

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION



RICHARD ROE, ET AL.,

Plaintiffs,

v.

PATRICK M. SHANAHAN, ET AL.,

Defendants.

CIVIL ACTION NO. 1:18-cv-01565

PROTECTIVE ORDER

WHEREAS, pursuant to discovery or otherwise during the course of the above-captioned action, the parties may be required to disclose non-classified confidential and sensitive information within the meaning of Rule 26(c) of the Federal Rules of Civil Procedure and/or subject to the Privacy Act; and

WHEREAS, a protective order pursuant to Rule 26(c) and 5 U.S.C. § 552a(b)(11) is necessary to prevent unnecessary disclosure or dissemination of such confidential and sensitive information held by the parties;

THEREFORE IT IS HEREBY ORDERED THAT:

1. **Scope of Order:** This Order shall govern the production, use, and disclosure of all information and materials produced by any party or non-party in response to any discovery request (including, but not limited to, documents, interrogatory answers, responses to requests to admit, and deposition transcripts and exhibits), all information contained in those materials and all copies, excerpts, or summaries of those materials (collectively "Discovery Material").
2. **Designation of Protected Material:** A party or non-party may, in good faith, designate as CONFIDENTIAL, and therefore subject to the protections and requirements of this Order, any Discovery Material that the designating party reasonably believes contains

confidential information, including personal, proprietary, or sensitive information not generally disclosed to the public, including HIV status. In particular, any other information that might be used to identify Plaintiffs Richard Roe and Victor Voe (“Identifying Information”), who have been granted permission to proceed pseudonymously in this action, shall be designated as CONFIDENTIAL. Discovery Material designated CONFIDENTIAL (“Protected Material”) shall be used by the receiving parties solely for the prosecution or defense of this action and shall not be disclosed to any person or entity unless specifically authorized by the terms of this Order or by further order of the Court. Furthermore, Protected Material that includes Identifying Information and Personal Identifying Information shall not be filed on the public record. To the extent that Protected Material is relied upon by the Parties in briefs, it should be redacted. Consistent with the requirements of this paragraph, a party may designate Discovery Materials as CONFIDENTIAL within fifteen (15) business days of receipt of the Discovery Materials produced or given by the other parties or by a non-party but not designated CONFIDENTIAL by that other party or non-party.

3. **Limitations on Use:** Protected Material and its contents, as well as copies, summaries, notes, memoranda, and computer databases thereto, shall be used solely for the purpose of litigating this action, shall be and remain confidential, and shall not be disclosed in any fashion, nor be used for any purpose other than litigating this action, except that, unless explicitly stated here, this Order does not in any way supersede or supplant Defendants’ statutory obligations to disclose or protect information, including obligations under the Freedom of Information Act, the Privacy Act, and the Health Insurance Portability and Accountability Act.

4. **Limited Disclosure of Protected Material:** Protected Material may be disclosed, subject to the specific procedures and provisions contained in this Order, to the following people and/or entities only:

- a. This Court and the officers, employees, and any stenographic reporters of this Court;
- b. Counsel representing the parties (including their supervisory officials) and their support personnel whose functions require access to Protected Material (collectively “Attorney Professionals”),
- c. Personnel from the Department of Defense, and the Department of the Air Force, necessary to assist the defense of Plaintiffs’ claims, as well as personnel employed by the Department of Justice utilized to assist the defense of Plaintiffs’ claims;
- d. Outside vendors who perform scanning, photocopying, computer classification, translation, or similar clerical functions, retained by the parties or their counsel in this action, but only for the purposes of performing such services and only so long as necessary to perform those services;
- e. Independent experts consulted or retained by counsel for assistance in the preparation or prosecution of claims or defenses in the action, to the extent reasonably necessary for such experts to prepare a written opinion or to prepare to testify or to assist counsel;
- f. Witnesses who have been noticed or subpoenaed for deposition or a court appearance to the extent reasonably necessary for the preparation or giving of his or her testimony about Protected Material; and

- g. Any other person who is so designated by order of this Court or by written agreement of the producing party for purposes of this litigation.

No Protected Material may be disclosed to persons identified in subparagraphs (d), (e), (f), or (g) until they have reviewed this Order and have executed a written agreement in the form attached hereto as Exhibit A, which executed agreements shall be maintained by counsel of record for the party making the disclosure to such persons (provided that Counsel who makes such disclosure shall retain the written agreement but shall not be required to produce it to opposing counsel until the deposition of the person or with order of the Court), except that the Department of Justice may disclose Identifying Information to contractors from Leidos, which provides litigation support services to the Department of Justice. If Protected Materials containing Identifying Information or Personal Identifying Information are being attached as exhibits they should be redacted, or if redactions would eliminate the usefulness of the document, the party may seek to file under seal, along with an appropriate motion to seal pursuant to this Court's local rules, so as to preserve the anonymity of Plaintiffs or other individuals who have not consented to have their identities revealed in the course of this litigation.

5. **Effect of Designation:** The designation of Protected Material pursuant to the Order shall not be construed as a waiver of any objection or a concession by any party that such Protected Material is relevant or material to any issue. Nor shall a failure to object to the designation of any such Protected Material be construed as a concession by the receiving parties that such Protected Material is, in fact, confidential or otherwise entitled to protection under the terms of this Order. All parties maintain their respective rights to object to production of any requested documents or portions of requested documents on the grounds that they are otherwise not discoverable, including, but not limited to, objections based on any applicable privilege,

undue burden, overbreadth, relevance, and proportionality to the needs of the case. Any party may seek an order from the Court determining that specified Protected Material is not entitled to be treated as CONFIDENTIAL.

6. **Mechanics of Designation:** No designation of CONFIDENTIAL shall be effective as to a particular page of Protected Material unless there is placed on or affixed to each page of such Protected Material a marking of "CONFIDENTIAL," except that all Identifying Information, regardless of whether every page of any produced material is specifically marked as containing Identifying Information, shall not be disclosed to anyone not otherwise authorized under this Order to receive such information. In the case of electronic documents produced in native format, such CONFIDENTIAL designation may be made on the physical media (*e.g.*, disk, flash drive) containing such electronic documents and on a slipsheet accompanying the native file if the file is served electronically. Testimony may be designated CONFIDENTIAL within ten (10) business days after receipt of a transcript of said testimony by furnishing to counsel for the other parties a detailed statement of the specific portions of any such information by page and line number or exhibit number, by designating lines and pages as CONFIDENTIAL by highlighting or digital marking, or by a statement on the record at the time that the testimony is given. Pending the expiration of said ten (10) business days, all parties shall presumptively treat the entire deposition transcript as CONFIDENTIAL. In addition to the requirements of this Order, the court reporter before whom a deposition or other testimony relating to Protected Material is taken shall, at the request of any party, designate a portion of the deposition or any exhibits containing Protected Material as CONFIDENTIAL. Any Identifying Information provided in deposition or other testimony shall be designated as CONFIDENTIAL by default. Furthermore, any Protected Material marked as CONFIDENTIAL or containing Identifying

Information that is used during a deposition will remain in the control of the parties. Court reporters present at a deposition are not permitted to take any such document with them at the end of the deposition. Rather, copies of such documents will be provided to counsel for both parties, who will take possession of such documents. It will be noted in the record of the deposition which exhibits marked during the deposition will be kept by counsel for the parties.

7. **No Waiver; Late Designation:** The failure of a party to designate information or documents as CONFIDENTIAL in accordance with this Order, and the failure to object to such a designation is not a waiver of the right to do so and shall not preclude a party at a later time from subsequently designating or objecting to the designation of such information or documents as CONFIDENTIAL. The parties understand and acknowledge that a party's failure to designate information or documents as CONFIDENTIAL relieves the other parties of any obligation of confidentiality until such a designation is made. Promptly after written notice to the receiving parties of any such subsequent designation by the producing party, which notice shall specifically identify the documents or information to be designated, the parties shall confer and agree upon a method to mark as CONFIDENTIAL any such subsequently designated documents. All documents containing any such subsequently designated information will be thereafter treated in accordance with this Order.

8. **Objections to Designations:** A party may, at any time, make a good faith challenge to the propriety of a CONFIDENTIAL designation. In the event a party objects in writing to the designation of any material under this Order, the objecting party shall consult with the designating party to attempt to resolve their difference. If the parties are unable to reach an accord as to the proper designation of the material, after giving notice to the designating party, either party may apply to the Court for a ruling regarding the designation. If such a motion is

made, the designating party has the burden of establishing that the designation is proper. If a timely motion is made, any documents or other materials that have been designated CONFIDENTIAL that are subject to the motion shall be treated as CONFIDENTIAL until such time as the Court rules that such materials should not be treated as CONFIDENTIAL.

9. **Control of Protected Material:** All Protected Material shall be maintained under the direct control of counsel of record, who shall be responsible for preventing any disclosure thereof, except as permitted by the terms of this Order. Attorney Professionals may review and make working copies, abstracts, and digests from Protected Materials, provided that such copies, abstracts, and digests shall also be considered CONFIDENTIAL, and access to those materials, in whatever form stored or reproduced, shall be limited to those persons entitled to receive such information pursuant to the terms of this Order and shall be appropriately marked in accordance with the terms of this Order.

10. **Redaction of Personal Identifying Information:** In the event that the parties are required to produce Protected Materials including Personal Identifying Information (including, but not limited to, name, social security number, military identification numbers, date of birth, and home address) for individuals living with HIV who have not previously provided the parties with written permission to disclose their HIV status (including, but not limited to, the individuals identified in Exhibits to the Memorandum in Support of the Motion for a Preliminary Injunction), the parties shall redact all such Personal Identifying Information. But the parties shall produce redacted documents in a manner that makes clear which documents pertain to a particular individual living with HIV whose Personal Identifying Information is redacted.

11. **Return or Destruction; Conclusion of Action:** Unless otherwise instructed by the Court, and subject to any applicable document retention requirements, at the conclusion of

this action, including any appeals, all Protected Material, in whatever form stored or reproduced, shall be returned to counsel of record for the party who produced said Protected Material, or the receiving parties shall certify that all such information has been destroyed, except that the attorneys for the parties shall be entitled to retain all litigation documents, including exhibits and their own memoranda, containing Protected Material. Such litigation documents and memoranda shall be used only for the purpose of preserving files, and shall not, without the written permission of the designating party or any order of this Court, be disclosed to anyone other than those to whom such information was actually disclosed in accordance with this Order.

12. **Filing Under Seal:** Any party seeking to file documents containing Protected Material, Identifying Information, or Personal Identifying Information on the public record shall redact those documents. Otherwise, the party seeking to file such documents shall file a motion to file under seal pursuant to Local Civil Rule 5.

13. **Subpoena of Protected Material:** If a person in possession of Protected Material who is not the producing party with respect to that Protected Material receives a subpoena or other request that would require production or other disclosure of Protected Material, that person shall immediately give written notice to counsel for the producing party, identifying the Protected Material sought and the dates and times that production or other disclosure is required. In no event should production or disclosure be made without written approval by counsel for the producing party or by further order of this Court or another court of competent jurisdiction.

14. **Inadvertent Disclosure:** Should any Protected Material be disclosed, through inadvertence or otherwise, to any person and/or entity not entitled to access or review the same, then such person and/or entity:

- a. Shall be informed promptly of all provisions of this Order by the responsible party;
- b. Shall immediately be identified to all counsel of record by the responsible party; and
- c. Shall be requested, in writing by the responsible party, to return the material to the responsible party.

Inadvertent disclosure by the disclosing party of any Protected Material, regardless of whether said Protected Material was so designated at the time of the disclosure, shall not be deemed a waiver in whole or in part of the protectability of the Protected Material in accordance with the terms of this Order, either as to the specific Protected Material disclosed, or as to any other information relating thereto or relating to the same or related subject matter.

15. **Privacy Act:** Pursuant to 5 U.S.C. § 552a(b)(11), Defendants are authorized to release to Plaintiffs the names and other Identifying Information about Plaintiffs where that information is within the custody and control of Defendants and is responsive to a discovery request.

16. **Modification:** This Order is without prejudice to the right of any party to apply at any time for additional protection, or to seek to amend, modify, or rescind the restrictions of this Order. The party must provide written notice to counsel of record specifying the portion(s) of this Order it seeks to amend, modify, or rescind, and any additional provisions it may seek to add to the Order. The written notice must be served five (5) business days in advance of filing any such motion. The parties expressly reserve the right to seek modification, amendment, or rescission of this Order by mutual agreement in writing.

17. **Enforcement:** All persons to whom Protected Material is disclosed shall be subject to the jurisdiction of this Court for the purpose of enforcing this Order. This Order shall continue in full force and effect, and shall be binding upon the parties and all persons to whom Protected Material has been disclosed, both during and after pendency of this case.

IT IS SO ORDERED.

Dated: 22 Jan 19

 /s/ _____

Ivan D. Davis
United States Magistrate Judge