

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
 No. 03-2684L & No. 01-568L (consolidated)

(Filed: November 25, 2008)

SHELDON PETERS WOLFCHILD, <i>et al.</i> ,)
Plaintiffs,)
v.)
UNITED STATES,)
Defendant.)

ORDER

On June 25, 2008, the court received a communication from counsel for *amicus curiae* Shakopee Mdewakanton Sioux Community (“Shakopee”), reporting that the names of the intervening plaintiffs in the Anonymous Walker Group had been disclosed as a result of an examination by counsel’s agents of publicly accessible files in the case. That disclosure should not have occurred; it contravened a protective order entered April 30, 2007 (docket no. 457), which superseded and supplanted a protective order entered December 29, 2004 (docket no. 45), as extended by an opinion and order of August 22, 2006. *See Wolfchild v. United States*, 72 Fed. Cl. 511, 540 (2006). Upon receiving the communication from counsel for Shakopee, the court immediately issued notice to all counsel in the case, including counsel for the Anonymous Walker Group, that the disclosure had occurred. *See Order of June 25, 2008* (docket no. 672). The court concurrently directed the clerk to secure and seal the files pertinent to anonymous plaintiffs and intervening plaintiffs and initiated proceedings respecting possible steps to ameliorate and cure, to the extent possible, adverse effects due to the disclosure. *Id.*

On July 8, 2008, the Anonymous Walker Group filed a motion for a federal investigation into the release of protected materials. *See Motion by Anonymous Walker Group* (docket nos. 677 (under seal) and 678 (redacted)). The court verified with the clerk’s office that the files pertaining to anonymous plaintiffs and intervening plaintiffs had been secured and sealed, and then ordered that evidentiary hearings be held on August 6 and 7, 2008, to address the circumstances in which the disclosure occurred, the steps that had been taken by counsel for Shakopee to secure the disclosed materials, and any further cure and remedy that might be appropriate beyond the steps that had already been taken. *See Order of July 17, 2008* (docket no. 683).

The evidentiary hearings took place as scheduled, and thereafter the court received additional submissions from the parties and from counsel for Shakopee. The matter accordingly is ready for resolution by the court.

The court GRANTS IN PART and DENIES IN PART the motion by the Anonymous Walker Group (docket nos. 677 and 678) for a federal investigation of the disclosure of the protected information. The motion is granted insofar as the court conducted two days of evidentiary hearings into the matter, but it is otherwise denied. The circumstances involved with the disclosure are set out in the testimony of witnesses who appeared at the evidentiary hearing. As a result of that testimony, the court found “that the disclosure . . . was inadvertent.” Hr’g Tr. 78:7-9 (Aug. 7, 2008).

The steps taken thus far by counsel for Shakopee to prevent further disclosure of the protected information are set out (1) in a letter from counsel for Shakopee dated July 25, 2008, a copy of which was attached to an order issued by the court on July 28, 2008, *see* Order of July 28, 2008 and attached letter from Philip Baker-Shenk and Brian B. O’Neill (July 25, 2008) (docket no. 685), and (2) in the testimony and recitations received at the evidentiary hearing on August 6, 2008. As a result of that communication and testimony, the court found “that reasonably prompt steps were taken to isolate the information that was protected, not only to isolate it but to prevent further disclosures.” Hr’g Tr. 78:10-13 (Aug. 7, 2008). Consequently, the court determines that sanctions are not appropriate and will not be imposed on Shakopee or its counsel.

The question remains what, if any, further steps should be taken to secure the protected materials and to ameliorate adverse effects from the disclosure that has occurred. The court concludes that further steps are necessary and appropriate, as follows:

1. Mr. O’Neill of Faegre & Benson, counsel for Shakopee (but who does not serve as counsel for Shakopee in any pending litigation) shall gather all copies of the protected information extant in the hands of Shakopee’s counsel or any of its agents, embodied in any form (*e.g.*, electronic, paper, or other), to include
 - (a) the thumb drive to which the contract researchers downloaded protected materials at the court on June 20, 2008;
 - (b) any printed embodiments of such materials;
 - (c) the original hard drives of the computers of the two researchers involved; and
 - (d) Shakopee’s back-up tapes.

2. Mr. O'Neill then shall secure the gathered materials in containers or into a packet covered with a wrapping, bearing a label setting out in red letters of at least 14-point type, the following legend:

Protected Information Secured Pursuant To A Protective Order
Entered On November 25, 2008 By The Court of Federal Claims
– Not To Be Opened Except By Order Of Court – To Be Destroyed
On November 26, 2028 Unless Otherwise Ordered By The Court

3. Mr. O'Neill shall place the resulting container or packet holding the gathered information in a locked, secure location maintained by his law firm, and shall restrict access to the information to himself and his immediate assistants, for a period of twenty years from the date of this order.

4. On or before December 24, 2008, Mr. O'Neill shall certify to the court that he has completed the steps set out above.

5. After the expiration of the twenty-year retention period, Mr. O'Neill shall certify to the court that the gathered information has been destroyed.

6. If for any reason Mr. O'Neill shall become unable to be responsible for securing the gathered information, he or his representative shall move the court for the appointment of a replacement.

7. The provisions of this order shall be enforceable against Shakopee and its agents under the provisions of Rule 71 of the Rules of the Court of Federal Claims (effective November 3, 2008).

The court recognizes that counsel for the Anonymous Walker Group has requested that the court serve as the repository of the gathered information. That suggestion, however, appears to be impracticable because Shakopee's back-up tapes contain information that is proprietary to that Community, and the court does not want access to those tapes. Nonetheless, for reasons of security, the court desires to have *all* of the gathered information in one location. As discussed during the evidentiary hearing, a potential problem could arise if retaliatory actions were taken against anonymous intervening plaintiffs whose names were inadvertently disclosed. Having all of the gathered information in one place would enable relatively assured steps to be taken to check claims of retaliation against the gathered, secured information. Mr. O'Neill appears to be in an appropriate position to provide a secure repository.

It is so ORDERED.

s/ Charles F. Lettow

Charles F. Lettow

Judge