

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HANFORD CHALLENGE, AND
UNITED ASSOCIATION OF
PLUMBERS AND STEAMFITTERS
LOCAL UNION 598,

Plaintiffs,

v.

ERNEST J. MONIZ, Secretary of the
United States Department of Energy,
the UNITED STATES
DEPARTMENT OF ENERGY, and
WASHINGTON RIVER
PROTECTION SOLUTIONS LLC,

Defendants.

NO: 4:15-CV-5086-TOR

PROTECTIVE ORDER GOVERNING
THE DISCLOSURE AND FILING
UNDER SEAL OF HEALTH,
MEDICAL, AND OTHER
CONFIDENTIAL INFORMATION

To expedite the flow of discovery material between the Parties, facilitate the prompt resolution of disputes over confidentiality, adequately protect individually identifiable health and medical information, and other information required by law or otherwise entitled to be kept confidential, and ensure that protection is afforded

1 only to material so entitled, it is, pursuant to the Court’s authority under Fed. R.
2 Civ. P. 26(c) and with the consent of the Parties, **ORDERED:**

3 1. Production of Health Information That May Be Subject to the Privacy Act, 5
4 U.S.C. § 552a, to 10 C.F.R. Part 1008, to 45 C.F.R. §§ 164.102–164.534, or Other
5 Privacy Protections. Any Party to this litigation and any non-party may produce
6 certain “Confidential Health Information” (defined as health information that is
7 connected to a patient’s name, address, Social Security number or other identifying
8 number, including HIC (health insurance claim) number), pursuant to a Party’s
9 discovery requests. The information produced may be subject to the provisions of
10 the Privacy Act, 5 U.S.C. § 552a, 10 C.F.R. Part 1008, 45 C.F.R. §§ 164.102–
11 164.534, or there may be no waiver by the patient to produce the records outside of
12 this litigation. Such information shall be produced unredacted, except to the extent
13 such information is not responsive to a request for production or is subject to a
14 claim of privilege. Upon producing this information, the producing party shall
15 designate it as “Confidential” in the manner set forth in Paragraph 3, below.

16 2. Production of Other Information Designated Confidential. In addition to the
17 Confidential Health Information discussed in Paragraph 1, any Party to this
18 litigation and any non-party shall have the right to designate as “Confidential” and
19 subject to this Order any information, document, or thing, or portion of any
20 document or thing that: (a) contains trade secrets, competitively sensitive technical,

1 marketing, financial, sales or other confidential business information; (b) contains
2 private or confidential personal information; (c) contains information received in
3 confidence from non-parties; or (d) the producing Party otherwise believes in good
4 faith to be entitled to protection under Rule 26(c)(1)(G) of the Federal Rules of
5 Civil Procedure.

6 3. Designation of Material Subject to this Protective Order. Any Party to this
7 litigation or any non-party covered by this Order who produces or discloses any
8 confidential material pursuant to Paragraphs 1 and 2 above, including without
9 limitation any information, document, thing, interrogatory answer, admission,
10 pleading, or testimony (hereinafter “Confidential Material”), shall mark the same
11 with the following or similar legend: “CONFIDENTIAL,” “CONFIDENTIAL –
12 SUBJECT TO PROTECTIVE ORDER,” or “CONFIDENTIAL HEALTH
13 INFORMATION – SUBJECT TO PROTECTIVE ORDER,” as appropriate.

14 Any party or non-party that designates information or items for protection under
15 this Order must take care to limit any such designation to specific material that
16 qualifies under the standards set forth in paragraphs 1 and 2 of this Order.

17 4. General Restrictions on Use of Confidential Material. Except as otherwise
18 provided for in this Order, all Confidential Material shall be used by the receiving
19 Party, including counsel and their personnel, solely for purposes of the prosecution
20 or defense of this action, shall not be used by the receiving Party for any business,

1 commercial, competitive, personal or other purpose, and shall not be disclosed by
2 the receiving Party to anyone other than as set forth in this Paragraph or
3 Paragraphs 5, 6, 7, 16 and 17 herein, unless and until the restrictions herein are
4 removed, either by waiver of the patient in the case of Confidential Health
5 Information, or by written agreement of counsel for the Parties or by Order of the
6 Court, in the case of other Confidential Material. Parties to this litigation, including
7 counsel and their personnel, may disclose Confidential Material to non-parties to
8 this litigation only as needed for the litigation, and only if the non-party signs the
9 form of acknowledgment attached to this Order. The Parties shall not file
10 documents containing Confidential Material with, or submit them to the Court, or
11 reproduce their contents in any court filing unless the document or filing is placed
12 under seal or all information that would identify the subject of the document or
13 filing has been removed.

14 5. Prohibition on Disclosure of Confidential Material. Confidential Material
15 shall be used only by individuals permitted access to it pursuant to this Order.
16 Confidential Material, copies thereof, and the information contained therein, shall
17 not be disclosed in any manner to any other individual, until and unless:

- 18 a. Counsel for the Party asserting confidentiality waives the claim of
19 confidentiality, except for Confidential Health Information, which requires
20 waiver by the patient;

1 b. The Court orders such disclosure; or

2 c. The Party is required to do so by a federal or state court or under
3 applicable federal or state law, including the Freedom of Information Act
4 (“FOIA”) or other public records statute.

5 (i) If the United States or the State of Washington receives a FOIA
6 or Public Records Act request or other request or demand for documents which
7 requests, demands, or covers Confidential Material, the United States or the State,
8 as appropriate, shall assert in good faith appropriate grounds for maintaining the
9 confidentiality of the document, including without limitation, applicable
10 exemptions under federal and Washington State law. The United States or the
11 State, as applicable, also shall give prompt notice to the other Parties, in
12 recognition of FOIA or other applicable time frames, to allow them a reasonable
13 opportunity to share their concerns regarding disclosure, and, as permitted by any
14 applicable law, initiate or participate in any formal proceeding, including filing an
15 action in the appropriate court of law, to challenge whether such Confidential
16 Material must be disclosed.

17 (ii) Any Party or non-party who has received a subpoena, order, or
18 request to disclose Confidential Material that determines that disclosure is required
19 shall give, prior to disclosure, reasonable written notice of its determination to each
20 Party that provided the Confidential Material proposed to be disclosed.

1 6. Use of Confidential Material in Deposition. Parties may show deponents
2 Confidential Material. With respect to Confidential Health Information related to a
3 person other than the deponent in particular, however, efforts should first be made,
4 if practicable, to conceal the identity of the subject of the record by redaction or by
5 coding the documents to substitute a numerical or other designation for the
6 patient's name or other identifying information. With respect to any depositions
7 that involve a disclosure of Confidential Material, the Parties shall have until thirty
8 (30) days after receipt of the deposition transcript within which to inform all other
9 Parties that portions of the transcript are to be designated Confidential, which
10 period may be extended by agreement of the Parties. Until expiration of the 30-day
11 period, the entire deposition will be treated as subject to protection against
12 disclosure under this Protective Order. Upon being informed that certain portions
13 of a deposition are to be designated as Confidential, each Party shall promptly
14 cause each copy of the transcript in its custody or control to be appropriately
15 marked, and shall limit disclosure of that transcript in accordance with Paragraphs
16 4, 5, 7, 16 and 17 herein.

17 7. Confidential Material in Open Court. The procedures for use of designated
18 confidential documents during any hearing or the trial of this matter shall be
19 determined by the Parties and the Court in advance of the hearing or trial. The
20 Parties shall consider redacting confidential documents to remove individual

1 patient identifiers or other confidential information, request the Court to submit
2 such documents under seal, code the documents to substitute a numerical or other
3 designation for the patient's name or other identifying information, request that
4 any exhibit be placed under seal, introduce summary evidence where practicable
5 which may be more easily redacted, and assure that all Social Security and HIC
6 numbers associated with the names of individual patients have been removed. No
7 Party shall disclose designated confidential documents in open Court without prior
8 consideration by the Court.

9 8. Objection to Designation of Confidential Material. If counsel for a Party
10 receiving Confidential Material hereunder objects to such designation of any or all
11 of such items, the following procedure shall apply:

12 a. Counsel for the objecting Party shall serve on the designating Party or
13 non-party a written objection to such designation, which shall describe with
14 particularity the documents or information in question and shall state the grounds
15 for objection. Counsel for the designating Party or non-party shall respond in
16 writing to such objection within 14 days, or any longer period agreed to in writing
17 (including email) by the designating Party and the objecting Party, and shall state
18 with particularity the grounds for asserting that the document or information is
19 Confidential. If no timely written response is made to the objection, the challenged
20 designation will be deemed to be void. If the designating Party or non-party makes

1 a timely response to such objection asserting the propriety of the designation,
2 counsel shall then confer in good faith in an effort to resolve the dispute.

3 b. If a dispute as to a Confidential designation of a document or item of
4 information cannot be resolved by agreement, the proponent of the designation
5 being challenged shall present the dispute to the Court initially by telephone or
6 letter, in accordance with Local Civil Rule 37.1(a)(1), before filing a formal
7 motion for an order regarding the challenged designation. The document or
8 information that is the subject of the filing shall be treated as originally designated
9 pending resolution of the dispute.

10 9. Filing of Documents. The Clerk shall accept for filing under seal any
11 documents or filings so marked by the Parties pursuant to the above paragraphs.

12 10. No Waiver. To the extent consistent with applicable law, the inadvertent or
13 unintentional disclosure of Confidential Material that should have been designated
14 as such, regardless of whether the information, document or thing was so
15 designated at the time of disclosure, shall not be deemed a waiver in whole or in
16 part of a Party's claim of confidentiality, either as to the specific information,
17 document or thing disclosed or as to any other material or information concerning
18 the same or related subject matter. Such inadvertent or unintentional disclosure
19 may be rectified by notifying in writing counsel for all parties to whom the
20 material was disclosed that the material should have been designated Confidential

1 within a reasonable time after disclosure. Such notice shall constitute a designation
2 of the information, document or thing as Confidential under this Protective Order.

3 When the inadvertent or mistaken disclosure of any information, document or
4 thing protected by privilege or work-product immunity is discovered by the
5 producing Party and brought to the attention of the receiving Party, the receiving
6 Party's treatment of such material shall be in accordance with this Protective Order
7 and the Order and Stipulation Regarding Discovery in this matter.

8 11. Obtaining Information from Another Source. No information that is in the
9 public domain, that is already known by the receiving Party through proper means,
10 or that is or becomes available to a Party from a source other than the Party
11 asserting confidentiality (where the source is rightfully in possession of such
12 information on a non-confidential basis), shall be deemed or considered to be
13 Confidential Material under this Protective Order.

14 12. No Ruling on Discoverability or Admissibility. This Protective Order does
15 not constitute a ruling on the question of whether any particular material is
16 properly discoverable or admissible and does not constitute a ruling on any
17 potential objection to the discoverability of any material. Any information that is
18 otherwise admissible or discoverable by any Party shall not be rendered
19 inadmissible or non-discoverable because it is, or is referenced, discussed, or

1 disclosed in, material designated as Confidential Material under this Protective
2 Order.

3 13. Modification Permitted. Nothing in this Protective Order shall prevent any
4 Party from seeking modification of this Protective Order or from objecting to
5 discovery that it believes to be otherwise improper.

6 14. Survival of Order. This Protective Order shall survive the termination of this
7 action and shall remain in full force and effect unless modified by an Order of this
8 Court or by the written stipulation of the Parties filed with the Court.

9 15. Disposition of Confidential Material. Within 90 days of the final conclusion
10 of this litigation, including the exhaustion of all appeals therefrom and all related
11 proceedings, all Parties or non-parties in possession of Confidential Material shall
12 dispose of it as follows. Non-parties subject to the terms of this Order shall follow
13 the terms of the Acknowledgement of Protective Order. Parties in possession of
14 Confidential Health Information produced by another Party or non-party shall
15 either return such documents designated “Confidential” and all copies, as well as
16 all notes, memoranda, summaries, or other documents containing information from
17 the designated confidential documents, to counsel for the producing Party or non-
18 party, or destroy them and certify in writing to counsel for the producing Party or
19 non-party that the documents have been destroyed. With respect to Confidential
20 Material other than Confidential Health Information, each non-Federal party shall

1 be under an obligation to either destroy or remain obligated to ensure the
2 confidentiality of all originals and unmarked copies of documents and things
3 containing Confidential Material, and to destroy all copies of Confidential Material
4 that contain and/or constitute attorney work product as well as excerpts, summaries
5 and digests revealing Confidential Material. The United States shall, at its option,
6 either destroy or remain obligated to ensure the confidentiality of Confidential
7 Material other than Confidential Health Information produced to it, and documents
8 and things containing such information, including copies of such material that
9 contain and/or constitute attorney work product as well as excerpts, summaries and
10 digests revealing such information. Nonetheless, counsel for any Party may retain
11 complete copies of all transcripts and pleadings including any exhibits attached
12 thereto containing Confidential Material other than Confidential Health
13 Information for archival purposes, subject to the provisions of this Protective
14 Order. A Party seeking the return of Confidential Material from the Court after the
15 final conclusion of the litigation, including the exhaustion of all appeals therefrom
16 and all related proceedings, shall file a motion seeking such relief.

17 16. Disclosure to Agencies or Departments of the United States.

18 Notwithstanding the foregoing, the United States may also share information
19 designated as Confidential hereunder among its various federal departments,
20 agencies, or instrumentalities for any proper government purpose. Any sharing of

1 Confidential Material by the United States among its departments, agencies, or
2 instrumentalities shall not constitute a disclosure or a waiver of any protection
3 afforded by this Protective Order. Nor shall any such sharing waive any protection
4 afforded by federal or state law to trade secrets, competitively sensitive technical,
5 marketing, financial, sales or other confidential business information.

6 17. Disclosure to Congress. Nothing contained in this Protective Order shall
7 prevent or in any way limit or impair the right of the United States to provide
8 designated Confidential Material to a Congressional entity; provided, however, that
9 the United States shall notify the Congressional entity requesting the documents
10 that the designated Confidential Material has been produced pursuant to this
11 Protective Order and shall, if there are no objections interposed by the
12 Congressional entity requesting the documents, use reasonable efforts to notify the
13 producing Party or nonparty of the Congressional entity's request and the United
14 States' response thereto.

15 18. Effect of Compliance. Notwithstanding any federal statute or regulation, no
16 agency, officer, employee or attorney of the United States or any other Party shall
17 be subject to any civil or criminal penalty or sanction relating to the disclosure of
18 non-public information, provided that such disclosure is made pursuant to the
19 terms of this Protective Order.

1 19. Effect of Order. This Protective Order constitutes a court order within the
2 meaning of the Privacy Act, 5 U.S.C. § 552a(b)(11); and the Health Insurance
3 Portability and Affordability Act of 1996 (HIPAA) implementing regulations, 45
4 C.F.R. § 164.512(a), (e)(1)(i). Pursuant to Federal Rule of Evidence 502(d),
5 production of any record by a Federal agency in this litigation does not waive any
6 Privacy Act protection of that record outside this litigation; and any such record
7 produced in this litigation must be strictly protected in accordance with this
8 Protective Order.

9 20. No Requirement to Produce Other Information. Nothing in this Protective
10 Order shall be construed to compel the United States to produce information that,
11 under law or agreement, it is prohibited from producing, including, inter alia,
12 information protected from compelled disclosure by a Certificate of Confidentiality
13 or an Assurance of Confidentiality issued pursuant to the Public Health Service
14 Act, 42 U.S.C. §§ 241(d), 242m(d), and/or CIPSEA; or confidential substance
15 abuse information protected by 42 U.S.C. §§ 290aa(n) or 290dd-2. This Protective
16 Order shall not govern the production or designation of classified information,
17 sensitive security information, technical data with military or space application, or

18 //

19 //

20 //

1 information on classified computer systems.

2 IT IS SO ORDERED.

3 The District Court Executive is hereby directed to enter this Order and
4 furnish copies to counsel.

5 DATED May 16, 2016.



Thomas O. Rice

THOMAS O. RICE
Chief United States District Judge

9
10
11
12
13
14
15
16
17
18
19
20

1 ACKNOWLEDGMENT OF PROTECTIVE ORDER

2 I have read and understand the Order Regarding Confidentiality ("Order")
3 entered in this action on _____, 2016. I hereby agree to be bound by the
4 terms of the Order. Specifically, I agree that I will use stamped confidential
5 documents and any information contained therein only for purposes of this case,
6 including any appeals, and not for any other purpose of any kind; that I will return
7 all stamped confidential documents to counsel within thirty (30) days after the later
8 of the termination of this litigation or expiration of all rights to appeal; that I will
9 take all appropriate steps to keep the stamped confidential documents and any
10 information contained therein confidential. I hereby confirm that my duties under
11 this Acknowledgment shall survive the termination of this case and are binding
12 upon me for all time. I hereby consent to the personal jurisdiction of the United
13 States District Court for the Eastern District of Washington in the above-captioned
14 case for purpose of enforcing the aforementioned Order.

15 DATED: _____

17 _____
Signature

18 _____
19 Printed Name
20