

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

ROBERT DEXTER WEIR et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

Civil Action No. 19-1708 (TFH)

PROTECTIVE ORDER

1. This case arises from the detention of Plaintiffs, who are Jamaican nationals, aboard Coast Guard cutters before their arrival in the United States for criminal prosecution. Because of the involvement of Coast Guard cutters and sensitive law enforcement information and materials, and with the agreement of the parties, the Court has determined that there is good cause for issuance of a Protective Order pursuant to [Federal Rule of Civil Procedure 26\(c\)](#) to govern the disclosure, use, and handling by the parties and their respective agents, successors, and personal representatives of certain information and items produced and received in discovery in the above-captioned action; accordingly,

IT IS ORDERED AS FOLLOWS:

A. Definitions

1. “Action” or “Lawsuit” shall mean the above-captioned case pending before the U.S. District Court for the District of Columbia, Case No. 19-cv-1708.

2. “Confidential Information” shall mean information that, at the time of its production in discovery in the action, or thereafter, is designated as confidential by counsel for

the United States, or counsel for the Plaintiffs, based upon a good faith belief that the information: (a) is not in the public domain, or if in the public domain, is improperly in the public domain; and (b) is to be restricted in its receipt, viewing, use of, possession, or dissemination, due to the inclusion of information concerning sensitive information, including national security, military, homeland defense, or law enforcement operations. Sensitive information and materials include, but are not limited to, U.S. National Defense Information (NDI) within the meaning of 18 U.S.C. § 793(d) and (f), and U.S. Law Enforcement Sensitive information (e.g., documents describing U.S. law enforcement techniques and procedures). This definition does not include, and this Protective Order does not contemplate, Classified National Security Information as discussed in Executive Order 13526.

3. “Disclose” (or forms thereof) shall mean to distribute, provide, or otherwise make available for access, viewing, or copying. This includes the actual covered document, as well as the contents thereof, such that disclosing a copy, summary, paraphrasing, or derivative would be a disclosure of the document or information itself for purposes of this Protective Order.

4. “Document” shall mean all items listed in Federal Rule of Civil Procedure 34(a)(1)(A).

5. “Challenging Party” shall mean any party who challenges a designation of Confidential Information under this Protective Order.

6. “Designating Party” and “Producing Party” shall mean the United States or counsel for Plaintiffs.

7. “Receiving Party” shall mean any party who receives designated Confidential Information.

8. “U.S. Citizen Only Information” shall mean information that, in addition to being “Confidential Information,” is further protected against disclosure, as stated in paragraph E.2.

below, based upon a good faith belief that an agency of the United States has prohibited disclosure to foreign persons.

B. Purpose, Scope, and Limitations of Protective Order

1. This Protective Order governs the disclosure, use, and handling of Confidential Information related to this action, including during all discovery and pre-trial matters.

2. Following the close of discovery, the parties will meet and confer regarding whether the terms of this protective order will be modified in relation to the use at trial of materials designated during discovery as Confidential Information. If the parties are unable to agree following this meet and confer process, they will raise any contested issues with the Court at the pre-trial conference.

3. This Order binds the Parties and their respective agents, successors, personal representatives, and assignees.

4. Nothing in this Protective Order supersedes existing independent statutory, law enforcement, national security, or regulatory obligations imposed on a Party by U.S. law, and this Protective Order does not prohibit or absolve the Parties from complying with such other obligations.

5. A party's compliance with the terms of this Protective Order shall not operate as an admission that any particular material is or is not (a) confidential, (b) privileged, or (c) admissible in evidence at trial. A Producing Party's production of document(s) or portions of document(s) under this Protective Order shall not act as a waiver of privilege, or admission regarding the scope of discovery allowed under Fed. R. Civ. P. 26(B)(1), with respect to any other document(s) or any other portions of document(s) not produced.

6. The protections conferred by this Protective Order do not cover any information that (a) is properly in the public domain; (b) becomes part of the public domain after its disclosure

to a Receiving Party as a result of publication not involving a violation of this Protective Order, including becoming part of the public record in this Action through trial or otherwise; or (c) is known to the Receiving Party prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who obtained the information lawfully and under no obligation of confidentiality to the Producing Party.

7. Nothing in this Protective Order shall restrict the right of the Producing Party, including its employees, to use its own Confidential Information for any purpose whatsoever, but if any such use results in a disclosure that causes the Confidential Information to lose its designation as Confidential Information, then it shall no longer be subject to any protection under this Protective Order.

8. This Protective Order applies only to disclosures, uses, and handling of Confidential Information occurring after the entry of this Protective Order.

9. Neither the termination of this Action, nor the termination of employment by (or other relationship between) a party and any person who has had access to any Confidential Information, shall relieve the Parties or such persons of the obligations under this Protective Order, which shall survive.

10. Any party may at any time seek modification of this Order by agreement or, failing agreement, by motion to the Court.

C. Method for Designating Confidential Information

1. Designations of Confidential Information shall be made by the Producing Party, prior to or at the time of production, except as otherwise provided by this Protective Order.

2. Confidential Information produced in paper or electronic form that allows for facial endorsement shall be designated “Confidential Information” or similar designation on each page of the document asserted to contain Confidential Information.

3. Electronic files containing Confidential Information that are produced in a format not amenable to facial endorsement (e.g., a video, or spreadsheet produced in “native” format) shall be produced with a cover page designated “Confidential Information” or similar designation, which cover page shall always accompany the underlying electronic file. The media on which such confidential electronic files are provided (e.g., CD, DVD, external hard drive) shall be designated and remain plainly labeled with “Confidential Information” or similar designation.

4. Answers to interrogatories, or responses to requests for admissions, that contain Confidential Information shall be designated by placing within each numbered answer or response the following: “Confidential Information” or similar designation.

5. Confidential deposition testimony shall be designated during the deposition on the record, or by letter from counsel within thirty (30) days of receipt of the official deposition transcript or copy thereof (or written notification that the transcript is available), listing the specific pages and lines of the transcript and/or any exhibits that should be treated as Confidential Information. The entire deposition transcript (including any exhibits not previously produced in discovery in this Action) shall be treated as Confidential Information under this Protective Order until the expiration of the above-referenced 30-day period for designation, except that the deponent (and his or her counsel, if any) may review the transcript of his or her own deposition during the 30-day period subject to this Protective Order and the requirement of executing the certification attached as Exhibit A. Upon designation of deposition testimony, the following shall be placed on the front of the original and each copy of a deposition transcript containing Confidential Information: “Confidential Information” or similar designation. If the deposition was filmed, both the recording storage medium (*i.e.*, CD or DVD) and its container shall be labeled “Confidential Information” or similar designation.

6. For any other document, electronic record, or tangible thing produced in this Action not falling within the above subparagraphs, designation of Confidential Information shall be made by labeling the item or the item's container with "Confidential Information" or similar designation. If only a portion or portions of the information contained in such item warrant protection as Confidential Information, it shall be accompanied by a cover letter identifying the specific portion or portions so designated.

7. In addition to being designated as Confidential Information in the manner described in the aforesaid subparagraphs, U.S. Citizen Only Information shall be designated with the further words "U.S. Citizen Only Information" or similar.

8. If it comes to the Producing Party's attention that information designated as Confidential Information does not qualify or no longer qualifies for protection, the Producing Party must promptly notify all Parties in writing that it is withdrawing the designation for the applicable information.

D. Challenging Confidential Designations

1. A Challenging Party shall not be obliged to challenge the propriety of a designation under this Protective Order at the time made, and a failure to do so shall not preclude a later challenge thereto.

2. The Challenging Party may initiate a challenge to the Designating Party's designation under this Protective Order after first providing to the Designating Party: (a) written notice of each designation it is challenging and (b) a description of the basis for each challenge.

3. The Challenging Party and the Designating Party shall attempt to resolve any challenge in good faith and must begin a meet-and-confer process within seven (7) calendar days after the Designating Party receives notice from the Challenging Party. During the conferring process, the Challenging Party must convey its basis for the challenge and the Designating Party

must review the applicable documents and either keep or change the designation. The Designating Party must communicate its decision(s) to the Receiving Party within fourteen (14) calendar days after receipt of notice of the challenge, or within another reasonable time if agreed to by the Parties.

4. If the Designating Party decides to change its designation, it shall give notice of this change to all parties.

5. If the Challenging and Designating Parties cannot come to a resolution within the time set forth in paragraph 3 above, or as otherwise agreed, the Challenging party may file a motion seeking a determination from the Court.

6. Any information designated as Confidential Information pursuant to and after the entry by the Court of this Protective Order shall be treated as Confidential Information until such time as (a) the Designating Party agrees that it shall no longer be treated as Confidential Information or (b) the Court rules that such information should not be treated as Confidential Information.

E. Disclosure, Use and Handling of Confidential Information

1. A Receiving Party may use Confidential Information only in connection with this Action, and only for prosecuting, defending, or attempting to settle this Action, and shall disclose such Confidential Information only in accordance with the terms of this Protective Order.

2. Confidential Information further designated as “U.S. Citizen Only Information” shall not be used by, or discussed, revealed or disclosed to, any person that is not a citizen of the United States of America.

3. Counsel of record are responsible for employing reasonable measures, consistent with this Protective Order, to control access to and secure distribution of Confidential Information.

4. Any copying or transferring of electronic files that are designated as Confidential Information must be done in a manner that maintains the protection for all copies, including, but not limited to, maintaining the cover page with all files that are not facially endorsed, transferring only via encrypted and/or password-protected means, and protecting networks and/or devices on which files are stored including by controlling users' access thereto.

5. Further to the limitations stated in this section, Confidential Information shall only be disclosed to the following persons:

- a. Counsel of record for the Receiving Parties, and associated personnel necessary to assist counsel of record in this Action, such as supervising attorneys, associates, law fellows, summer interns, paralegals, information technology personnel, or clerical personnel, but excluding the Plaintiffs;
- b. Expert witnesses and consultants;
- c. Court reporters and other persons not employed by this Court, retained to record or transcribe testimony or argument at interviews or depositions in connection with this Action;
- d. Mediators or arbitrators; and
- e. This Court (including any judicial officer to whom this Court may refer this matter for settlement purposes), and Court personnel, including persons recording or transcribing testimony or argument at a conference, hearing, trial, or appeal in this Action.

6. Disclosure to the persons referenced in subsections (E)(5)(a)-(d) above may only occur after the person to whom the disclosure is being made has been given a copy of this Protective Order and has signed a declaration in the form attached hereto as "Exhibit A."

7. Persons receiving Confidential Information pursuant to the terms of this

Protective Order are prohibited from disclosing it to any person except in conformance with this Protective Order.

8. Unless the Designating Party gives written permission, all Confidential Information that is filed with the Court must be: (1) filed under seal or *in camera* in accordance with the Court's Local Rules and procedures; or (2) redacted from any filing.

9. If a Receiving Party or anyone subject to this Protective Order receives a subpoena under Fed. R. Civ. P. 45 (or an equivalent mechanism under state law) seeking Confidential Information as designated in this Action, the Receiving Party or such individual shall promptly notify the Designating Party and shall not disclose any Confidential Information until the Designating Party has had a reasonable opportunity to inform the subpoenaed person either: (a) the Designating Party does not object to the production of the Confidential Information; or (b) that that the Designating Party will seek appropriate relief or protection from the proper Court. The Designating Party shall bear the burden and expense of seeking protection of its designated Confidential Information, and nothing in this Protective Order should be construed as authorizing or encouraging a subpoenaed person to disobey a lawful directive from this or another court.

10. If the need arises for any party to disclose Confidential Information in a proceeding in open Court or in support of a dispositive motion, it may do so only after giving seven (7) days' notice to the Designating Party who, after a good faith effort to meet-and-confer, may seek additional relief from the Court.

F. Inadvertent Production of Confidential Information

1. Nothing herein shall be deemed or construed as a waiver of any applicable privilege, right of privacy, or proprietary interest with respect to any information or item. The Parties have agreed to, and shall, follow Fed. R. Civ. P. 26(b)(5)(B) and the procedures specified

below with respect to any inadvertently or unintentionally produced or disclosed Confidential Information.

2. If a Receiving Party learns that, by inadvertence or otherwise, it, or a person to whom it has disclosed Confidential Information in accordance with this Protective Order, has disclosed Confidential Information to any person or in any circumstance not authorized under this Protective Order, the Receiving Party shall, upon learning of the unauthorized disclosure: (a) promptly notify the person(s) to whom the unauthorized disclosure was made that the unauthorized disclosure contains Confidential Information subject to this Protective Order; (b) promptly make all reasonable efforts to obtain the return of the Confidential Information and to prevent further unauthorized disclosures of the Confidential Information, including requesting the person who received the unauthorized disclosure to agree to be bound by the terms of this Protective Order by executing a declaration in the form attached as “Exhibit A”; and (c) within five (5) calendar days notify the Producing Party and all other Parties of the identity of the person(s) to whom the unauthorized disclosure was made, the circumstances surrounding the disclosure, and the steps taken to prevent any use or further disclosure of the Confidential Information that was the subject of the unauthorized disclosure.

G. Disposition of Documents Containing Confidential Information

1. Except as provided in this Protective Order, within 90 days of the final termination of this Action, whether by settlement, judgment, or other disposition or conclusion and all appeals or opportunities to appeal therefrom, a Receiving Party shall take reasonable steps either to (a) destroy or delete all items designated as Confidential Information or (b) return them to the Designating Party, depending upon the Designating Party’s stated reasonable preference, except materials that exist on back-up tapes or similar systems. Materials that exist on back-up tapes, systems, or similar storage need not be immediately deleted or destroyed, and,

instead, such materials may be overwritten and destroyed in the normal course of business. Until they are overwritten in the normal course of business, the Receiving Party will take reasonable steps to limit access, if any, to the persons necessary to conduct routine IT and cybersecurity functions. In the course of disposing of information in its possession under this paragraph, Receiving Party also will take reasonable steps to notify persons to whom it distributed Confidential Information pursuant to this Order that such information should be returned to Receiving Party or destroyed by the person possessing the information with written confirmation to Receiving Party.

2. For material that contains or reflects Confidential Information, but that constitutes or reflects counsel's work product, counsel of record for the Parties shall be entitled to retain such work product in their files in accordance with the provisions of this Protective Order, so long as it is and remains clearly marked to reflect that it contains Confidential Information subject to this Protective Order, and remains accompanied by a copy of this Protective Order.

3. Counsel of record for the Parties shall also be entitled to retain an archival copy of all pleadings; affidavits; motion papers; trial, deposition, and hearing transcripts; legal memoranda; correspondence; deposition and trial exhibits; expert reports; briefs; other papers filed with the Court; and any other parts of the trial record, even if such material contains Confidential Information, so long as such material is and remains clearly marked to reflect that it contains Confidential Information.

4. Even after the final disposition of this Action, the terms of this Protective Order shall continue to govern the disclosure, use, and handling of any Confidential Information unless and until its Designating Party agrees otherwise in writing or a court order directs.

5. In particular, after final disposition of this Action, the Designating Party shall continue to maintain and shall not destroy or delete all items previously designated as

Confidential Information for a period of four (4) years; and any time within this period of four (4) years, the Receiving Party shall have the right, with reasonable advance notice, to inspect and copy such previously designated Confidential Information.

SO ORDERED this 28th day of April, 2021.

THOMAS F. HOGAN
UNITED STATES DISTRICT JUDGE

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

ROBERT DEXTER WEIR et al.,

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Defendants.

Civil Action No. 19-1708 (TFH)

CERTIFICATION

1. My name is _____
2. I have read the Protective Order Regarding Sensitive Information that has been entered in this case, and a copy of it has been given to me. I understand the provisions of the Protective Order, and agree to comply with and be bound by its provisions. I also consent to the jurisdiction of this Court for purposes of enforcement of the Protective Order.
3. I declare under penalty of perjury that the foregoing is true and correct.

Executed this _____ day of _____

by _____
(Print Name)

Signed _____