

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN, *et al.*, individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

**MEMORANDUM IN SUPPORT OF JOINT MOTION TO
FILE EXHIBITS UNDER SEAL**

The Parties in the above-captioned case, pursuant to Rule 5.2(d) and Local Rule 26.4(c)(2), move this Court for an order to file under seal the unredacted versions of an expert report by Dr. Dan Karasic, attached as Exhibit A, encompassing paragraphs 47-93 and the Affidavit of Jennifer Myers, attached as Exhibit B, encompassing paragraphs 3(a)-(v) and 5(a)-(q). Good cause exists to seal the relevant portions of Dr. Karasic’s report because it contains a psychological evaluation of Plaintiffs and discusses their sensitive personal identifying information, protected health information, and other confidential information.¹ The same is true for the Affidavit of Jennifer Myers, which contains a list of medical services received by Plaintiffs, along with personal identifying information.

Under Local Rule 26.4(c)(2), a motion to seal must be accompanied by a memorandum of law that contains: “(A) the reasons why sealing is necessary, including the reasons why alternatives

¹ The portion of Dr. Karasic’s report that Plaintiffs request to file under seal redacts some information that is highly sensitive and which Plaintiffs assert is irrelevant to the issues before the Court.

to sealing, such as redaction, are inadequate; (B) the requested duration of the proposed seal; and (C) a discussion of the propriety of sealing, giving due regard to the parameters of the common law and First Amendment rights of access as interpreted by the Supreme Court and our Court of Appeals.” L.R. Civ. P. 26.4(c)(2). Although public inspection of court documents “is necessary to allow interested parties to judge the court’s work product in the cases assigned to it,” the court will seal documents when “exceptional circumstances” are present. *Id.*; *Adkins v. Appalachian Power Co.*, No. CV 3:21-0164, 2022 WL 1096627, at *1 (S.D.W. Va. Apr. 12, 2022). While “[t]he common law “presumes a right of the public to inspect and copy ‘all judicial records and documents,’” *id.* (citing *Va. Dep’t of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004)), this presumption can be rebutted “if countervailing interests heavily outweigh the public interests in access.” *Id.* (citing *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)). This is a balancing test but ultimately, the “decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.” *Nixon v. Warner Commc’ns., Inc.*, 435 U.S. 589, 599 (1978).

Alternatives to sealing, such as redaction, are wholly inadequate. Paragraphs 47-93 of Dr. Karasic’s Report memorialize the psychological interviews he conducted with Plaintiffs. Plaintiffs’ interest in sealing the information within that limited range of paragraphs—which at times discussed in detail the more intimate and highly sensitive aspects of their lives and health information—far outweighs any interest that the public may have in such information. *See Graening v. Wexford Health Sources, Inc.*, No. 1:20-cv-00400, 2022 WL 433332, at *2 (S.D.W. Va. Feb. 11, 2022) (finding that interest in protecting sensitive health information outweighed public’s right of access under First Amendment test—despite the fact that the plaintiff put his health information at issue by filing the case). Similarly, paragraphs 3(a)-(v) and 5(a)-(q) of the

Affidavit of Jennifer Myers contain protected health information, including extensive details about medical services received, and sensitive identifying information. Even if redactions were feasible, which they are not, they would render the entirety of the Affidavit of Jennifer Myers unusable.

Courts in this circuit have recognized that redaction of information in order to “protect[] the privacy rights” of a party is a sufficiently compelling interest to justify sealing under both the common law and the First Amendment. *BrickStreet Mut. Ins. Co. v. Zurich Am. Ins. Co.*, No. 2:15-CV-06172, 2016 WL 10789403, at *2 (S.D.W. Va. June 17, 2016) (citing *Doe v. Public Citizen*, 749 F.3d 246, 269 (4th Cir. 2014)). Additionally, the Parties do not seek to file the entirety of Dr. Karasic’s Report and the Affidavit of Jennifer Myers under seal, but rather just those limited paragraphs and sections that fall into the categories of medical and other information that are *sensitive, protected, and confidential*. The documents contain very specific and personal medical information about Plaintiffs. The Parties have redacted only what is truly necessary to redact, but mere redactions would not adequately protect Plaintiffs’ privacy while allowing the Court to understand the issues presented.

The Parties request that paragraphs 47-93 of Exhibit A and paragraphs 3(a)-(v) and 5(a)-(q) of Exhibit B remain under permanent seal, as there is no time at which the confidential nature of this information will expire. *See, e.g., United States v. Bennett*, No. 19-cr-255 (JNE/TNL) (2), 2021 WL 2310391, at *15 n.1 (D. Minn. June 7, 2021) (granting motion to seal exhibit containing medical information “indefinitely”).

Dated: May 31, 2022

/s/ Kimberly Bandy

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served electronically on May 31, 2022
on the following counsel for Defendants in this case:

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