

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE
COOPERATIVE,

Plaintiff,
on behalf of itself and all
others similarly situated,

v.

THE UNITED STATES,

Defendant.

No. 1:17-cv-00877-KCD
(Judge Davis)

JOINT MOTION FOR A PROTECTIVE ORDER

Pursuant to Rule 7(b) of the Rules of the United States Court of Federal Claims and the Privacy Act of 1974, 5 U.S.C. § 552a, the parties respectfully request that the Court enter an order authorizing defendant to disclose to plaintiffs certain Protected Information covered by the Privacy Act or other provisions and privileges.

In the course of settlement discussions, plaintiffs have requested defendant to disclose certain information and documents, of the parties or third-parties, that may contain information that is confidential, proprietary, or privileged and is protected from disclosure or otherwise subject to a privilege against disclosure as permitted by law or by the Rules of the Court of Federal Claims, the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a, or otherwise contain confidential information. The parties respectfully request that the production and use of such information be subject to the terms of the proposed protective order, attached hereto as Attachment A.

The parties agree that a protective order will help to ensure that confidential information, otherwise protected, is used appropriately during the parties' settlement

discussions. The parties agree upon the attached proposed protective order, which sets forth procedures to follow regarding disclosure and use of confidential information.

Accordingly, to expedite production and to facilitate the parties' use of confidential information in their settlement discussions, we respectfully request that the Court grant this motion and enter the attached protective order.

DATED: July 12, 2023

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

s/ Adam B. Wolfson

Adam B. Wolfson
adamwolfson@quinnemanuel.com
865 S. Figueroa Street
Los Angeles, California 90017
Telephone: (213) 443-3000
Facsimile: (213) 443-3100

Andrew H. Schapiro
andrewschapiro@quinnemanuel.com
191 N. Wacker Drive, Suite 2700
Chicago, Illinois 60606
Telephone: (312) 705-7400
Facsimile: (312) 705-7401

*Attorneys for Plaintiff Common Ground
Healthcare Cooperative and the Class*

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney
General

PATRICIA M. McCARTHY
Director

s/ Claudia Burke
CLAUDIA BURKE
Deputy Director

s/ David M. Kerr
DAVID M. KERR
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 305-7597
Facsimile: (202) 307-2503
Email: Chris.Carney@usdoj.gov

OF COUNSEL:

ALBERT S. IAROSI
Senior Trial Counsel
U.S. Department of Justice

*Attorneys for Defendant The United
States*

Attachment A

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE
COOPERATIVE,

Plaintiff,
on behalf of itself and all
others similarly situated,

v.

THE UNITED STATES,

Defendant.

No. 1:17-cv-00877-KCD
(Judge Davis)

JOINT STIPULATED PROTECTIVE ORDER

In the course of settlement discussions, plaintiffs have requested defendant to disclose certain information and documents, of the parties or third-parties, that may contain information that is confidential, proprietary, or privileged and is protected from disclosure or otherwise subject to a privilege against disclosure as permitted by law or by the Rules of the Court of Federal Claims, the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a, or otherwise contain “Confidential Information” as defined in paragraph 1 of this Order. Access to such documents, therefore, should be restricted.

Accordingly, it is hereby AGREED BETWEEN THE PARTIES AND THEIR COUNSEL, AND ORDERED BY THE COURT:

1. For purposes of this Order, the term “Confidential Information” shall include confidential, proprietary, privileged, and competitively sensitive information disclosed in discovery or other proceedings in this case (including for the purposes of settlement negotiations), including documents (or portions

thereof) that defendant believes are (i) within the scope of 5 U.S.C. § 552a, the Privacy Act, that identify specific individuals and contain personal information including but not limited to, social security numbers, home addresses, and tax information; (ii) records that are exempt from disclosure under 5 U.S.C. § 552(b)(2), (5) and (6) of the Freedom of Information Act; (iii) proprietary information of plaintiffs or plaintiffs' competitors; and (iv) proprietary information relating to the Department of Health and Human Services (HHS).

2. (a) At the time of producing documents, defendant shall designate each document that it reasonably believes to contain Confidential Information as described in paragraph 1 of this Order. Such documents (or portions thereof) shall be used only for purposes of settlement negotiations in this litigation. Nothing in this Order shall prohibit defendant from withholding the name or other personal identifying information, as well as non-responsive information, that is protected from disclosure by the Privacy Act, 5 U.S.C. § 552a, by redacting such information from such documents or information that is to be produced under this Order or otherwise in this litigation. If information or documents sought by plaintiffs contain information that is or may be covered by the Privacy Act and could have been redacted but was not redacted, defendant, in response to any discovery properly propounded pursuant to the Rules of the United States Court of Federal Claims, is hereby authorized to release to plaintiffs' counsel in this case records that are relevant to this action, without obtaining prior written consent of the individual to whom such covered information pertains. Such disclosures by defendant or its attorneys shall be deemed authorized by law. *See* 5 U.S.C. § 552a(b)(11).

(b) When defendant produces documents or things for initial inspection

to plaintiffs' counsel of record, no marking or redaction need be made in advance of the initial inspection. Thereafter, upon selection of specified documents for copying by plaintiffs' counsel of record, defendant shall mark or redact the copies as appropriate at the time the copies are produced to plaintiffs' counsel of record. In the event that documents are produced without first marking such material as confidential or redacting protected material, then defendant may do so upon discovery of the omission by notice in writing to plaintiffs' counsel of record. Upon such notification, plaintiffs' counsel shall appropriately mark or redact all copies of such material.

(c) Should defendant inadvertently fail to designate material as Confidential Information or redact protected information, or mistakenly designate information as confidential material, the party discovering the inadvertence or mistake shall notify the other party for prompt correction. Because of the large volume of documents that defendant may produce during discovery in this case, defendant may inadvertently or mistakenly produce documents that could have been withheld in whole or in part upon the basis of privilege or some other protection. Therefore, any such production of all or part of a document shall not constitute a waiver of any privilege or other protection as to any portion of that document, in this or any other proceeding, provided that, upon discovery of the inadvertence or mistake, defendant notifies plaintiffs' counsel of record, in writing. Upon receipt of such notification, plaintiffs' counsel shall return to defendant the inadvertently or mistakenly produced document, shall destroy any reproduction, by any means, of the document, any portion of the document, or any information contained in the document, and shall not make any use of the document or any information contained in the document.

3. Identifying Protected Information. Protected information may be provided only to the court and to individuals admitted under this Protective Order and must be identified as follows:

(a) if provided in electronic form, the subject line of the electronic transmission shall read “CONTAINS PROTECTED INFORMATION”; or

(b) if provided in paper form, the document must be sealed in a parcel containing the legend “PROTECTED INFORMATION ENCLOSED” conspicuously marked on the outside.

The first page of each document containing protected information, including courtesy copies for use by the judge, must contain a banner stating “Protected Information to Be Disclosed Only in Accordance With the U.S. Court of Federal Claims Protective Order” and the portions of any document containing protected information must be clearly identified.

4. By producing Confidential Information pursuant to this Order, defendant is not waiving, and reserves the right to assert, any appropriate privileges and protections with respect to the Confidential Information. By receiving Confidential Information pursuant to this Order, plaintiffs are not agreeing that any document marked as “Confidential” is entitled to any protection from disclosure. Nothing in this Order shall require the production or disclosure of any documents, information, or other matters (including but not limited to “Confidential Information”) as to which defendant, under applicable law or rules of the Court of Federal Claims, may assert a privilege or some other protection.

5. Persons receiving or obtaining access to the Confidential Information may use such material solely for the purpose of settlement negotiations and not for any other purpose. Confidential Information shall not be given, shown, made available, discussed or otherwise communicated in any form to persons to whom disclosure is not authorized herein. Each person receiving Confidential Information shall maintain such Confidential Information in his or her possession in a manner sufficient to protect such material against unauthorized disclosure.

6. Access to or disclosure of Confidential Information shall be limited to: (a) the Court of Federal Claims and the Court of Appeals for the Federal Circuit, if this case is appealed, as well as personnel employed by these courts; (b) counsel of record for the parties and employees of counsel; and (c) independent experts and consultants, including their clerical personnel, who have been retained by a party to provide testimony or consultation in connection with this litigation. All individuals having access to Confidential Information shall be instructed that their use of the Information is governed by the terms of this Order. Nothing contained in this agreement and protective order shall prevent or in any way limit or impair the right of counsel for the United States to disclose to any agency of the United States (including other divisions and branches of the Department of Justice) any document or information regarding any potential violation of law or regulation or, subject to procedures that maintain the confidentiality of Confidential Information consistent with this agreement and protective order, prevent or limit in any way the use of such documents and information by an agency in any proceeding regarding any potential violation of law or regulation.

7. If counsel for plaintiffs desires to disclose Confidential Information to independent experts or consultants under paragraph 6 of this Order, counsel shall first obtain a signed statement from such person stating that he or she shall comply with all provisions of this Order. See Exhibit A.

8. Should plaintiffs wish to disclose Confidential Information that is subject to this Order to any additional persons other than those indicated in paragraph 6 of this Order, plaintiffs' counsel will first inform defendant. If defendant consents to disclosure of Confidential Information to such additional person(s), counsel for plaintiffs shall first obtain a signed statement from such person stating that he or she shall comply with all provisions of this Order. See Exhibit A. If defendant does not consent to the disclosure, then plaintiffs may, on motion, seek modification of this Order from the Court.

9. Nothing in this Order shall bar or otherwise restrict plaintiffs' counsel from rendering advice with respect to this litigation to his or her client who is a plaintiff in this litigation and, in the course thereof, relying generally upon counsel's examination of the information designated as Confidential.

10. Those portions of Court filings containing material designated as Confidential Information shall be filed under seal.

11. With regard to any depositions that may be taken, defendant may, on the record of such deposition or within five (5) working days after receipt of the transcript, designate any portion or portions of the depositions as containing Confidential Information. Prior to the expiration of the time described in the preceding sentence, plaintiffs may not disclose such deposition transcript to anyone who did not participate in

the deposition other than those persons described in paragraph 6. All such depositions transcripts and any copies thereof, and the portions of such transcripts so designated may be disclosed only as provided in this Order.

12. At the conclusion of this litigation (whether by settlement or by a judgment that has become non-appealable), if any of the information contained in records designated as Confidential Information is reproduced in whole or in part, in any manner, by any means, such information, along with original documents marked Confidential Information, shall be returned to defendant, or destroyed along with a written certification of same. As to those materials that contain Confidential Information but that constitute counsel's work product, plaintiffs' counsel shall maintain such records in a manner consistent with the terms of this Order. Plaintiffs' counsel shall be entitled to retain complete copies of all depositions transcripts, exhibits, pleadings, or other filings with this Court, provided that the documents are maintained in accordance with this Order.

13. After the termination of this action or any subsequent appeals, this Order shall continue to be binding upon the parties hereto and upon all persons to whom Confidential Information has been disclosed.

14. In the event of a breach of this agreement, the party alleging breach shall be entitled to apply to this Court for appropriate relief.

15. This Order does not constitute a ruling upon the question of whether any particular record is properly discoverable and does not constitute a ruling upon any potential objection to the discoverability or admissibility of any record.

ORDERED:

DATED: July 12, 2023

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

s/ Adam B. Wolfson

Adam B. Wolfson
adamwolfson@quinnemanuel.com
865 S. Figueroa Street
Los Angeles, California 90017
Telephone: (213) 443-3000
Facsimile: (213) 443-3100

Andrew H. Schapiro
andrewschapiro@quinnemanuel.com
191 N. Wacker Drive, Suite 2700
Chicago, Illinois 60606
Telephone: (312) 705-7400
Facsimile: (312) 705-7401

*Attorneys for Plaintiff Common Ground
Healthcare Cooperative and the Class*

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney
General

PATRICIA M. McCARTHY
Director

s/ Claudia Burke
CLAUDIA BURKE
Deputy Director

s/ David M. Kerr
DAVID M. KERR
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 305-7597
Facsimile: (202) 307-2503
Email: Chris.Carney@usdoj.gov

OF COUNSEL:

ALBERT S. IAROSI
Senior Trial Counsel
U.S. Department of Justice

*Attorneys for Defendant The United
States*

Exhibit A

FORM 10
APPLICATION FOR ACCESS TO INFORMATION UNDER
PROTECTIVE ORDER BY EXPERT CONSULTANT OR WITNESS

United States Court of Federal Claims

<p>_____ ,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>THE UNITED STATES,</p> <p style="text-align: center;">Defendant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>No. _____</p> <p>Judge _____</p>
--	---	-------------------------------------

APPLICATION FOR ACCESS TO INFORMATION UNDER
PROTECTIVE ORDER BY EXPERT CONSULTANT OR WITNESS

1. I, the undersigned, am a _____ with _____ and hereby apply for access to protected information covered by the Protective Order issued in connection with this proceeding.

2. I have been retained by _____ and will, under the direction and control of _____, assist in the representation of _____ in this proceeding.

3. I hereby certify that I am not involved in competitive decision making as discussed in *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of any party to this proceeding or any other firm that might gain a competitive advantage from access to the information disclosed under the protective order. Neither I nor my employer provides advice or participates in any decisions of such parties in matters involving similar or corresponding information about a competitor. This means, for example, that neither I nor my employer provides advice concerning, or participates in decisions about, marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected information could provide a competitive advantage.

4. My professional relationship with the party for whom I am retained in this proceeding and its personnel is strictly as a consultant on issues relevant to the proceeding. Neither I nor any member of my immediate family holds office or a management position in any company that is a party in this proceeding or in any competitor or potential competitor of a party.

5. I have attached the following information:

- a. a current resume describing my education and employment experience to date;
- b. a list of all clients for whom I have performed work within the two years prior to the date of this application and a brief description of the work performed;
- c. a statement of the services I am expected to perform in connection with this proceeding;

- d. a description of the financial interests that I, my spouse, and/or my family has in any entity that is an interested party in this proceeding or whose protected information will be reviewed; if none, I have so stated;
- e. a list identifying by name of forum, case number, date, and circumstances all instances in which I have been granted admission or been denied admission to a protective order, had a protective order admission revoked, or have been found to have violated a protective order issued by an administrative or judicial tribunal; if none, I have so stated; and
- f. a list of the professional associations to which I belong, including my identification numbers.

6. I have read a copy of the Protective Order issued by the court in this proceeding. I will comply in all respects with all terms and conditions of that order in handling any protected information produced in connection with the proceeding. I will not disclose any protected information to any individual who has not been admitted under the Protective Order by the court.

7. For a period of two years after the date this application is granted, I will not engage or assist in the preparation of a proposal to be submitted to any agency of the United States government for _____ when I know or have reason to know that any party to this proceeding, or any successor entity, will be a competitor, subcontractor, or teaming member.

8. For a period of two years after the date this application is granted, I will not engage or assist in the preparation of a proposal or submission to _____ nor will I have any personal involvement in any such activity.

9. I acknowledge that a violation of the terms of the Protective Order may result in the imposition of such sanctions as may be deemed appropriate by the court and in possible civil and criminal liability.

* * *

By my signature, I certify that, to the best of my knowledge, the representations set forth above (including attached statements) are true and correct.

Signature

Date Executed

Typed Name and Title

Telephone Number

E-mail Address

Signature of Attorney of Record

Date Executed

Typed Name and Title

Telephone Number

E-mail Address