

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 INS 00738

<p>Blue Cross and Blue Shield of North Carolina, Petitioner,</p> <p style="text-align: center;">v.</p> <p>North Carolina State Health Plan for Teachers and State Employees, Respondent.</p>	<p style="text-align: center;">ORDER GRANTING MOTION FOR PROTECTIVE ORDER</p>
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Upon consideration of Respondent and Respondent Intervenor's Joint Motion for Entry of a Protective Order in this contested matter, and for good cause shown, the Undersigned **GRANTS** the Motion and **ENTERS** the following Protective Order:

Because certain information, documents, and things to be produced in this Litigation may contain information appropriately deemed Confidential or Highly Confidential–Attorneys’ Eyes Only (as defined below), and to address the potential inadvertent production or disclosure of information protected by the attorney-client communication, work product, or other privilege, this Tribunal hereby enters the following Protective Order.

1. DEFINITIONS

1.1 Confidential Information: all Material designated as “Confidential” or “Highly Confidential–Attorneys’ Eyes Only” in accordance with Section 4.

A Producing Party may designate any Material as “Confidential” if it contains trade secrets, proprietary business information, competitively sensitive information, personally identifiable information, or other information, the disclosure of which, to persons or entities not identified in Section 6.2 would, in the good-faith judgment of the

Producing Party, cause injury to the Producing Party or the Producing Party's customers, clients, or members. A Producing Party may also designate any Material as "Confidential" if it contains proprietary business information or competitively sensitive information of a third party and the Producing Party has an obligation to keep the information confidential.

A Producing Party may designate any Material as "Highly Confidential—Attorneys' Eyes Only" if, in the good-faith judgment of the Party making such designation, the information embodies or contains extremely sensitive trade secrets or non-public confidential and/or proprietary business, commercial, or financial information, the disclosure of which to persons or entities not identified in Section 6.3 would cause injury to the Producing Party or the Producing Party's customers, clients, or members.

For avoidance of doubt, no Material that constitutes a public record subject to inspection and examination under Chapter 132 of the North Carolina General Statutes shall be designated as "Confidential" or "Highly Confidential—Attorneys' Eyes Only."

1.2 Material: all documents, deposition transcripts and recordings, deposition exhibits, responses to any discovery requests, including responses to interrogatories, document requests, and requests for admission, inspections, and physical evidence, and any other information or items produced pursuant to discovery obligations in this Litigation or otherwise given, received, or exchanged by or among the Parties or filed with this Tribunal. "Material" includes all copies of such documents or other materials, in hard copy, electronic form, or any other form or format.

1.3 Party: any party to this Litigation, including any officer, director, manager, member, or employee of the party.

1.4 Receiving Party: a Party or non-party that receives Material from a Producing Party.

1.5 Producing Party: a Party or non-party that produces Material in this Litigation.

1.6 Designating Party: a Party or non-party that designates Material as “Confidential” or “Highly Confidential–Attorneys’ Eyes Only” in accordance with Section 4.

1.7 Outside Counsel: attorneys of record in this Litigation (as well as their support staff) who are not employees of a Party, but who are retained to represent or advise a Party, including any counsel retained by contract for the sole purpose of reviewing documents for discovery in the Litigation.

1.8 House Counsel: attorneys (as well as their support staff) who are employees of a Party and provide legal services to the Party.

1.9 Counsel (without qualifier): Outside Counsel and House Counsel.

1.10 Expert: a person who has been retained by a Party or its Counsel to serve as an expert witness or as a consultant in this Litigation (as well as their support staff).

1.11 Professional Vendors: court reporters and persons or entities that provide litigation support services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing, storing, retrieving data in any form or medium; etc.) and their employees and subcontractors.

1.12 Joinder: the “Acknowledgment and Agreement to Be Bound by Protective Order,” the form of which is attached as Exhibit A.

1.13 Litigation: as used herein, the term “Litigation” shall mean and refer solely to proceedings in the above-captioned Petition for Contested Case Hearing, including any judicial review or appeal.

2. SCOPE

The protections conferred by this Order cover not only Confidential Information, but also any information copied or extracted from Confidential Information, as well as all copies, excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by Parties or Counsel to or in this Tribunal, or in other settings that might reveal Confidential Information.

3. DURATION

After the termination of this Litigation, the confidentiality obligations imposed by this Order, including any Joinder signed pursuant to this Order, shall remain in effect until a Designating Party agrees otherwise in writing or this Tribunal or a court of competent jurisdiction otherwise directs.

4. DESIGNATING CONFIDENTIAL INFORMATION

4.1 Manner and Timing of Designations. Material sought to be protected under this Order must be clearly designated at the time the Material is disclosed or produced. Designation in conformity with this Order requires:

- (a) for information in documentary form (other than transcripts of depositions or other prehearing or hearing proceedings), that the Producing Party conspicuously affix the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” on each page of each document that contains Confidential Information;

(b) for testimony given in deposition or in other prehearing or hearing proceedings, that the Party or non-party identify on the record all protected testimony, or within ten business days after the transcript is received after the close of the deposition, hearing, or other proceeding, specify any portions of the testimony that qualify as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY.” Only those portions of the testimony that are designated for protection within the ten-business-day period shall be covered by the provisions of this Order. Until the expiration of the ten-business-day period, all deposition testimony shall be deemed “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” and treated as if so designated; and

(c) for information produced in some form other than documentary, and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the object, container or containers, or electronic file in which the information or item is stored, as applicable, the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY.” With respect to any electronic document production, the confidentiality designation of each document shall be included as a metadata field supplied with the production.

4.2 Personally Identifiable Information. Materials containing personally identifiable information may be produced in redacted form, with any redactions strictly limited to such information.

4.3 Inadvertent Failure to Designate Confidential Information. Should a Producing Party discover or determine after production that Materials should have been

designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY,” the Producing Party shall promptly notify the other Parties of its failure to designate such Materials.

Should the other Parties not consent to the new designation of such Materials, the Producing Party may move this Tribunal for appropriate relief. The Parties shall treat such Materials consistently with the Producing Party’s proposed new designation under the terms of this Order until this Tribunal enters an order on the Producing Party’s motion. The inadvertent failure to designate Confidential Information shall not itself provide a basis to argue that the right to designate material as such has been waived as to that Document or any other Document unless the Producing Party has unambiguously stated its intention to waive such right.

5. CHALLENGING CONFIDENTIALITY DESIGNATIONS

5.1 Meet and Confer. A Party that elects to challenge a Designating Party’s confidentiality designation must do so in good faith and must begin the process by conferring directly (in videoconference, telephone conference, or face-to-face dialogue; other forms of communication are not sufficient) 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, or reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A challenging Party may proceed to the next stage of the challenge process only if it has first engaged in this meet-and-confer process.

5.2 Motions Challenging Designations. A Party that elects to pursue a challenge to a confidentiality designation after considering the justification offered by the

Designating Party may file a sealed motion to that effect. Upon any such motion to this Tribunal, the burden shall be on the Designating Party to show why its classification is proper. Pending this Tribunal's determination of the motion, the designation of the Designating Party shall be maintained.

5.3 Non-Waiver. The failure to timely challenge a Designating Party's confidentiality designation and any delay in making such a challenge shall not (i) constitute a waiver, (ii) preclude a challenge to a Designating Party's confidentiality designation, or (iii) be used in any way to contest a challenge or in support of a Designating Party's claim of confidentiality.

6. ACCESS TO AND USE OF CONFIDENTIAL INFORMATION

6.1 Basic Principles. A Receiving Party may use Confidential Information that is disclosed or produced by another Party or by a non-party in connection with this Litigation only for prosecuting or defending this Litigation and for no other purposes. Such Confidential Information may be disclosed only to the categories of persons and under the conditions described in this Order. When the Litigation has been concluded, a Receiving Party must comply with the provisions of Section 10 below.

Confidential Information must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

6.2 Disclosure of Confidential Information. Unless otherwise ordered by this Tribunal or permitted in writing by the Designating Party, any information or item designated "Confidential" may be disclosed only to:

- (a) Counsel who represent the Parties, including attorneys, paralegals, legal secretaries, and administrative staff to whom disclosure is reasonably necessary;
- (b) Representatives of the Parties who are assisting with or making decisions concerning the Litigation, to the extent deemed reasonably necessary by Outside Counsel, for the purpose of assisting in the prosecution or defense of the Litigation;
- (c) Witnesses or deponents, and their counsel, whose testimony is reasonably related to the Confidential Information sought to be disclosed to them, and who have signed a Joinder, to the extent reasonably necessary to prepare for and provide testimony;
- (d) Experts (as defined in this Order) to whom disclosure is reasonably necessary for this Litigation and who have signed a Joinder;
- (e) This Tribunal and its personnel;
- (f) Professional Vendors to whom disclosure is reasonably necessary for this Litigation;
- (g) Authors, addressees, and recipients of the Confidential Information or the original source of the Confidential Information to the extent that they have previously had lawful access to the particular Confidential Information to be disclosed; and
- (h) Any other persons upon consent of the Parties or upon Order of the Tribunal.

6.3 Disclosure of Highly Confidential–Attorneys’ Eyes Only Information.

Unless otherwise ordered by this Tribunal or permitted in writing by the Designating

Party, any information or item designated “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” may be disclosed only to:

- (a) Outside Counsel, including attorneys, paralegals, legal secretaries, and administrative staff of the law firm(s) of Outside Counsel to whom disclosure is reasonably necessary for this Litigation;
- (b) Attorneys employed by the North Carolina Department of State Treasurer (“Department”), who provide legal services to the Department, the North Carolina State Health Plan for Teachers and State Employees, and/or the Board of Trustees of the State Health Plan for Teach and State Employees;
- (c) Experts (as defined in this Order) to whom disclosure is reasonably necessary for this Litigation and who have signed the Joinder;
- (d) This Tribunal and its personnel;
- (e) Professional Vendors to whom disclosure is reasonably necessary for this Litigation and who have signed a Joinder;
- (f) Authors, addressees, and recipients of the Confidential Information or the original source of the Confidential Information to the extent that they have previously had lawful access to the particular Confidential Information to be disclosed; and
- (g) Any other persons upon consent of the Parties or upon Order of the Tribunal.

6.4 Outside Counsel for the Receiving Party shall maintain the original of each Joinder signed pursuant to this Order and shall promptly provide a copy thereof to Outside Counsel for the Producing Party and/or the Designating Party upon request.

6.5 Nothing herein shall restrict the manner in which the Producing Party may use or disclose its own Confidential Information.

6.6 The nondisclosure agreement reflected in Attachment I of Request for Proposal #270-20220830TPAS (the “RFP”) shall not prohibit any Party from disclosing the following to any Expert who has executed a Joinder:

- (a) any portion of the RFP;
- (b) its submission in response thereto; or
- (c) any materials used in the preparation of such submissions that are also produced in discovery in this case to the extent required under applicable rules of the Office of Administrative Hearings or North Carolina Rules of Civil Procedure.

7. FILING CONFIDENTIAL INFORMATION

A Party seeking to file with this Tribunal Material designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” or containing or referring to Confidential Information, including without limitation pleadings, motion papers, memoranda of law, briefs, affidavits, declarations, and stipulations, must seek to file the Material under seal in accordance with applicable procedures of this Tribunal.

Within three (3) business days of a sealed filing or as soon as reasonably possible, Outside Counsel for all Parties shall confer and agree upon redactions of Confidential Material. Thereafter, Counsel for the filing Party shall file a redacted public version of the sealed filing(s) within two (2) business days.

8. CONFIDENTIAL INFORMATION SUBPOENAED OR ORDERED TO BE PRODUCED IN OTHER LITIGATION

If any third party (including a governmental agency) subpoenas, requests, or moves to compel discovery of Confidential Information from a Receiving Party, or if a Receiving Party is otherwise asked or required (by oral questions, interrogatories, requests for information or documents, civil investigative demand, or similar process) to disclose any Confidential Information, the Receiving Party must so notify the Designating Party. The notification must be in writing by email to the Designating Party's counsel of record.

The notification must be made as soon as possible and must be sent no more than three business days after the Receiving Party receives the applicable subpoena, request, motion, or order. Such notification must include a copy of such subpoena, request, motion, or order. Notwithstanding the above, there shall be no obligation to provide notice of the subpoena, request, motion, or order where such notice is prohibited by statute, regulation, court order, or operation of law.

The Receiving Party also must immediately inform in writing the party who caused the subpoena, request, motion or order to issue that some or all of the material covered by the subpoena or order is the subject of this Order and must provide such party a copy of this Order promptly. No Receiving Party shall disclose Confidential Information in response to a subpoena or other request before notifying the Disclosing Party and before the date required by the terms thereof or by applicable law.

The purpose of imposing these duties is to alert the interested parties to the existence of this Order and to afford the Designating Party in this Litigation an opportunity to protect its confidentiality interests in the tribunal from which the subpoena

or order issued. The Designating Party shall bear the burdens and the expenses of seeking protection in that tribunal of its Confidential Information. If failing entry of a protective order, a Receiving Party is compelled to disclose Confidential Information, that Receiving Party may, without liability hereunder, disclose the portion of the Confidential Information that it is compelled to disclose.

9. UNAUTHORIZED DISCLOSURE OF CONFIDENTIAL INFORMATION

If a Party learns that, by inadvertence or otherwise, it has disclosed Confidential Information designated by another Party or non-party to any person or in any circumstance not authorized under this Order, the Party must immediately:

- (a) notify in writing the Producing or Designating Party of the unauthorized disclosures,
- (b) use its best efforts to retrieve all copies of the Confidential Information,
- (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and
- (d) request that person or those persons to execute a Joinder.

10. FINAL DISPOSITION

This Order shall remain in force and effect until modified, superseded, or terminated by further order of this Tribunal, and shall survive the termination of this Litigation. Unless otherwise ordered or agreed in writing by the Producing Party, within thirty days after the final termination of this Litigation, including any judicial review, appeals, and/or rehearings, each Receiving Party must destroy or return all Confidential Information to the Producing Party; provided, however, that no Party shall be required to return or destroy any Confidential Information that it is required by statute, rule, regulation, or other governmental mandate to retain, including but not limited to the

Public Records Act, N.C. General Statutes, Chapter 132. As used in this Section, “all Confidential Information” includes all copies, abstracts, compilations, summaries, or any other form of reproducing or capturing any of the Confidential Information. The Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the thirty-day deadline, affirming that all the Confidential Information was returned or destroyed and that the Receiving Party has not retained any copies, abstracts, compilations, summaries, or other forms of reproducing or capturing any of the Confidential Information. Notwithstanding this provision, Counsel are entitled to retain all pleadings, motion papers, transcripts, legal memoranda, correspondence, emails, notes, and attorney work product, even if such materials contain Confidential Information. Any such materials that contain or constitute Confidential Information remain subject to this Order as set forth in Section 3 above.

11. INADVERTENT PRODUCTION OF PRIVILEGED INFORMATION

A Producing Party’s inadvertent disclosure of documents that such Producing Party believes constitute, contain, or reflect information otherwise protected by the attorney-client privilege, the work product doctrine, or any other privilege or immunity from discovery (“Privileged Material”), shall not constitute a waiver with respect to such Privileged Material or generally of such privilege or immunity in this Litigation. In such an instance, the Parties shall follow North Carolina Rule of Civil Procedure 26(b)(5) and the process set forth above in Section 5 to resolve the claim.

Counsel may not assert as a ground for compelling production the fact or circumstance that the alleged Privileged Material has already been produced. In the event of a motion to compel production of the alleged Privileged Material, it shall be the responsibility of the Producing Party to provide, in its opposition to the motion to compel,

information regarding the content and context of the alleged Privileged Material sufficient to establish the applicability of any asserted privilege or immunity from discovery. If this Tribunal so requests, the Producing Party shall provide the alleged Privileged Material to the Tribunal for an in camera review.

12. PRIVILEGE LOGS

To the extent that the following documents are withheld on the grounds that they constitute Privileged Material, they need not be included on a Party's privilege log:

- (a) Communications exclusively between a Party or its House Counsel and that Party's Outside Counsel occurring on or after December 14, 2022;
- (b) Communications exclusively between a Party and its House Counsel, or exclusively among its House Counsel, occurring on or after December 14, 2022 and relating solely to the prosecution or defense of the Litigation or Blue Cross NC's public-records requests; and
- (c) Communications exclusively between (i) a Party, a Party's House Counsel, or a Party's Outside Counsel and (ii) any retained (testifying or nontestifying) expert witness that do not relate to any of the matters identified in Rule 26(b)(4)e.1, 2, or 3.

Each Party's privilege log shall, for each entry, describe the nature of the Documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable an assessment of the applicability of the privilege or protection (including date, author, recipients, individuals copied, privilege claimed, basis for privilege or protection claimed).

A single Document containing multiple Email messages (*i.e.*, an Email chain) may be logged as a single entry. If only part of a chain is privileged, the privileged content

should be redacted and the remaining content in the chain should be produced. A Document Family (*e.g.*, an Email and its attachments) may be logged as a single entry so long as the entire Family is privileged, and the log entry accurately describes both the Parent and its attachment(s).

13. MISCELLANEOUS

13.1 Modification. Nothing in this Order abridges the right of any person to seek its modification by this Tribunal in the future.

13.2 Public Records. Notwithstanding anything herein to the contrary, to the extent that any obligations herein conflict or are inconsistent with the Respondent's or the North Carolina Department of State Treasurer's obligations as an administrative agency of the State of North Carolina under the public records statute, N.C. General Statutes Chapter 132, then the obligations thereunder shall control and supersede any such obligations herein.

13.3 Right to Assert Other Objections. This Order shall be without prejudice to the right of any Party to oppose production of any information on any ground allowed under applicable rules.

13.4 Right to Request or Agree Upon Additional Protection. Nothing in this Order abridges the right of any Party to seek additional protection of Material from this Tribunal or to agree upon additional protection of Material with any other person.

13.5 Rights of Non-Parties. If a non-party provides Material in connection with this Litigation, and if the non-party so elects by signing a Joinder, then the provisions of this Order shall apply to such Material. Under such circumstances, the non-party shall have the same rights and obligations under this Order as would a Party.

13.6 Additional Parties or Attorneys. In the event additional parties or attorneys join or are joined in this Litigation, they will be bound by this Order.

13.7 Notwithstanding any other provision of this Order to the contrary, the confidentiality obligations herein shall not apply, or shall cease to apply, to any information that:

- (a) At the time of disclosure hereunder was already lawfully in the possession of the Receiving Party and was not acquired under any obligation of confidentiality; or
- (b) At the time of disclosure hereunder was, or subsequently becomes, through no fault of the Receiving Party, a public document or publicly available.

13.8 This Tribunal retains jurisdiction even after termination of this Litigation to enforce this Order and to make such deletions from or amendments, modifications, and additions to the Order. Any Party for good cause may apply, before or after termination of this Litigation, to this Tribunal for a modification of this Order.

SO ORDERED, this the 26th day of April, 2023.



Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 26th day of April, 2023.



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