

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KEITH COLE, et al.,	§	
	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO.
v.	§	4:14-cv-1698
	§	
BRYAN COLLIER, et al.,	§	
	§	
Defendants.	§	

LADDY VALENTINE, et al.,	§	
	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO.
v.	§	4:20-cv-1115
	§	
BRYAN COLLIER, et al.,	§	
	§	
Defendants.	§	

PLAINTIFFS' EMERGENCY MOTION TO MODIFY PROTECTIVE ORDER

Plaintiffs in both *Cole v. Collier* and *Valentine v. Collier* respectfully move to modify the protective order from *Cole v. Collier* so that all counsel, and the Court, may use confidential documents exchanged in the *Cole* matter in the *Valentine* litigation.

I. NATURE AND STAGE OF THE PROCEEDING

At the outset of the *Cole v. Collier* litigation, this Court entered a protective order requiring the parties to keep documents so-designated by the producing party confidential—and to only use those confidential documents in the *Cole v. Collier* litigation. *Cole v. Collier*, Doc. 151.

Over the years, TDCJ has applied confidentiality stamps to tens of thousands of pages of production, including photographs, diagrams of the facility, medical records, medical information,

and inmate transfer records. Confidential documents have been considered by experts, this Court, and numerous witnesses. Confidential documents are used to delineate the Subclass which is more vulnerable to heat extremes and enjoys additional protections under the class action settlement.

On March 30, 2020, two class members in *Cole* filed a separate lawsuit, represented by the undersigned and additional counsel, seeking injunctive relief to implement rudimentary steps to protect the Pack Unit's residents from the novel coronavirus, COVID-19. *Valentine v. Collier*, Doc. 1.

After TDCJ revealed on April 14, 2020 that a Pack Unit inmate died early April 11, 2020 and was posthumously diagnosed with COVID-19, *see* Ex. 1, this Court set a hearing on the *Valentine* Plaintiffs' motion for temporary restraining order for April 16, 2020 at 1:30 pm. *See Valentine v. Collier*, Docs. 26, 27.

II. ARGUMENT

The Court should modify the *Cole* protective order to encompass the *Valentine* litigation. The proposed substantive modification is solely to add section 21 to the order:

21. Scope

For the purposes of this order, "this litigation" means either or both the *Cole et al. v. Collier et al.* No. 4:14-cv-1698, matter and the *Valentine et al. v. Collier et al.*, No. 4:20-cv-1115, matter. Accordingly, for example, counsel for any party in one of those two cases is a "Qualified Person." Classified Information under this order may be used for the purposes of either case by any qualified person as described in this order. This definition shall have retroactive effect to documents previously marked as classified.

Proposed order, p. 9.

The Court has wide discretion to modify its protective order in one case to allow non-parties to access confidential documents that are relevant to another case. *See, e.g., Newby v. Enron Corp.*, 443 F.3d 416, 424 (5th Cir. 2006) (affirming modification of protective order to allow non-

parties to intervene and access sealed filings). The Court should modify the order for at least three reasons.

First, due to the ongoing emergency, the parties in *Valentine v. Collier* do not have time to navigate the lengthy discovery process that developed in the *Cole v. Collier* matter all over again. Due to the breadth of relevant documents falling under the protective order, many similar records—and many of the exact same documents—would ultimately be subject to discovery and disclosed again in *Valentine*. Thus, the real effect of granting this motion will be merely to expedite the COVID-19 case.

Second, much of the documentation in *Cole v. Collier*—including facility photographs and medical information—is eminently relevant to COVID-19 and should be fair game in the *Valentine* case. For example, the parties can better estimate the at-risk population housed at Pack today from medical information disclosed in the Pack Unit case, such as the Subclass member list. The Subclass is based on conditions that substantially overlap with those at risk from COVID-19. The parties can also better evaluate possible protective measures against COVID-19. For example, although the *Valentine* Plaintiffs' expert Eldon Vail has already attested that prisoners' beds at the Pack Unit are all less than 6 feet apart from his personal observation, if this fact is disputed, then photographs would help settle the question.

Finally, the protective order would still be in place and the confidential information will not be made public by this modification. In practice, the only new people who would see confidential *Cole* documents would be Plaintiffs' additional counsel in *Valentine*, expert witnesses in that litigation, and other qualified persons under the order such as court reporters. TDCJ did not give any explanation for its opposition.

Accordingly, the Court should modify the existing protective order to allow all discovery accessible in *Cole v. Collier* to be available to counsel and the Court in *Valentine v. Collier*.

III. CONCLUSION

In light of the ongoing COVID-19 emergency, the Court should modify the protective order in *Cole v. Collier* to include the related *Valentine v. Collier* case, so counsel can use that evidence to address the emergency hearing on April 16, 2020 and beyond.

Dated: April 15, 2020.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

By my signature below, I certify that a true and correct copy of the foregoing has been served on all counsel of record through the Electronic Case Files System of the Southern District of Texas.

/s/ Jeff Edwards
Jeff Edwards

CERTIFICATE OF CONFERENCE

By my signature below, I certify that I conferred with opposing counsel by electronic mail. After attempting to obtain agreement with TDCJ's counsel in both cases, their counsel merely stated without any explanation that TDCJ is opposed. Defendants are opposed to the relief requested in this motion.

/s/ Jeff Edwards
Jeff Edwards



April 14, 2020

COVID-19 TDCJ Update

The Texas Department of Criminal Justice (TDCJ) is saddened to learn of the death of an offender that may be related to the COVID-19 virus.

An offender death from the Pack Unit in Navasota is under investigation to determine if it is connected to COVID-19. Early Saturday morning April 11, 2020, 62-year-old Leonard Clerkly had difficulty breathing and was transported by EMS to Grimes County Hospital where life saving measures continued. Clerkly was pronounced dead at 5:25 a.m. Preliminary autopsy results suggest a preliminary cause of death of viral pneumonia due to COVID-19 with other contributing factors. Like all in-custody deaths, this death is under investigation, and the cause of death is pending final autopsy results. Clerkly had served 5 years, 7 months and 11 days of a life sentence for Aggravated Sexual Assault of a Child under 14 out of Tarrant County.

No other offenders or staff at the Pack Unit have tested positive for COVID-19 at this time.

In all there have been 97 TDCJ employees, staff or contractors and 236 offenders in custody who have tested positive for COVID-19.

A complete list of data is available at www.tdcj.texas.gov/covid-19/offender_mac.html.

Medical Action Center



Action Center >

FAQs >

Previous Updates >



Helpful Links:

[Texas Department of State Health Services \(DSHS\) - News Updates COVID-19](#)

[Texas Department of State Health Services \(DSHS\) - Texas Case Counts Map](#)

[Centers for Disease Control and Prevention \(CDC\)- Coronavirus \(COVID-19\)](#)

[CDC Coronavirus Disease 2019 \(COVID-19\) - World Map](#)

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AMENDED CONFIDENTIALITY AND PROTECTIVE ORDER

After considering Plaintiffs' motion for a protective order, all relevant briefing, all applicable law, and all argument presented, the Court ORDERS as follows:

1. Classified Information

"Classified Information" means any information of any type, kind, or character that is designated as "Confidential", "For Counsel Only", or "Attorneys Eyes Only" by any of the supplying or receiving persons, whether it be a document, information contained in a document, information revealed during a deposition, information revealed in an interrogatory answer, or otherwise.

2. Qualified Persons

"Qualified Persons" means:

- a. For Counsel or Attorneys Only information:

- i. retained counsel for the parties in this litigation and their respective staff;
 - ii. actual or potential independent experts or consultants (and their administrative or clerical staff) engaged in connection with this litigation (which shall not include the current employees, officers, members, or agents of parties or affiliates of parties) who, prior to any disclosure of Classified Information to such person, have signed a document agreeing to be bound by the terms of this Protective Order (such signed document to be maintained by the attorney retaining such person) and have been designated in writing by notice to all counsel;
 - iii. litigation vendors, court reporters, and other litigation support personnel; and
 - iv. this court and its staff and any other tribunal or dispute resolution officer duly appointed or assigned in connection with this litigation.
- b. For Confidential information:
 - i. the persons identified in subparagraph 2(a);
 - ii. the party, if a natural person;
 - iii. if the party is an entity, such officers or employees of the party who are actively involved in the prosecution or defense of this case who, prior to any disclosure of Confidential information to such person, have been designated in writing by notice to all counsel and have signed a document agreeing to be bound by the terms of this Protective Order (such signed document to be maintained by the attorney designating such person);
 - iv. any person who was an author, addressee, or intended or authorized recipient of the Confidential information and who agrees to keep the information confidential, provided that such persons may see and use the Confidential information but not retain a copy.
- c. Such other person as this court may designate after notice and an opportunity to be heard.

3. Designation Criteria

- a. *Nonclassified Information.* Classified Information shall not include information that either:
- i. is in the public domain at the time of disclosure, as evidenced by a written document;
 - ii. becomes part of the public domain through no fault of the recipient, as evidenced by a written document;
 - iii. the receiving party can show by written document was in its rightful and lawful possession at the time of disclosure; or
 - iv. lawfully comes into the recipient's possession subsequent to the time of disclosure from another source without restriction as to disclosure, provided such third party has the right to make the disclosure to the receiving party.

- b. *Classified Information.* A party shall designate as Classified Information only such information that the party in good faith believes in fact is confidential. Information that is generally available to the public, such as public filings, catalogues, advertising materials, and the like, shall not be designated as Classified.

Information and documents that may be designated as Classified Information include, but are not limited to, trade secrets, confidential or proprietary financial information, operational data, business plans, and competitive analyses, personnel files, personal information that is protected by law, and other sensitive information that, if not restricted as set forth in this order, may subject the producing or disclosing person to competitive or financial injury or potential legal liability to third parties.

Correspondence and other communications between the parties or with nonparties may be designated as Classified Information if the communication was made with the understanding or reasonable expectation that the information would not become generally available to the public.

- c. *For Counsel or Attorneys Only.* The designation "For Counsel Only" or "Attorneys Eyes Only" shall be reserved for information that should not be disclosed to parties or to offenders in the TDCJ. Such information may include, but is not limited to, redacted medical information and information pertaining to prison construction and security such as facility blueprints. A document containing protected health information does not need to be treated "Confidential," "For Counsel Only," or "Attorneys Eyes

Only” if the protected health information—such as name, social security number, birth date, etc.—is redacted.

Notwithstanding the above, documents, even those marked “Confidential,” “Attorneys Eyes Only,” or “For Counsel Only” that contain protected information about an inmate may be shared with the inmate to whom the record refers.

Protected health information of correctional officers and living offenders, of whatsoever kind or nature, including the personal health and psychological information of each proposed class representative, shall not be provided to any other offender even if there is consent. Provided, however, an offender may receive a copy of his or her own protected health information records. Personal health and psychological information may be contained in or part of many types of records such as e-mails, medical files, grievance files, classification files, or the like. Regardless of the type of file or document where the personal health and psychological information may be mentioned, referred to, or copied into, all offenders’ or TDCJ employees’ personal health and psychological information of whatsoever kind or nature shall be deemed and treated as “For Counsel Only” or “Attorneys’ Eyes Only” information, regardless of whether it has been redacted or has been marked as such on the specific document.

Each of the named Plaintiffs’ medical records may be provided to Plaintiffs by Defendants without redactions or identifiers, provided, however, these records shall be marked “For Attorneys’ Eyes Only and Mr. [named plaintiff].” These records shall not be shared with any offenders except that each named Plaintiff may receive a copy of his or her own records from Plaintiffs’ counsel.

- d. *Ultrasensitive Information.* At this point, the parties do not anticipate the need for higher levels of confidentiality as to ultrasensitive documents or information. However, in the event that a court orders that ultrasensitive documents or information be produced, the parties will negotiate and ask the court to enter an ultrasensitive information protocol in advance of production to further protect such information.

4. Use of Classified Information

All Classified Information provided by any party or nonparty in the course of this litigation shall be used solely for the purpose of preparation, trial, and appeal of this litigation and for no other purpose, and shall not be disclosed except in accordance with the terms hereof.

5. Marking of Documents

Documents provided in this litigation may be designated by the producing person or by any party as Classified Information by marking each page of the documents so designated with a stamp indicating that the information is “Confidential”, “For Counsel Only”, or “Attorneys Eyes Only”. In lieu of marking the original of a document, if the original is not provided, the designating party may mark the copies that are provided.

Based on the discovery needs of the Plaintiffs, the Court overrules the Defendants’ concerns regarding personal health information and authorizes the Defendants and the Office of the Attorney General to provide documents that contain protected health information without redaction to Plaintiffs; *provided, however, that the documents shall be marked, and if not marked, presumed to be “Attorneys’ Eyes Only” documents. Regardless of whether an offender has provided consent, these records shall not be shared with any other offenders except that they may be shared with the offender about whom the record is made.*

Originals shall be preserved for inspection.

6. Disclosure at Depositions

Information disclosed at (a) the deposition of a party or one of its present or former officers, directors, employees, agents, consultants, representatives, or independent experts retained by counsel for the purpose of this litigation, or (b) the deposition of a nonparty may be designated by any party as Classified Information by indicating on the record at the deposition that the testimony is “Confidential” or “For Counsel Only” and is subject to the provisions of this Order.

Any party also may designate information disclosed at a deposition as Classified Information by notifying all parties in writing not later than 30 days of receipt of the transcript of the specific pages and lines of the transcript that should be treated as Classified Information thereafter. Each party shall attach a copy of each such written notice to the face of the transcript and each copy thereof in that party’s possession, custody, or control. All deposition transcripts shall be treated as For Counsel Only for a period of 30 days after initial receipt of the transcript.

To the extent possible, the court reporter shall segregate into separate transcripts information designated as Classified Information with blank, consecutively numbered pages being provided in a nondesignated main transcript. The separate transcript containing Classified Information shall have page numbers that correspond to the blank pages in the main transcript. Counsel for a party or a nonparty witness shall have the right to exclude from depositions any person who is not authorized to receive Classified Information pursuant to this Protective Order, but such right of exclusion shall be applicable only during periods of examination or testimony during which Classified Information is being used or discussed.

7. Disclosure to Qualified Persons

- a. *To Whom.* Classified Information shall not be disclosed or made available by the receiving party to persons other than Qualified Persons except as necessary to comply with applicable law or the valid order of a court of competent jurisdiction; provided, however, that in the event of a disclosure compelled by law or court order, the receiving party will so notify the producing party as promptly as practicable (if at all possible, prior to making such disclosure) and shall seek a protective order or confidential treatment of such information. Information designated as For Counsel Only shall be restricted in circulation to Qualified Persons described in subparagraph 2(a).
- b. *Retention of Copies During this Litigation.* Copies of For Counsel Only information shall be maintained only in the offices of outside counsel for the receiving party and, to the extent supplied to experts described in subparagraph 2(a)(ii), in the offices of those experts. Any documents produced in this litigation, regardless of classification, that are provided to Qualified Persons shall be maintained only at the office of such Qualified Person and only necessary working copies of any such documents shall be made. Copies of documents and exhibits containing Classified Information may be prepared by independent copy services, printers, or illustrators for the purpose of this litigation.
- c. Each party's outside counsel shall maintain a log of all copies of For Counsel Only documents that are delivered to Qualified Persons.

8. Unintentional Disclosures

Documents unintentionally produced without designation as Classified Information later may be designated and shall be treated as Classified Information from the date written notice of the designation is provided to the receiving party.

If a receiving party learns of any unauthorized disclosure of Confidential information or For Counsel Only information, the party shall immediately upon learning of such disclosure inform the producing party of all pertinent facts relating to such disclosure and shall make all reasonable efforts to prevent disclosure by each unauthorized person who received such information.

9. Documents Produced for Inspection Prior to Designation

In the event documents are produced for inspection prior to designation, the documents shall be treated as For Counsel Only during inspection. At the time of copying for the receiving parties, Classified Information shall be marked prominently "Confidential", "For Counsel Only", or "Attorneys Eyes Only" by the producing party.

10. Consent to Disclosure and Use in Examination

Nothing in this order shall prevent disclosure beyond the terms of this order if each party designating the information as Classified Information consents to such disclosure or if the court, after notice to all affected parties and nonparties, orders such disclosure. Nor shall anything in this order prevent any counsel of record from utilizing Classified Information in the examination or cross-examination of any person who is indicated on the document as being an author, source, or recipient of the Classified Information, irrespective of which party produced such information.

Further, in any court proceeding, the parties are to use a numbering system when referring to inmates other than those named Plaintiffs or those that testify. For those inmates that testify at any hearing or trial, the Court will not close the courtroom or otherwise prohibit the public and Plaintiffs to hear the testimony.

11. Challenging the Designation

- a. Classified Information.* A party shall not be obligated to challenge the propriety of a designation of Classified Information at the time such designation is made, and a failure to do so shall not preclude a subsequent challenge to the designation. In the event that any party to this litigation disagrees at any stage of these proceedings with the designation of any information as Classified Information, the parties shall first try to resolve the dispute in good faith on an informal basis, such as by production of redacted copies. If the dispute cannot be resolved, the objecting party may move the court for an order de-designating the disputed information as Classified Information. The party wishing to preserve the designated status of the disputed information shall have the burden of persuasion and shall within 10 days of the objecting party's filing a motion with the Court submit its response. The disputed information shall remain Classified Information unless and until the court orders otherwise. Failure of the designating party to submit a response within 10 days shall terminate of the status of such item as Classified Information.
- b. Qualified Persons.* In the event that any party in good faith disagrees with the designation of a person as a Qualified Person or the disclosure of particular Classified Information to such person, the parties shall first try to resolve the dispute in good faith on an informal basis. If the dispute cannot be resolved, the objecting party shall have 14 days from the date of the designation or, in the event particular Classified Information is requested subsequent to the designation of the Qualified Person, 14 days from service of the request to move the court for an order denying the disposed person (a) status as a Qualified Person, or (b) access to particular Classified Information. The objecting person shall have the burden of demonstrating that disclosure to the disputed person would expose the objecting party to the risk of serious harm. Upon the timely filing of such a motion, no disclosure of Classified

Information shall be made to the disputed person unless and until the court enters an order preserving the designation.

12. Manner of Use in Proceedings

In the event a party wishes to use any Classified Information in affidavits, declarations, briefs, memoranda of law, or other papers filed in this litigation, the party shall do one of the following: (1) with the consent of the producing party, file only a redacted copy of the information; (2) where appropriate (e.g., in connection with discovery and evidentiary motions) provide the information solely for in camera review; or (3) file such information under seal with the court consistent with the sealing requirements of the court.

13. Filing Under Seal

The clerk of this court is directed to maintain under seal all documents, transcripts of deposition testimony, answers to interrogatories, admissions, and other papers filed under seal in this litigation that have been designated, in whole or in part, as Classified Information by any party to this litigation consistent with the sealing requirements of the court.

14. Return of Documents

Not later than 120 days after conclusion of this litigation and any appeal related to it, any Classified Information, all reproductions of such information, and any notes, summaries, or descriptions of such information in the possession of any of the persons specified in paragraph 2 (except subparagraph 2(a)(iii)) shall be returned to the producing party or destroyed, except as this court may otherwise order or to the extent such information has been used as evidence at any trial or hearing. Notwithstanding this obligation to return or destroy information, counsel may retain attorney work product, including document indices, so long as that work product does not duplicate verbatim substantial portions of the text of any Classified Information.

15. Ongoing Obligations

Insofar as the provisions of this Protective Order, or any other protective orders entered in this litigation, restrict the communication and use of the information protected by it, such provisions shall continue to be binding after the conclusion of this litigation, except that (a) there shall be no restriction on documents that are used as exhibits in open court unless such exhibits were filed under seal, and (b) a party may seek the written permission of the producing party or order of the court with respect to dissolution or modification of this, or any other, protective order.

16. Advice to Clients

This order shall not bar any attorney in the course of rendering advice to such

attorney's client with respect to this litigation from conveying to any party client the attorney's evaluation in a general way of Classified Information produced or exchanged under the terms of this order; provided, however, that in rendering such advice and otherwise communicating with the client, the attorney shall not disclose the specific contents of any Classified Information produced by another party if such disclosure would be contrary to the terms of this Protective Order.

17. Duty to Ensure Compliance

Any party designating any person as a Qualified Person shall have the duty to reasonably ensure that such person observes the terms of this Protective Order and shall be responsible upon breach of such duty for the failure of such person to observe the terms of this Protective Order.

18. Waiver

Pursuant to Federal Rule of Evidence 502, neither the attorney-client privilege nor work product protection is waived by disclosure connected with this litigation.

19. Redaction upon Production

No party is to redact any information other than attorney-client privileged or attorney-work product information when producing documents to any other party but may mark such unredacted documents "Confidential," "For Counsel Only," or "Attorneys Eyes Only" as described above except that Defendants may redact information that poses security concerns and personal identifying information of TDCJ employees.

20. Modification and Exceptions

The parties may, by stipulation, provide for exceptions to this order and any party may seek an order of this court modifying this Protective Order.

21. Scope

For the purposes of this order, "this litigation" means either or both the *Cole et al. v. Collier et al.* No. 4:14-cv-1698, matter and the *Valentine et al. v. Collier et al.*, No. 4:20-cv-1115, matter. Accordingly, for example, counsel for any party in one of those two cases is a "Qualified Person." Classified Information under this order may be used for the purposes of either case by any qualified person as described in this order. This definition shall have retroactive effect to documents previously marked as classified.

It is SO ORDERED this _____ day of _____, 2020.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE