

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*,

Plaintiffs-Petitioners

v.

QUINCY BOOTH, in their official capacity
as Director of the District of Columbia
Department of Corrections, *et al.*,

Defendants-Respondents.

No. 1:20-cv- _____

**PLAINTIFFS' MOTION FOR LEAVE TO FILE UNDER SEAL EXHIBITS 4-7
TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER**

Plaintiffs, through undersigned counsel, hereby move the Court, pursuant to Federal Rule of Civil Procedure 7(b) and Local Civil Rules 5.1(h) and 7, for leave to file Exhibits 4, 5, 6, and 7 to the Motion for Temporary Restraining Order under seal, with a copy of the Motion for Temporary Restraining Order with redacted Exhibits 4, 5, 6, and 7 to be filed publicly by March 31, 2020. Defendants' counsel has not yet been assigned and therefore cannot be asked about Defendants' position on this motion. In support of this motion, Plaintiffs state as follows:

1. Although there is a "strong presumption in favor of public access to judicial proceedings," a district court has discretion to allow a party to file documents under seal where it determines that other factors, such as the privacy interest in sensitive personal information, "act to overcome this presumption." *Hardaway v. D.C. Hous. Auth.*, 843 F.3d 973, 980 (D.C. Cir. 2016).

2. The district court's discretion in determining whether to seal documents is "exercised in light of the relevant facts and circumstances of the particular case." *United States v. Harris*, 204 F. Supp. 3d 10, 16 (D.D.C. 2016). In *United States v Hubbard*, 650 F.2d 293 (D.C.

Cir. 1980), the D.C. Circuit set forth six factors that district courts must consider:

(1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.

Hubbard, 650 F.2d at 317-22; *see, e.g., Hardaway*, 843 F.3d at 980; *EEOC v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996).

3. Under this standard, Plaintiffs should be permitted to file Exhibits 4, 5, 6, and 7 under seal, with redacted copies to be filed on public record, in order to protect their privacy interests in the confidential medical information contained therein.

4. Plaintiff Edward Banks's declaration (Exhibit 4 at paragraphs 3, 5) contains confidential medical information about his medical diagnoses, his current medical conditions, and the medications he currently takes. Plaintiff Keon Jackson's declaration (Exhibit 5 at paragraph 14) contains confidential medical information about his medical diagnosis and his current medical conditions. Plaintiff Eric Smith's declaration (Exhibit 6 at paragraph 9) contains confidential medical information about his medical diagnoses, his current medical conditions, and the medication he currently takes. Plaintiff D'Angelo Phillips's declaration (Exhibit 7 at paragraph 9) contains confidential medical information about his medical diagnosis and current medical conditions.

5. Application of the *Hubbard* factors illustrates that sealing, and redaction of the public filing, are warranted in order to protect Plaintiffs' confidential medical information.

6. There is "no need for public access" to the detailed medical information revealed in the Plaintiffs' declarations. *See, e.g., Hardaway*, 843 F.2d at 980 (noting that "[t]he public has no need for access to documents that describe [plaintiff's] disability" in lawsuit brought against

housing authority under Americans with Disabilities Act, Rehabilitation Act, and Fair Housing Act). Moreover, Plaintiffs are ready to file the Exhibits in the public record with the medical information redacted. Because the medical information is contained in a very small portion of each declaration, the redacted material will be minimal and the public will have access to the vast majority of each Exhibit. Therefore, the first *Hubbard* factor weighs in favor of sealing and redaction.

7. “Previous access [to particular documents or information] is a factor which may weigh in favor of subsequent access.” *Hubbard*, 650 F.2d at 318. Here, in contrast, there has been no previous public access to the medical information contained in the Exhibits. Therefore, the second *Hubbard* factor weighs in favor of sealing and redaction. *See Hardaway*, 204 F.Supp.3d at 17.

8. “The fact that a party moves to seal the record weighs in favor of the party’s motion.” *Harris*, 204 F. Supp.3d at 17. Because Plaintiffs are the ones who object to public disclosure and seek sealing of their detailed medical information, the third *Hubbard* factor weighs in favor of sealing and redaction. *Hardaway*, 843 F.3d at 980 (allowing sealing and/or redacting of medical records and descriptions of plaintiff’s disability where plaintiff “objected to their disclosure”).

9. Plaintiffs have a strong privacy interest in keeping confidential the details of their medical diagnoses, conditions, and treatment. *See, e.g., Hardaway*, 843 F.3d at 980 (sealing documents and noting that plaintiff “possesse[d] a strong privacy interest in keeping the details of her disability confidential”); *United States v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995) (noting that certain subject matters, such as “illnesses,” weigh “more heavily” against public access); *Bertolotti v. AutoZone, Inc.*, 132 F. Supp. 3d 590, 609-10 (D.N.J. 2015) (granting motion to seal

exhibits to summary judgment motion “contain[ing] information concerning Plaintiff’s medical conditions” due to privacy interest in health information, including medical history and records); *Briggs v. Marriott Int’l, Inc.*, 368 F. Supp. 2d 461, 463 n.1 (D. Md. 2005) (granting motion to seal exhibits containing ERISA plaintiff’s “medical information”); *Spahr v. Med. Dir. Ely State Prison*, No. 19-cv-0267 (CLB), 2020 WL 137459, at *2 (D. Nev. Jan. 1, 2020) (granting motion to seal exhibits containing plaintiff’s “sensitive health information, medical history, and treatment records” and explaining that “the plaintiff’s interest in keeping his sensitive health information confidential outweighs the public’s need for direct access to the medical records”); *United States v. Robinson*, No. 16-CR-5307 BHS-5, 2019 WL 2567356, at *2 (W.D. Wash. June 21, 2019) (granting motion to seal defendant’s declaration in support of motion for compassionate release because declaration contained medical information and defendant’s “right to privacy in her medical information outweighs the public’s right of access to the court files”). Therefore, the fourth *Hubbard* factor weighs heavily in favor of sealing and redaction.

10. The “possibility of prejudice to those opposing disclosure” refers to “whether disclosure of the documents will lead to prejudice in future litigation to the party seeking the seal.” *Harris*, 204 F. Supp. 3d at 17 (citing *Friedman v. Sebelius*, 672 F. Supp.2d 54, 60 (D.D.C. 2009)). Because Plaintiffs do not contend that disclosure of the medical information “would have an effect on future litigation,” the fifth *Hubbard* factor “is neutral.” *Harris*, 204 F. Supp. 3d at 17.

11. The final *Hubbard* factor considers “the purposes for which the documents were introduced during the judicial proceedings.” *Hardaway*, 843 F.3d at 980; *Hubbard*, 650 F.2d at 321. “The more relevant [the information] is to the central claims of the litigation, the stronger the presumption of [public access to the information] becomes.” *Harris*, 204 F.Supp.3d at 17-18. Here, the specific diagnoses, conditions, and treatments of each of the Plaintiffs is not of high

relevance to the claims of the litigation. Plaintiffs claim that the recklessness and deliberate indifference of Defendants violates the Fifth and Eighth Amendments rights of all residents of the Central Detention Facility (“CDF”) and the Correctional Treatment Facility (“CTF”). While the Centers for Disease Control and Prevention is clear that certain preexisting medical diagnoses increase the risk that COVID-19 will cause serious harm or death, it is Plaintiffs’ claim that COVID-19 poses sufficient harm to all persons residing at CDF and CTF to meet the Fifth and Eighth Amendment tests. Should the Court appoint an expert to make recommendations regarding the release of as many proposed class members as possible, Plaintiffs’ specific medical information may become relevant to that expert’s recommendation. But as to Plaintiffs’ legal claim, which regards the treatment of all residents of CDF and CTF, Plaintiffs’ medical diagnoses are not relevant. Therefore, the sixth *Hubbard* factor either weighs in favor of sealing and redaction, or is neutral. *Cf. Hamen v. Islamic Republic of Iran*, 318 F. Supp. 3d 194, 199 (D.D.C. 2018) (granting motion for leave for witness to testify under seal and reasoning that although “the witness’s testimony may inform the Court’s decision,” “it appears unlikely that the testimony is essential to Plaintiffs’ case, and thus the public interest is not at its zenith”).

12. Under the *Hubbard* factors, Plaintiffs’ substantial privacy interests in protecting the details of their medical diagnoses, conditions, and treatment outweigh the public’s need to access the minimal portions of Exhibits 4, 5, 6, and 7 that are the subject of this Motion. Further, Plaintiffs are ready to file publicly available redacted versions of the Exhibits, which would ensure that the vast majority of each Exhibit will be public, and that Defendant would have full access to the redacted information, subject to a protective order.

WHEREFORE, Plaintiff requests that the Court grant the Motion for Leave to File Under Seal Exhibits 4, 5, 6, and 7 to the Motion for Temporary Restraining Order.

DATED: March 30, 2020
Washington, D.C.

Respectfully submitted,

/s/ Steven Marcus

Steven Marcus (D.C. Bar # 1630882)
Jonathan Anderson (D.C. Bar # 475306)
Jenna Cobb (D.C. Bar # 979506)
Public Defender Service for the District of Columbia
633 Indiana Avenue N.W.
Washington, D.C. 20004
Tel. 202-824-2524
Fax 202-824-2525
smarcus@pdsdc.org

/s/ Scott Michelman

Scott Michelman (D.C. Bar # 1006945)
Arthur B. Spitzer (D.C. Bar # 235960)
Michael Perloff (D.C. Bar # 1601047)
American Civil Liberties Union Foundation
of the District of Columbia
915 15th Street NW, Second Floor
Washington, D.C. 20005
Tel. 202-457-0800
smichelman@acludc.org