DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80202	DATE FILED: September 7, 2021 3:45 PM FILING ID: 7095627476874 CASE NUMBER: 2014CV34530
PLAINTIFFS: STATE OF COLORADO, EX. REL. PHILIP J. WEISER, ATTORNEY GENERAL, and MARTHA FULFORD, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE, v. **DEFENDANTS:** CENTER FOR EXCELLENCE IN HIGHER EDUCATION, INC., a not-for-profit company; *et al.*,	▲COURT USE ONLY▲ Case No.: 2014CV34530 Div. 275
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DEFENDANTS' APPLICATION FOR ORDER TO RETAIN CONFIDENTIALITY

Defendants Center for Excellence in Higher Education, Inc. ("CEHE"); CollegeAmerica Denver, Inc. and CollegeAmerica Arizona, Inc., divisions thereof, d/b/a CollegeAmerica;

Stevens-Henager College, Inc., a division thereof, d/b/a Stevens-Henager College (collectively "CollegeAmerica" or "CA"); CollegeAmerica Services, Inc., a division thereof, d/b/a the Carl Barney Living Trust, Carl Barney as Chairman of CEHE and Trustee of the Carl Barney Living Trust, and Eric Juhlin (collectively "Defendants"), through counsel and pursuant to paragraphs six and seven of the Court's January 4, 2016 Amended Protective Order, once again apply to the Court for an Order maintaining the confidential status and protection of confidential documents and materials presented at trial.

I. BACKGROUND INFORMATION

As the Court is aware, Defendants applied to the Court in January 2021 for an order maintaining protection over materials it designated as confidential notwithstanding the State's argument that those materials lost their protection when they were submitted at trial. The State has nevertheless continued its efforts to breach that protection. As a result, Defendants must apply to the Court yet again to hold the State to its duties under the Court's Protective Order.

On August 30, 2021, counsel for Defendants received an email from counsel for the State, stating that the Attorney General's office had received a request under the Colorado Open Records Act ("CORA") for materials from the 2017 trial. *See* Declaration of Douglas N. Marsh ("Dec.") ¶ 5; Dec. Ex. A. The State informed Defendants the request had come from an NPR reporter seeking admissions recordings that were presented as trial exhibits. *See id*. Tellingly, the State received that request on August 26, 2021—the same day that the Court of Appeals issued its decision reversing this Court's Findings of Fact and Conclusions of Law. *Id*. As the State has argued before, the State contended that there was no basis to withhold these exhibits notwithstanding the fact that they had been designated as confidential, because they had been

entered into evidence at trial. *Id*.

Defendants responded to the State's email on August 31, 2021, informing the State that all these exhibits were and should be maintained as confidential. Dec. Ex. B.[1] The State replied by asserting that it saw "no basis for confidentiality of these records" notwithstanding that they had been designated as confidential, and informed Defendants that the State intended to produce the confidential exhibits on September 10. Dec. Ex. C. Defendants are therefore required to apply to this Court yet again to protect the confidentiality of the trial materials.

II. ARGUMENT

The timing of the underlying document request, coming just hours after the Court of Appeals reversed the Court's Judgment, is no coincidence. The State now knows it cannot advance its improper political agenda in a Court of Law. And so it is renewing its efforts to advance that agenda in the media instead. In doing so, the State is once again attempting to shirk its obligations under the Protective Order, as it has already tried to do multiple times. The State should not be allowed to violate those duties again.

The Court entered its Amended Protective Order on January 4, 2016. In this Order, the Court instructed that any person producing materials "may in good faith . . . designate as CONFIDENTIAL such Litigation Materials containing trade secret or other confidential research, development, or commercial information, personal identifying information . . . and student information. . . ." Am. Protective Order ¶ 1. These confidential Litigation Materials also include "all information derived from designated materials and all copies, summaries, abstracts,

[1] Defendants also informed the State that other student recordings should be maintained as confidential, and that to the extent they were not designated as confidential in the first place that was due to oversight. *See* Dec. Ex. B. Such materials are therefore to be treated as though designated CONFIDENTIAL pursuant to paragraph one of the Amended Protective Order.

excerpts, indices and descriptions of such material that reveal CONFIDENTIAL information." *Id.* To the extent one party disagrees with another's confidentiality designation, the Protective Order permits the disputing party to provide a written notice of objection, also to be made "in good faith, to a designation of Litigation Materials as Confidential." *Id.* ¶ 6. The Order then instructs the parties to follow a dispute resolution process after which, if the dispute is not resolved, the designating party is to "apply to the Court for an order that the Litigation Materials at issue are entitled to CONFIDENTIAL status and protection under this Order." *Id.*

Defendants discussed these issues with the State as required by the Protective Order but were unable convince the State to abandon its objection. Defendants therefore apply to the Court to maintain the materials' protected status.

A. The State's Renewed Argument that Materials Lost Protection as a Result of their Submission at Trial Remains Fatally Flawed.

Here, as it has argued before, the State suggests that anything submitted into evidence magically morphed to public information freely available to all. This claim is indefensible. The specific materials at issue—recordings of conversations with students as part of the admissions process—were properly designated in the first place because of their sensitive contents—a point the State once again does not contest.

The State nevertheless raises the same argument it previously raised as to *all* trial materials: the State continues to maintain that *any* materials submitted at trial thereby lost their protection as confidential materials. That contention should be rejected for all the reasons previously discussed. As Defendants previously demonstrated, the Court's Amended Protective Order specifically instructs that designated materials "*may be offered into evidence* at hearings on motions and may be used to prepare for and conduct discovery, to prepare for trial and to

support or oppose any motion in this action, *but shall be subject to the terms of this Order and to any further order regarding confidentiality that this Court may enter*." Am. Protective Order ¶ 14 (emphasis added). The Protective Order further provides that materials designated as confidential must be returned after final disposition of this matter, though allowing as an exception to this rule that Counsel may retain "*the trial record (including exhibits)* even if such material contains Confidential Litigation Material, so long as such material is clearly marked to reflect that it may contain such information." *Id*. ¶ 15 (emphasis added).

This shows that the Protective Order preserves the protection it bestows upon designated materials even if they were submitted into evidence as exhibits at trial. As previously noted, this is consistent with well-established standards both in and beyond Colorado. *See, e.g.*, *Int'l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc.*, No. 11-CV-02007-MSK-KLM, 2012 WL 1429524, at *3 (D. Colo. Apr. 24, 2012) ("In the event Confidential Information is used in any court filing or proceeding in this action, including but not limited to its use at trial, it shall not lose its confidential status as between the Parties through such use."); *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 341 (S.D. Iowa 1993) (noting that even though the trial record had not been sealed, confidential materials submitted as trial exhibits retained protection where "the original protective order expressly provided . . . that the order covered designated confidential data introduced at trial"); *Livingston v. Isuzu Motors, Ltd.*, 910 F. Supp. 1473, 1480 (D. Mont. 1995) (maintaining confidentiality of exhibits where: "[1] All of the documents were produced pursuant to protective order which contemplated use of such documents at trial without loss of their confidentiality. [2] Plaintiffs did not timely dispute whether any of the produced documents were truly confidential and as such subject to the protective order. [3] This court notes that

during the trial these documents were regarded by all parties as confidential, sensitive information, and by implication agreed that the untoward release of them had the potential to harm defendants. [4] Finally, the confidential documents are not now part of the public record; the continued treatment of the documents as confidential will not impose a burden upon any party to this action.").

Both the parties and the Court treated these materials as Confidential before trial, and—notwithstanding the State's multiple attempts to breach the protection—after trial as well. Indeed, the Court Clerk continues to observe the protection over these materials, as the State made clear in its communications to Defendants. *See* Dec. Ex. A. The State should do the same. The exhibits were properly designated in the first place. They did not lose that protection simply because portions of those exhibits were discussed at trial.[2]

B. The Designated Materials Contain Confidential Information that Must be Protected.

The State also claims that the recordings do not contain personal identifying information that needs to be withheld or reacted. *See* Dec. Ex. A. But even considering these exhibits on an individual basis, it is clear that they, too, contain confidential materials and should retain their protection as such.

The very emails requesting that the underlying exhibits be produced confirm that they contain confidential materials that should remain protected—not only because they are

[2] Furthermore, not all these exhibits were presented to the public. Exhibit 764, for example, was submitted into evidence, but was never played. Instead, the State excerpted the exhibit, playing small snippets of the conversations (often taking the statements out of context). *See* October 18, 2017 Trial Transcript at 38–40. To the extent the State relies on these materials' presentation at the trial as a basis for voiding their protection, that argument cannot apply to materials that were not in fact presented to the public.

Defendants' confidential business records, but also for the sake of the students involved in the conversations. For example, in the clips the reporter requested, students are recorded discussing personal and sensitive details such as the wages they were earning at the time, their financial status, and their family situation. *See* Dec. Ex. A. That the recordings do not include the students' names is immaterial: this is quintessentially private, student-specific information. Those students have every expectation that their description of these sensitive subjects, recorded in their own voice, would not be handed off to be broadcast on National Public Radio.

It is not merely Defendants' confidential information whose protection the State is trying to breach; it is the students' as well. Defendants are obligated to maintain the confidentiality of these materials. For that matter, so is the State.

C. The State's Effort to Revoke Protection of these Confidential Materials is Improper.

In seeking to breach the protection over this confidential information, the State is once again trying to help its ideological allies cut corners. As Defendants pointed out in responding to the State's previous efforts to circumvent the Protective Order, any person that wishes to review the protected records of the Court can seek access to them on their own, including by filing their own Motion if they desire. The State is once again trying to fast-track this process for non-parties, not to serve any litigation or other legitimate purpose of the Attorney General's office, but to facilitate efforts by others to press their shared political agenda against private career colleges. Its purpose, now as before, is to advance its improper political motives and to do harm to CollegeAmerica and CEHE by any means possible, legal or otherwise. Having been stymied by the Court of Appeals, the State looks to these ideological allies to accomplish what it knows it cannot do itself.

The State's cavalier attitude towards the protected information (for which it has already been sanctioned) is once again inconsistent with the standards the Court pronounced in the Amended Protective Order. The State remains under the obligation to shield these sensitive and confidential materials from public disclosure. It should be instructed to keep that obligation.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully apply to the Court for an order that the Litigation Materials they have designated are entitled to retain their confidential status and protection under the Court's January 6, 2016 Amended Protective Order.

Dated: September 7, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2021, the foregoing was filed electronically on all persons registered to receive case filings through CCES.

/s/ Vanessa Sanchez
Vanessa Sanchez, Paralegal