this Protective Order through their counsel of record: Plaintiffs, through ~~David H. Thompson of Cooper & Kirk, PLLC~~; and the Duke University Defendants, through Richard W. Ellis and Dixie T. Wells of Ellis & Winters LLP. To the extent that any other person seeks access to information designated as confidential pursuant to this Protective Order, such person or its counsel must ~~first~~ execute the Agreement Concerning Protected Information attached as Exhibit A hereto (“Confidentiality Agreement”). Specifically, and without limiting the foregoing, if any party to the above-captioned litigation (“Litigation”) who is not a Party to this Protective Order (e.g., a party that is involved in a claim for which discovery has been stayed) seeks access to information designated as confidential, seeks to attend a portion of any deposition at which confidential information is discussed or seeks to review any deposition exhibit containing confidential information, such party or its counsel ~~must first execute the Confidentiality Agreement~~. As used herein, the term “Signatory” shall refer to any person who has executed the Confidentiality Agreement

or otherwise evidenced their agreement to abide by the terms of this Protective Order.

2. Material Governed. This Protective Order shall govern all discovery material produced or disclosed in this Litigation, including the following: documents (which shall have the broadest possible meaning and include information memorialized in any way, including in paper or electronic format), data and information, answers to interrogatories, deposition transcripts, answers to deposition questions, responses to requests for admission, affidavits, and such other materials and information as may be provided by the Parties or

other persons during the course of discovery in this Litigation, including pages of documents or divisible parts of other materials.

3. “Confidential Information.” For purposes of this Protective Order, “Confidential Information” means information in any form, including those described in paragraph 2, that is disclosed and designated in accordance with the procedures set forth in this Protective Order and that reflects or contains: ~~personal financial information, e.g., salary information, account statements and tax returns and related schedules and supporting documents;~~ protected by HIPPA personal health information, e.g., medical records; education records as that term is defined in the ~~Family Educational Rights and Privacy Act (“FERPA”);~~  ~~disciplinary information, e.g., information related to discipline by a school, college, athletic team, or public authority; personnel records, e.g., performance reviews and evaluations; minutes of meetings of the Duke University board of trustees; decisions involving faculty hiring, retention, and compensation issues; insurance policies; research by faculty that would otherwise remain in confidence; information related to police investigations that is ordinarily maintained in confidence; and business, financial or economic information that would ordinarily be maintained in confidence,~~ where the disclosing person has taken appropriate efforts to maintain the confidentiality of such information or the party is otherwise required to keep such information confidential by agreement or law. The designation of material as Confidential Information shall be deemed effective, subject to the provisions of paragraph 17.

and any trade secret or other confidential research, development, or commercial information, as those phrases are used in Fed. R. Civ. P. Rule 26(c)(1)(G).

4. Public Information. No document or other material that is or becomes available to the public, other than through a violation of this Protective Order, shall be considered Confidential Information.

5. Uses. Confidential Information appearing in any form, including those described in paragraph 2, may not be disclosed to any person except as permitted in paragraph 13 or as otherwise ordered by the Court. Confidential Information produced in this Litigation is to be used solely for purposes of this Litigation (i.e., preparing for trial, for use at trial, , for supporting or opposing any motion, and preparing for any appeal of this Litigation) ~~and shall not be used in any other litigation, including but not limited to the litigation captioned *McFadyen v. Duke University*, Case No. 1:07CV953, or for any business or other purpose whatsoever. By their signatures below, undersigned counsel specifically agree and represent that they and their clients will not provide such information or documents to anyone who is not a Party or a Signatory, including but not limited to posting (either directly or indirectly) any Confidential Information on any website that is accessible to anyone who is not a Party or a Signatory.~~

6. Designation of Information as "CONFIDENTIAL." A Party ~~or other person~~ may, in the exercise of good faith, designate any material as Confidential Information pursuant to this Protective Order. Documents, responses to interrogatories, responses to requests for admission, exhibits and other material may be designated as containing Confidential Information by stamping the word "CONFIDENTIAL" on each page or medium containing the material or data sought to be protected, such that the material or data

appearing on the page is not obscured. ~~Upon request of counsel for any Party to this Litigation,~~ the designating person shall promptly and precisely identify the Confidential Information on a page stamped "CONFIDENTIAL." Material produced or used in a non-hard copy format (i.e., a native format, such as an Excel spreadsheet file or Word document file) may be designated as containing Confidential Information by stamping the word "CONFIDENTIAL" on any compact disc containing such material and/or by otherwise conspicuously indicating, as appropriate for the type of electronic material at issue, that such material is "CONFIDENTIAL" (e.g., by including the word "CONFIDENTIAL" in the name of the electronic file).

7. ~~Documents Produced for Inspections. For purposes of disclosing documents for inspection, the disclosing person may refrain from designating specific documents as Confidential Information until after the inspecting person has selected specific documents and/or materials for copying. In this event, the disclosing person shall announce in writing prior to producing the documents or material for inspection that all such documents and material should be considered Confidential Information for the purposes of the inspection. After the inspecting person selects specified documents and material for copying but before the production of such copies, the disclosing person shall designate any Confidential Information contained in such material.~~

8. ~~Non Relevant Confidential Information. Before producing discovery material, a disclosing person may redact Confidential Information that is not relevant to the subject~~

~~matter of this Litigation. Any discovery material that is redacted shall have "REDACTED" stamped on each page from which Confidential Information has been redacted. Upon the request of counsel for any Party to this Litigation, the disclosing person shall produce a log describing the nature of the redacted Confidential Information.~~

9. Deposition Designations In General. All oral deposition testimony, regardless of whether the testimony was designated as Confidential Information on the record, shall be treated as Confidential Information and subject to this Protective Order for ~~thirty (30)~~ days after counsel for each of the Parties has received the transcript of the deposition.

ten (10)  
calendar

10. Designations During The Deposition. Any person may, on the record at the deposition, designate portions of oral testimony, or the testimony in its entirety, as Confidential Information. In the event that any question is asked at a deposition with respect to which it is asserted, on the record, that the answer requires the disclosure of Confidential Information, the question shall nonetheless be answered by the witness fully and completely. Before the witness answers, however, all persons present who are not otherwise bound by this Protective Order shall be required to sign or otherwise indicate on the record their agreement to the Confidentiality Agreement. If any such person, other than the witness, declines to do so, that person shall leave the room during the time in which Confidential Information is disclosed or discussed. When any document or other material designated as Confidential Information is introduced as an exhibit, counsel introducing such exhibit shall advise the court reporter that the exhibit is Confidential Information pursuant to this

Protective Order. All persons present at the deposition during the discussion of such exhibit shall either be a Party or a Signatory or shall otherwise evidence their agreement to the Confidentiality Agreement. No deposition exhibit marked as Confidential Information shall be provided to any person who is not a Party or Signatory or who did not otherwise evidence his or her agreement to the Confidentiality Agreement. The fact that a Party has not objected to designation of all or any portion of the deposition transcript as Confidential Information during the deposition itself does not waive such Party's right to seek release of that transcript from the terms and provisions of this Protective Order pursuant to paragraph 17.

11. Designations After The Deposition. Alternatively, counsel for the designating party may designate an entire transcript or designate specific pages and lines of the transcript or video recording of the deposition as Confidential Information by notifying counsel for the Parties and other attendees of the deposition in writing within ~~thirty (30)~~ ten (10) calendar days of receipt of the transcript or video recording of such deposition. If within ~~thirty (30)~~ ten (10) calendar days of receipt of the transcript or video recording of such deposition no person timely designates the transcript or recording, or any portion thereof, as Confidential Information, then the transcript and any recording shall not thereafter be subject to this Protective Order. Deposition exhibits that are marked as "CONFIDENTIAL" will continue to be protected without further designation, and the continued protection of such exhibits will not be dependent upon the transcript, or any portion thereof, being designated as Confidential Information.



A separately-bound transcript of those portions of the deposition testimony and exhibits that are designated as Confidential Information shall be made and the cover shall be marked with the “CONFIDENTIAL” designation. If any portion of any transcript so marked is required to be filed with the Court, it shall be filed using the procedures set forth in paragraph 21.

12. Restrictions on Disclosure. No Confidential Information shall be disclosed to any persons other than those Authorized Persons identified in paragraph 13, who may use such information only for the purposes described in paragraph 5. Nothing in this Protective Order, however, shall prevent disclosure beyond the terms of this Protective Order if the person designating the information consents in writing prior to such disclosure, or if the Court orders such disclosure. Nothing in this Protective Order shall be construed as a restriction on the use or disclosure of information by the person who supplied the information, or otherwise limit the ability of a person to publicly disclose its own Confidential Information.

13. Authorized Persons. Except as agreed to in writing by the designating person (or its counsel) or as otherwise provided by this Protective Order, and only after compliance with the procedures set forth herein, access to Confidential Information shall be restricted to the following persons:

- a. The Court and Court personnel;

- b. The Parties to this Litigation, provided that Duke University personnel with access to material designated as Confidential Information by the Plaintiffs shall be limited to officers, administrators, employees, and contractors of Duke University who require such access in order to assist in or evaluate this Litigation;
- c. Counsel of record described in paragraph 1 of this Protective Order, along with associated attorneys in their law firms and law clerks, paralegals, clerical staff, and other staff employed by such law firms, provided that such persons orally agree to abide by the terms and provisions of this Protective Order;
- d. Independent consulting or testifying expert witnesses or trial consultants, including their staff, retained by the parties in connection with this case, provided that such persons sign the Confidentiality Agreement;
- e. Outside contractors hired to copy, index, sort, or otherwise manage the storage and retrieval of discovery material, provided that such persons sign the Confidentiality Agreement; and their identity is disclosed to the disclosing party
- f. The officer or court reporter taking, reporting, recording, transcribing, or videotaping deposition or other testimony in this action, and employees of such officers or court reporters to the extent necessary to prepare the transcript of the deposition; and
- g. Any other person who is subsequently designated either by written agreement by the Parties or by Order of the Court and who has signed the Confidentiality Agreement.

Each person described above to whom Confidential Information is delivered shall maintain the confidentiality of the document and/or information. In the event that any person subject to this Protective Order shall cease to be involved in this Litigation, such person's access to the Confidential Information shall be terminated and such person shall either promptly return such Confidential Information to the person who designated it or destroy

such information, providing a written confirmation of such destruction to the person who designated it. Any person who has agreed to be bound by this Protective Order will continue to be bound even if no longer involved in this Litigation.

14. Safe-Keeping of Confidential Information. The recipient of any Confidential Information disclosed pursuant to this Protective Order shall maintain it in a secure area and shall exercise due and proper care to protect its confidentiality.

15. Inadvertent Disclosure of Confidential Information By Designating Person. Failure to designate or stamp information as “CONFIDENTIAL” at the time of its production shall not constitute a waiver of protection of such Confidential Information, provided that the disclosing person or its counsel promptly notifies all receiving persons upon realizing the failure, ~~but in no event more than thirty (30) calendar days from the date of production.~~ Any person who is notified that Confidential Information has been inadvertently produced shall treat the information as subject to this Protective Order unless and until the Court determines that such designation does not apply. Such receiving person shall make reasonable efforts to notify all other persons to whom it has provided the Confidential Information that such material shall be treated and handled in accordance with this Protective Order. However, the receiving person shall not be in violation of this Protective Order for any disclosure of information made prior to receiving such notice.

16. Disclosure of “CONFIDENTIAL” Information By Receiving Party. If a Party or other person receiving “CONFIDENTIAL” Information learns that, by inadvertence or

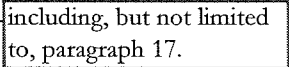
otherwise, it has disclosed such information under circumstances not authorized under this Protective Order, such receiving Party or person shall immediately (i) notify in writing the person who designated the information as “CONFIDENTIAL” of the unauthorized disclosures; (ii) use its best efforts to retrieve all copies of the “CONFIDENTIAL” information; and (iii) inform the person or persons to whom unauthorized disclosure was made of all the terms of this Protective Order.

17. Objections to Designations. Counsel for any Party may at any time object to the designation of any material as Confidential Information and seek the release of such material from the terms and provisions of this Protective Order by making such request in writing to the person who designated such material as Confidential Information. Upon making such a request, the Party requesting the release shall initiate a “meet and confer” among all Parties to this Protective Order and the person who designated the material as Confidential Information. If the Parties and the designating person are unable to agree as to whether the material at issue is properly designated Confidential Information, counsel for the designating person may, within 30 days of the “meet and confer” session, file a motion defending such designation with the Court. If counsel for the designating person does not file such a motion within 30 days, the challenged information originally designated as Confidential Information shall be released from the terms and provisions of this Protective Order. If counsel for the designating person does file such a motion within 30 days, pending

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a ruling from the Court, information originally designated as Confidential Information shall be subject to this Protective Order until the Court rules otherwise.

18. Notification of Subpoenas. In the event that any person who receives or is in possession of Confidential Information subsequently receives from anyone who is not bound by this Protective Order any subpoena or other compulsory request seeking the production or other disclosure of such Confidential Information, that person shall immediately notify in writing the person who designated the material as Confidential Information, specifying the material sought and enclosing a copy of the subpoena or other form of compulsory process in order to permit the designating person the opportunity to intervene and seek to prohibit the disclosure of the material. Where possible, at least ten (10) calendar days' notice shall be given prior to the production or disclosure sought to be compelled. Unless otherwise ordered by a court or other tribunal with appropriate jurisdiction, in no event shall any person produce or disclose Confidential Information before notice is given to the person who designated such material as Confidential Information.

19. Third Parties. Any person, even if not a Party to this Litigation, who produces information pursuant to subpoena, other legal process or otherwise may designate such material as Confidential Information pursuant to this Protective Order. 

20. Newly-Added Parties. In the event that additional parties are named in this Litigation, neither they nor their counsel shall have access to Confidential Information until this Protective Order has been amended, with the Court's approval, to govern such additional

parties and counsel, and until such additional parties and their counsel have signed the Confidentiality Agreement.

21. Filing with the Court. No Party or other person shall file any materials that contain Confidential Information with the Court unless filing those materials is relevant to an issue before the Court. If a party desires to file materials containing Confidential Information with the Court or to reference or quote Confidential Information in any filing, its counsel shall comply with the following provisions:

a. ~~For Dispositive and Other Substantive Filings. Counsel will perform a document-specific, good faith examination of the Confidential Information to be filed under seal to ensure that it meets the legal and factual criteria for such treatment. If the Confidential Information meets the legal and factual criteria for filing under seal, counsel for the Party or person seeking to file, reference or quote Confidential Information shall file a motion with this Court showing the particularized need for filing, referencing or quoting such material. No Confidential Information shall be filed under seal, or be referenced or quoted in a filing made under seal, without the filing person having first obtained an order granting leave to file under seal. Upon appropriate order of the Court, Confidential Information may be filed under seal, or referenced or quoted in a filing made under seal, according to the local rules and other authority governing the filing of material under seal in this District. For any filing or portion thereof submitted under seal pursuant to this Protective Order, the filing~~

~~person shall file a redacted version that does not reflect Confidential Information such that the redacted filing is publicly available on the Court's CM/ECF docket.~~

~~In the event that the person seeking to file, reference or quote Confidential Information is not the person who designated the material as Confidential Information, the person seeking to file, reference or quote such material shall give the designating person ten (10) days advance notice that it intends to do so. The designating person then may file a motion with the Court seeking an order that such material must be filed under seal as provided in this sub-paragraph. In that event, no Confidential Information shall be filed, referenced or quoted in a publicly available filing until the Court rules on such motion. In the event that the designating person files such motion and the Court does not rule on such motion by the time the Confidential Information is filed, the Confidential Information shall be filed provisionally under seal pending that ruling. If, upon the ten (10) days advance notice described above, the designating person has not filed such a motion within those ten days, then the material at issue may be deemed non confidential and not protected by the terms of this Protective Order.~~

b. For Discovery-Related Motions. Any Confidential Information filed in connection with a ~~discovery-related~~ motion and any portion of any ~~discovery-related~~ motion that references or quotes Confidential Information must be filed under seal, and this Protective Order shall be cited as authority for such filing under seal. The filing of Confidential Information under seal shall be done according to the local rules and other

authority governing the filing of material under seal in this District. For any filing or portion thereof submitted under seal pursuant to this Protective Order, the filing person shall file a redacted version that does not reflect Confidential Information such that the redacted filing is publicly-available on the Court's CM/ECF docket.

22. No Waiver. By consenting to this Protective Order, no Party waives any right it may have to dispute any person's designation of Confidential Information. Further, by declining to challenge the designation of any material as Confidential Information, no Party waives any right it may have to challenge the use, admissibility or authenticity of such material for any other reason.

23. Use at Trial. Either Party may move this Court for an order that the evidence at trial be received in such a way as to prevent unnecessary disclosure consistent with applicable law. Absent such additional order of this Court, all parties are entitled to use Confidential Information as evidence during trial without restriction. The Parties shall have the right to request that any hearing or portions of any hearing involving the use or presentation of Confidential Information be conducted in camera.

24. Conclusion of Litigation. At the conclusion of this Litigation, all copies of any document, file or other material that contains or reflects Confidential Information shall be destroyed within sixty (60) calendar days of the disposition or final termination of this case (or if a post-hearing motion or appeal is filed, sixty (60) calendar days after the disposition of those matters). Counsel for each person who has received Confidential Information shall



certify in writing to the disclosing person that all such information has been destroyed. Notwithstanding the foregoing, counsel may retain two archival copies of court filings (one in electronic form; one in hard copy form) and two copies of deposition and trial transcripts (including two copies of exhibits thereto) (one in electronic form; one in hard copy form), as well as any materials constituting attorney work product, containing Confidential Information, which materials will remain subject to this Protective Order.

25. Survival. The terms and conditions of this Protective Order shall remain in full force and effect, shall survive the final resolution of this Litigation and shall be binding on all Parties and Signatories unless the Protective Order is terminated or modified in writing by the Court. Each person subject to this Protective Order shall continue to be subject to the jurisdiction of this Court, for the purposes of this Protective Order, in perpetuity, and the Court will retain jurisdiction to enforce the terms of this Protective Order following termination of this Litigation, the filing of a notice of appeal or any other pleading which would have the effect of divesting this Court of jurisdiction of this matter generally.

26. Modification or Termination. The entry of this Protective Order shall be without prejudice to the rights of any person to apply for additional or different protection where it is deemed appropriate. This order is subject to modification or termination by the

Court upon showing of good cause. or as the ends of justice require. written agreement of the parties, or, if no agreement can be reached after the parties meet and confer for that purpose, by order of

27. Notices. All notices required or permitted to be provided by this Protective Order shall be made by email. In the event that notification by email is impracticable, a

notice shall be made by either (i) hand-delivery of the notice to counsel of record in person;  
or (ii) sending the notice by a courier for overnight delivery to counsel of record.

/s/ P. Trevor Sharp  
United States Magistrate Judge

Date: January 19, 2012

/s/ Charles J. Cooper

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