

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

CODY FLACK and
SARA ANN MAKENZIE,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF
HEALTH SERVICES and
LINDA SEEMEYER, in her official capacity
as Secretary of the Wisconsin Department of
Health Services,

Defendants.

Case No. 3:18-cv-00309-wmc
Judge William Conley

STIPULATION TO ENTER PROTECTIVE ORDER

Plaintiffs Cody Flack and Sara Ann Makenzie (“Plaintiffs”) and Defendants Wisconsin Department of Health Services (“DHS”) and Linda Seemeyer, in her official capacity as Secretary of DHS (“Defendants”) (collectively, the “Parties”), stipulate to the following:

1. The Parties anticipate that they may need to exchange confidential, sensitive, or personally identifiable information (collectively, “confidential information”) between themselves and/or with third parties during the course of this litigation.
2. The Parties agree that such exchange of confidential information, other than in accordance with a protective order governing the confidentiality of documents produced in discovery, answers to interrogatories, answers to requests for admission, and deposition testimony, may cause unnecessary damage and injury to the Parties or to others.
3. The Parties agree to the terms of the proposed Stipulated Protective Order, attached as an exhibit hereto, to govern their exchange of confidential information in this case.

Based on the foregoing, the Parties request that the Court enter the proposed Stipulated Protective Order under Rule 26(c) of the Federal Rules of Civil Procedure.

Dated: June 12, 2018

/s/ Joseph J. Wardenski
Joseph J. Wardenski
Jennifer I. Klar
Orly May
RELMAN, DANE & COLFAX PLLC
1223 19th Street, NW, Suite 600
Washington, DC 20036
Telephone: (202) 728-1888
Facsimile: (202) 728-0848
jwardenski@relmanlaw.com
jklar@relmanlaw.com
omay@relmanlaw.com

Robert Theine Pledl
Mark A. Peterson
Daniel A. Peterson
MCNALLY PETERSON, S.C.
1233 North Mayfair Road, Suite 200
Milwaukee, WI 53226-3255
Telephone: (414) 257-3399
Facsimile: (414) 257-3223
rpled@mcpetelaw.com
mpeterson@mcpetelaw.com
dpeterson@mcpetelaw.com

Abigail Coursolle
Catherine McKee
NATIONAL HEALTH LAW PROGRAM
200 N. Greensboro Street, Suite D-13
Carrboro, NC 27510
Telephone: (919) 968-6308
Facsimile: (919) 968-8855
coursolle@healthlaw.org
mckee@healthlaw.org

Attorneys for Plaintiffs

Respectfully submitted,

Brad D. Schimel
Attorney General of Wisconsin

/s/ Steven C. Kilpatrick
Steven C. Kilpatrick
Assistant Attorney General
State Bar #1025452

Jody J. Schmelzer
Assistant Attorney General
State Bar #1027796

Colin T. Roth
Assistant Attorney General
State Bar #1103985

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (SCK)
(608) 266-3094 (JJS)
(608) 264-6219 (CTR)
(608) 267-2223 (Fax)
kilpatricksc@doj.state.wi.us
schmelzerjj@doj.state.wi.us
rothct@doj.state.wi.us

Attorneys for Defendants

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

CODY FLACK and
SARA ANN MAKENZIE,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF
HEALTH SERVICES and
LINDA SEEMEYER, in her official capacity
as Secretary of the Wisconsin Department of
Health Services,

Defendants.

Case No. 3:18-cv-00309-wmc
Judge William Conley

STIPULATED PROTECTIVE ORDER

Based on the Stipulation of Plaintiffs Cody Flack and Sara Ann Makenzie (“Plaintiffs”) and Defendants Wisconsin Department of Health Services (“DHS”) and Linda Seemeyer, in her official capacity as Secretary of DHS (“Defendants”) (collectively, the “Parties”), and the factual representations set forth therein, the Court finds that exchange of confidential, sensitive, or personally identifiable information between or among the Parties and/or third parties, other than in accordance with this Protective Order, may cause unnecessary damage and injury to the Parties or to others. The Court further finds that the terms of this Protective Order are fair and just and that good cause has been shown for entry of a protective order governing the confidentiality of documents produced in discovery, answers to interrogatories, answers to requests for admission, and deposition testimony.

IT IS THEREFORE ORDERED THAT, pursuant to Fed. R. Civ. P. 26(c):

A. DESIGNATION OF INFORMATION AS CONFIDENTIAL, PERSONALLY IDENTIFIABLE INFORMATION, OR FOR ATTORNEYS' EYES ONLY.

Designation of information under this Protective Order must be made by placing or affixing on the document or material, in a manner that will not interfere with its legibility, the words CONFIDENTIAL or ATTORNEYS' EYES ONLY.

1. One who produces information, documents, or other material may designate them as CONFIDENTIAL when the person in good faith believes they contain trade secrets or nonpublic confidential technical, commercial, financial, personal, or business information.

2. One who produces information, documents, or other material may designate them as ATTORNEYS' EYES ONLY when the person in good faith believes that they contain particularly sensitive trade secrets or other nonpublic confidential technical, commercial, financial, personal, or business information that requires protection beyond that afforded by a CONFIDENTIAL designation.

3. Except for information, documents, or other materials produced for inspection at the party's facilities, the designation of confidential information as CONFIDENTIAL or ATTORNEYS' EYES ONLY must be made prior to, or contemporaneously with, their production or disclosure. In the event that information, documents or other materials are produced for inspection at the party's facilities, such information, documents, or other materials may be produced for inspection before being marked confidential. Once specific information, documents, or other materials have been designated for copying, any information, documents, or other materials containing confidential information will then be marked confidential after copying but before delivery to the party who inspected and designated them. There will be no waiver of confidentiality by the inspection of confidential information, documents, or other materials before they are copied and marked confidential pursuant to this procedure.

4. Portions of depositions of a party's present and former officers, directors, employees, agents, experts, and representatives will be deemed confidential only if designated as such when the deposition is taken or within 10 days of receipt of the deposition transcript.

5. If a party inadvertently produces information, documents, or other material containing CONFIDENTIAL or ATTORNEYS' EYES ONLY information without marking or labeling it as such, the information, documents, or other material shall not lose its protected status through such production and the parties shall take all steps reasonably required to assure its continued confidentiality if the producing party provides written notice to the receiving party within 10 days of the discovery of the inadvertent production, identifying the information, document or other material in question and of the corrected confidential designation.

B. DISCLOSURE AND USE OF CONFIDENTIAL AND PERSONALLY IDENTIFIABLE INFORMATION.

Information, documents, or other material designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY under this Protective Order must not be used or disclosed by the Parties or counsel for the Parties or any persons identified in subparagraphs B.1. and B.2. below for any purposes whatsoever other than preparing for and conducting the litigation in which the information, documents, or other material were disclosed (including appeals). Nothing in this Protective Order prohibits a receiving party that is a government agency from following its routine uses and sharing such information, documents or other material with other government agencies or self-regulatory organizations as allowed by law.

1. CONFIDENTIAL INFORMATION. The Parties and counsel for the Parties must not disclose or permit the disclosure of any information, documents or other material designated as CONFIDENTIAL by any other party or third party under this Protective Order, except that disclosures may be made in the following circumstances:

a. Disclosure may be made to employees of counsel for the Parties who have direct functional responsibility for the preparation and trial of the lawsuit. Any such employee to whom counsel for the Parties makes a disclosure must be advised of, and become subject to, the provisions of this Protective Order requiring that the information, documents, or other material be held in confidence.

b. Disclosure may be made only to employees of a party required in good faith to provide assistance in the conduct of the litigation in which the information was disclosed who are identified as such in writing to counsel for the other parties in advance of the disclosure of the confidential information, documents or other material.

c. Disclosure may be made to court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making copies of documents or other material. Before disclosure to any such court reporter or person engaged in making copies, such reporter or person must agree to be bound by the terms of this Protective Order.

d. Disclosure may be made to consultants, investigators, or experts (collectively, "experts") employed by the parties or counsel for the parties to assist in the preparation and trial of the lawsuit. Before disclosure to any expert, the expert must be informed of and agree to be subject to the provisions of this Protective Order requiring that the information, documents, or other material be held in confidence.

e. Disclosure may be made to deposition and trial witnesses in connection with their testimony in the lawsuit and to the Court and the Court's staff.

f. Disclosure may be made to persons already in lawful and legitimate possession of such CONFIDENTIAL information.

g. Disclosure may be made to the court in this case consistent with the procedures set forth in Section C.2.

h. With respect to any medical records or other documents reflecting Plaintiffs' diagnoses of and treatments for gender dysphoria that are designated as CONFIDENTIAL, the Parties may, consistent with this Protective Order, identify such diagnoses and treatments for gender dysphoria (including identifying the name/diagnostic code for specific procedures and services sought or obtained; date(s) of treatment; and treating provider(s)) in pleadings, depositions, or court hearings. If specific medical records or other documents marked CONFIDENTIAL are attached as exhibits to a court filing, the exhibits should be filed under seal unless the Parties agree otherwise.

2. ATTORNEYS' EYES ONLY INFORMATION. The Parties and counsel for the Parties must not disclose or permit the disclosure of any information, documents, or other material designated as ATTORNEYS' EYES ONLY by any other party or third party under this Protective Order to any other person or entity, except that disclosures may be made in the following circumstances:

a. Disclosure may be made to counsel and employees of counsel for the Parties who have direct functional responsibility for the preparation and trial of the lawsuit. Any such employee to whom counsel for the parties makes a disclosure must be advised of, and become subject to, the provisions of this Protective Order requiring that the information, documents, or other material be held in confidence.

b. Disclosure may be made to court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making copies of documents or other material. Before disclosure to any such court reporter or person

engaged in making copies, such reporter or person must agree to be bound by the terms of this Protective Order.

c. Disclosure may be made to consultants, investigators, or experts (collectively, “experts”) employed by the parties or counsel for the parties to assist in the preparation and trial of the lawsuit. Before disclosure to any expert, the expert must be informed of and agree to be subject to the provisions of this Protective Order requiring that the information, documents, or other material be held in confidence.

d. Disclosure may be made to deposition and trial witnesses in connection with their testimony in the lawsuit and to the Court and the Court’s staff.

e. Disclosure may be made to persons already in lawful and legitimate possession of such ATTORNEYS’ EYES ONLY information.

f. Disclosure may be made to the court in this case consistent with the procedures set forth in Section C.2.

g. With respect to any medical records or other documents reflecting Plaintiffs’ diagnoses of and treatments for gender dysphoria that are designated as ATTORNEYS’ EYES ONLY, the Parties may, consistent with this Protective Order, identify such diagnoses and treatments for gender dysphoria (including identifying the name/diagnostic code for specific procedures and services sought or obtained; date(s) of treatment; and treating provider(s)) in pleadings, depositions, or court hearings. If specific medical records or other documents marked ATTORNEYS’ EYES ONLY are attached as exhibits to a court filing, the exhibits should be filed under seal unless the Parties agree otherwise.

C. MAINTENANCE OF CONFIDENTIALITY.

Except as provided in Section B above, counsel for the Parties must keep all information, documents, or other material designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY that are received under this Protective Order secure within their exclusive possession and must place such information, documents, or other material in a secure area.

1. All copies, duplicates, extracts, summaries, or descriptions (hereinafter referred to collectively as "copies") of information, documents, or other material designated as confidential under this Protective Order, or any portion thereof, must be immediately affixed with the words CONFIDENTIAL or ATTORNEYS' EYES ONLY if not already containing that designation.

2. To the extent that any answers to interrogatories, transcripts of depositions, responses to requests for admissions, or any other papers filed or to be filed with the Court reveal or tend to reveal information claimed to be confidential, these papers or any portion thereof must be filed under seal by the filing party with the Clerk of Court utilizing the procedures set forth in General L. R. 79(d). If a Court filing contains information, documents, or other materials that were designated CONFIDENTIAL or ATTORNEYS' EYES ONLY by a third party, the party making the filing shall provide notice of the filing to the third party.

D. CHALLENGES TO CONFIDENTIALITY DESIGNATION.

The designation of any material or document as CONFIDENTIAL or ATTORNEYS' EYES ONLY is subject to challenge by any party. The designating party bears the burden of proving that the information, documents, or other material at issue are properly designated as confidential. The following procedure shall apply to any such challenge.

1. Meet and Confer. A party challenging the designation of Confidential must do so in good faith and must begin the process by conferring directly with counsel for the designating party. In conferring, the challenging party must explain the basis for

its belief that the confidentiality designation was not proper and must give the designating party an opportunity to review the designated material, to reconsider the designation, and, if no change in designation is offered, to explain the basis for the designation. The designating party must respond to the challenge within five (5) business days.

2. Judicial Intervention. A party that elects to challenge a confidentiality designation may file and serve a motion that identifies the challenged material and sets forth in detail the basis for the challenge. Each such motion must be accompanied by a competent declaration that affirms that the movant has complied with the meet and confer requirements of this procedure. The burden of persuasion in any such challenge proceeding shall be on the designating party. Until the Court rules on the challenge, all parties shall continue to treat the materials as confidential under the terms of this Order. The Court may award the party prevailing on any such motion actual attorney fees and costs attributable to the motion.

E. CONCLUSION OF LITIGATION.

At the conclusion of the litigation, a party may request that all information, documents, or other material not filed with the Court or received into evidence and designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY under this Protective Order must be returned to the originating party or, if the Parties so stipulate, destroyed, unless otherwise provided by law. Notwithstanding the requirements of this paragraph, a party may retain a complete set of all documents filed with the Court, subject to all other restrictions of this Protective Order.

SO ORDERED, this ____ day of _____, _____.

U.S. District Judge