

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Robertson)
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	

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**DEFENDANTS’ MOTION FOR A PROTECTIVE ORDER  
REGARDING CONFIDENTIAL INDIVIDUAL AND TRIBAL INFORMATION**

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, Defendants respectfully request that this Court enter a protective order authorizing Defendants to disclose audit and reconciliation documents related to the NORC Meta-Analysis Study that contain certain protectible information as described further in this motion. On October 3, 2007, Defendants’ counsel conferred with Plaintiffs’ counsel regarding this motion, and Plaintiffs’ counsel stated that this motion would be opposed. As grounds for this motion, Defendants state the following.

1. During the course of the final pretrial conference held by this Court on September 28, 2007, Plaintiffs’ counsel argued that the Court should enter a motion in limine with regard to an analysis conducted by Interior Defendants’ contractor, NORC. See Plaintiffs’ Motion in Limine to Preclude Testimony, Documents, and Other Information Regarding NORC’s Meta-Analysis (filed Sept. 20, 2007) (Dkt. No. 3402). In seeking such relief, Plaintiffs argued that Defendants had failed to include copies of audits and reconciliation documents with Defendants’ expert reports, even though the reports were referenced in Volume II of a NORC document regarding meta-analysis. See id. at 5-6. Defendants’ counsel responded that while the NORC experts had not considered the referenced reports in preparing their reports, Defendants were

prepared to produce the documents. Defendants' counsel further noted that some of the materials would require protection, particularly with respect to tribal information.

2. Defendants' counsel attempted to contact Plaintiffs' counsel on the morning of October 1, 2007, to address protective order issues. Since then, the parties have conferred, without successfully resolving questions of protection.

3. Defendants have undertaken a review of the audit and reconciliation documents, and based upon that review, have concluded that the majority of the documents require protection because they contain sensitive, confidential information which includes, but is not necessarily limited to, information protected by the Privacy Act, 5 U.S.C. § 552a; information which relates to confidential statistical or financial data within the meaning of 18 U.S.C. § 1905; and other confidential, proprietary, or commercially sensitive information, including but not limited to financial information of individual Indians or Tribes.<sup>1</sup> These materials cannot be released by Defendants without an order of this Court directing their release.

4. On previous occasions, this Court has entered protective orders to ensure confidential treatment of information related to individual Indians and Tribes. E.g., Order (filed Mar. 29, 2000) (Dkt. No.481) (protection of materials pursuant to 18 U.S.C. § 1905 and 25 U.S.C. § 2103); Protective Order (filed Nov. 27, 1996) (Dkt. No. 15) (Privacy Act protection).

5. To allow for the timely production of the remainder of the audit and reconciliation materials referenced in Volume II of the NORC meta-analysis document, while protecting

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<sup>1</sup> To the extent Defendants have concluded documents do not require protection, they are in the process of preparing them for production to Plaintiffs' counsel.

confidential information of individual Indians and/or Tribes, Defendants respectfully request that this Court enter the Protective Order set forth as Exhibit 1 to this motion.

6. Pursuant to this proposed order, Defendants would produce those documents which they concluded required protection, endorsed with the following legend:

PROTECTED MATERIAL: SUBJECT TO OCTOBER 2007  
PROTECTIVE ORDER ENTERED IN COBELL v.  
KEMPTHORNE REGARDING CONFIDENTIAL INDIVIDUAL  
AND TRIBAL INFORMATION

7. Any materials designated as protected, in accordance with paragraph 6, above, would be treated in all respects in the same fashion as material protected under this Court's November 27, 1996 Protective Order.

#### Conclusion

For the foregoing reasons, Defendants' respectfully request that this Court grant this Motion for a Protective Order Regarding Confidential Individual and Tribal Information.

Dated: October 3, 2007

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General  
MICHAEL F. HERTZ  
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN  
Director

/s/ Robert E. Kirschman, Jr.  
ROBERT E. KIRSCHMAN, JR.  
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CERTIFICATE OF SERVICE

I hereby certify that, on October 3, 2007 the foregoing *Defendants' Motion for a Protective Order Regarding Confidential Individual and Tribal Information* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
Browning, MT 59417  
Fax (406) 338-7530

/s/ Kevin P. Kingston  
Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, <u>et al.</u> ,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96cv01285JR
DIRK KEMPTHORNE,	)	
Secretary of the Interior, <u>et al.</u> ,	)	
Defendants.	)	

**PROTECTIVE ORDER**

1. All materials and information provided by Defendants to Plaintiffs or their experts related to Volume II to the “NORC Qualitative Meta-Analysis of Audit and Reconciliation Studies on Indian Trust Accounts” dated June 23, 2006, and as discussed during the final pretrial conference held in this matter on September 28, 2007, shall be subject to the terms of this Protective Order.

2. Defendants have undertaken a review of the material and information referenced in paragraph 1, and based upon that review, have concluded that the majority of the documents require protection because they contain sensitive, confidential information which includes, but is not necessarily limited to, information protected by the Privacy Act, 5 U.S.C. § 552a; information which relates to confidential statistical or financial data within the meaning of 18 U.S.C. § 1905; and other confidential, proprietary, or commercially sensitive information, including but not limited to financial information of individual Indians or Tribes.

3. To allow for the timely production of the material and information referenced in paragraph 1, above, Defendants shall produce those documents which they concluded required

protection, endorsed with the following legend:

PROTECTED MATERIAL: SUBJECT TO OCTOBER 2007  
PROTECTIVE ORDER ENTERED IN COBELL v.  
KEMPTHORNE REGARDING CONFIDENTIAL INDIVIDUAL  
AND TRIBAL INFORMATION

4. Any materials and information designated as protected, in accordance with paragraph 3, above, shall be treated in all respects in the same fashion as material protected under this Court's November 27, 1996 Protective Order.

SO ORDERED.

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James Robertson  
UNITED STATES DISTRICT JUDGE  
United States District Court for the  
District of Columbia

Date: \_\_\_\_\_

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Secretary of the Interior, <u>et al.</u> ,	)	
	)	
Defendants.	)	
_____	)	

**ORDER**

This matter comes before the Court on *Defendants' Motion for a Protective Order Regarding Confidential Individual and Tribal Information* (Dkt. No. \_\_\_\_). Upon consideration of the Defendants' Motion, Plaintiffs' Opposition, any Reply thereto, and the entire record of this case, it is hereby;

ORDERED that Defendants' Motion is GRANTED.

SO ORDERED.

\_\_\_\_\_  
James Robertson  
UNITED STATES DISTRICT JUDGE  
United States District Court for the  
District of Columbia

Date: \_\_\_\_\_