

UNITED STATES COURT OF APPEALS

January 21, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

IN RE: PROCEDURES FOR THE
FILING, SERVICE, AND
MANAGEMENT OF HIGHLY
SENSITIVE DOCUMENTS

No. 95-1

ORDER
Filed January 21, 2021

Before **TYMKOVICH**, Chief Circuit Judge.

In response to recent widespread breaches of both private sector and government computer systems, federal courts are implementing new procedures to protect highly sensitive sealed documents (HSDs) filed with the courts. To that end, the court finds that good cause exists to permit certain HSDs to be filed conventionally (i.e., in paper form or on an electronic device) outside of the court's electronic case filing system (CM/ECF) pursuant to Federal Rule of Appellate Procedure 25(a)(2)(B)(i).

Effective as of the date of this order and until such time as the court orders otherwise, the filing, service, and maintenance of certain HSDs shall be subject to the procedures and requirements set forth below. This general order supersedes any and all inconsistent provisions in this court's existing local rules, other general orders, policies, and procedures. This general order does not, however, change any

rules, policies, or procedures that govern whether and how a document may be filed under seal.

1. Highly Sensitive Documents

Highly sensitive documents are sealed documents filed conventionally outside of CM/ECF as a means of preventing unauthorized electronic access. The Clerk's Office will maintain all HSDs in a secure paper filing system or a secure computer system. Sealed documents that are not highly sensitive will be filed and served in accordance with established rules, policies, and procedures for sealed documents, and will be maintained under seal in CM/ECF.

While all HSDs are sealed, most sealed documents will not be designated as HSDs. The initial designation of a document as highly sensitive will almost always be made by the originating court or agency.

Examples of HSDs include documents related to ongoing criminal investigations (e.g., grand jury materials, applications for search warrants or for electronic surveillance that have not been made public); documents containing sensitive national security information; and other documents designated as HSDs by the originating court or agency. The following types of documents generally are not considered HSDs: presentence reports, pretrial release reports, statements of reasons, pleadings related to cooperation in criminal cases, social security records, administrative immigration records, most sealed filings in civil cases, and any documents not designated as HSDs by the originating court or agency.

2. Documents Filed as HSDs in Lower Courts and Agencies

Motions to file documents conventionally as HSDs should be presented and resolved during the course of the proceedings in the originating court or agency.

Documents filed electronically in the originating court or agency generally will not be filed conventionally as HSDs in this court.

Documents filed conventionally as HSDs in the originating court or agency may be filed conventionally as HSDs in this court as follows:

- a. HSDs transmitted to this court as part of a preliminary record on appeal shall be transmitted either in paper form or on an electronic device as defined in paragraph 7 below. The paper copy or electronic device shall be sealed in an envelope marked “HIGHLY SENSITIVE DOCUMENT.” The outside of the envelope shall include the case name and number for the originating district court case.
- b. In appeals with a designated record on appeal or a pro se record, *see* 10th Cir. R. 10.1, the originating court shall transmit HSDs to this court in one or more separate HSD-designated volume(s) of the record. HSD-designated volumes of the record shall be transmitted either in paper form or on an electronic device as defined in paragraph 7 below. The paper copies or

electronic device shall be sealed in an envelope marked “HIGHLY SENSITIVE DOCUMENT.” The outside of the envelope shall include the case name and number of the appeal in which the record materials will be filed.

- c. In appeals with an electronic appendix prepared by retained counsel, *see* 10th Cir. R. 10.1, any request for leave to conventionally file an appendix volume consisting of HSDs must be included in counsel’s motion for leave to file portions of the appendix under seal per 10th Cir. R. 30.1(D)(7). In addition to complying with Rule 30.1(D)(7), sealing motions that include requests to conventionally file materials treated as HSDs in the originating court or agency shall generally describe the HSDs and cite to or attach the originating court’s or agency’s order designating the materials as HSDs.

3. Requests to File a Document Conventionally as an HSD for the First Time on Appeal

Requests to file a document conventionally as an HSD for the first time on appeal may be made only when a change in circumstances warrants consideration of HSD treatment for the first time on appeal, or the need for HSD treatment arises in the first instance on appeal. In such instances, leave to file conventionally as an

HSD shall be requested in a Tenth Circuit Rule 25.6 motion for leave to file the document under seal in accordance with the following procedures.

- a. In addition to satisfying the court's sealing requirements, the motion shall state whether the document was electronically filed in the originating court or agency, and if so, what change in circumstances warrants conventional filing on appeal, or, if the need arises for the first time on appeal, explain why the document should be filed conventionally as an HSD.
- b. Represented parties and pro se parties with e-filing privileges shall electronically file their motion. The motion shall describe the proposed HSD in detail sufficient for the court to determine whether conventional filing as an HSD is appropriate. **A copy of the proposed HSD shall not be filed electronically.**
- c. Pro se parties without e-filing privileges shall file – per Federal Rule of Appellate Procedure 25(a)(2)(A)(i), and in compliance with Federal Rule of Appellate Procedure 27 and Tenth Circuit Rule 27 – a motion for leave to file under seal and conventionally as an HSD. The motion shall describe the proposed HSD in detail sufficient for the court to determine whether HSD designation is appropriate.

- d. If the motion is granted, the movant will be ordered to file and serve the HSD as set forth in paragraph 4 below.

4. Filing and Service of HSDs

The following filing and service requirements apply to appendix volumes comprised of HSDs, and documents filed conventionally as HSDs for the first time on appeal.

- a. The court requires three copies of appendix volumes comprised of HSDs, and documents filed conventionally as HSDs filed for the first time on appeal. The required three copies may be provided in paper form, or on three electronic devices as described in paragraph 7 below. The first page of any HSD must be conspicuously marked “HIGHLY SENSITIVE DOCUMENT,” and the paper copies or electronic devices shall be sealed in an envelope marked “HIGHLY SENSITIVE DOCUMENT.” The outside of the envelope shall include the name and case number of the appeal in which the HSD is being filed.
- b. The filing party shall serve the HSD on all other parties by any manner specified in Federal Rule of Appellate Procedure 25(c), except for service via the court’s electronic filing system.

5. Service of Highly Sensitive Court Orders

If the court determines that a court order contains highly sensitive information, the Clerk's Office will mark the first page of the order as a "HIGHLY SENSITIVE DOCUMENT," file and maintain the order in a secure paper filing system or a secure standalone computer system that is not connected to any network, and serve paper copies of the order on the parties via mail.

6. Removal of Existing HSDs or Highly Sensitive Cases from the Court's Electronic Filing System

Upon motion of a party or upon its own motion, the court may determine that an electronically filed sealed document is highly sensitive and should be removed from the court's electronic filing system and maintained by the Clerk's Office in a secure paper filing system or a secure standalone computer system that is not connected to any network.

A motion to remove an HSD from CM/ECF should be filed in the originating court or agency in the first instance. A motion asking this court to remove an HSD from CM/ECF shall explain whether the originating court or agency has granted the same relief, and if not, why this court should nonetheless treat the document at issue as highly sensitive and remove it from CM/ECF.

7. Electronic Device

Parties that wish to submit HSDs on an electronic device may do so on a **Windows-compatible** USB drive, DVD, CD, or portable hard drive. Materials submitted on an electronic device must be in a familiar file format that can be accessed using commonly available software. The files on the electronic device must be named with a file-naming convention that clearly identifies each individual file. The electronic device shall be clearly labeled with the case name and number for the appeal in which the HSD is being filed.

8. Questions about HSD Filing Procedures

Questions about how an HSD should be filed with the court pursuant to this General Order should be directed to the Clerk's Office at Clerk@ca10.uscourts.gov or (303) 844-3157.

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk