

**STATE OF MINNESOTA
BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION**

In the Matter of a Petition by Excelsior Energy,
Inc. for Approval of a Power Purchase
Agreement Under Minnesota Stat. §
216B.1694, Determination of Least Cost
Technology, and Establishment of a Clean
Energy Technology Minimum Under Minn.
Stat. § 216B.1693

Docket No. E-6472/M-05-1993
OAH Docket No. 12-2500-17260-2

**RESPONSE TO MCGP'S
MOTION TO MODIFY
PROTECTIVE ORDER**

I. INTRODUCTION

A presumption of access exists to court proceedings and documents produced in those proceedings. If a court wishes to restrict access to such information, it must first balance the interests supporting access against the interests asserted for denying access, while keeping in mind the presumption in favor of access. There is of course a burden on the party in favor of restricting access to demonstrate strong countervailing reasons to deny access to overcome the presumption. Here, we do not believe that a balancing test was used, and it is plain that Excelsior Energy, Inc., did not demonstrate compelling reasons to restrict access to information. The issue before you in the context of this motion is therefore whether the restrictions in the Protective Order dated June 5, 2006, deny certain parties rights to information in violation of the law.

II. FACTS

As the Administrative Law Judge is well aware, Excelsior Energy, Inc. ("Excelsior"),

filed a petition on December 27, 2005, under the Innovative Energy Project statute¹ to obtain an order from the Public Utilities Commission (the “Commission”) that its proposed power purchase agreement (“PPA”) with NSP d/b/a Xcel Energy (“Xcel”) is in the public interest. As part of these proceedings, Excelsior moved for the adoption of a protective order (the “Motion”) under which party access to certain documents would be restricted. Whether documents were “Trade Secret” would be determined by Excelsior.

Under the terms of the protective order proposed in the Motion, different parties receive different treatment. Of particular concern to these respondents is the treatment of third-parties that are neither a utility nor a power producer. In the final proposed protective order submitted by Excelsior it states “Non-utility or non-power producer Parties shall not have access to Trade Secret Information absent a showing that the interest they seek to protect cannot be protected without it.” *Excelsior Energy Inc’s Final Comments on Protective Order*, May 22, 2006 (“Final Comments”), attached Proposed Protective Order, pg. 3. The general reason asserted for such a restriction was “Sensitive commercial trade secret information is not typically disclosed to the general public.” *Final Comments* at 4. Excelsior did not offer specific justifications for restricting access to information it classified as “Trade Secret.”

Most of what Excelsior proposed was adopted in a protective order dated June 5, 2006 (the “Protective Order”).² The Protective Order adopted most of the proposed language with respect to the third parties. The memorandum accompanying the Protective Order stated as follows:

¹ MINN. STAT. § 216B.1694.

² In the memorandum accompanying the third pre-hearing order dated June 5, 2006 (the “Memorandum”), the Court states “We have adopted Excelsior Energy’s position in most instances.” *Memorandum*, pg. 2.

Parties that are not a utility or a power producer will usually not need access to the detailed cost and technical data. Sometimes they are not in a position to make helpful comment about it. But they may be. So separate treatment is reasonable. However, the Excelsior Energy language may present too high a hurdle for such a party seeking such data. Therefore, Paragraph 1(c)(F) has been modified to require “a showing that the interest they seek to protect reasonably requires it.”

Memorandum, pg. 2. In the event the third-party seeking such information opposes the “Trade Secret” classification, they have the additional burden of seeking to remove the classification through notice and hearing. *Protective Order*, ¶ 2, pg. 3. How a third-party could determine which documents it should seek to remove the “Trade Secret” classification is not clear, and the imposition of these burdens on third-parties is inconsistent with applicable case law.

III. ANALYSIS

A. Prior to Issuing a Protective Order, Applicable Case Law Requires Courts to Engage in a Balancing Test and to Review Documents Subject to the Proposed Order.

Not only must a court balance the interests favoring access against those for restricting access before entering a protective order, the court must also review those documents subject to the protective order. The standard to be applied in making a determination on a proposed protective order was resolved in *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d (Minn. 1986). In *Star Tribune*, the local media, including the Minneapolis Star & Tribune (the “Media”), were seeking access to sealed civil court files. The Media argued that they were entitled to view the settlement documents and transcripts in the files on Constitutional grounds. The Minnesota Supreme Court disagreed and applied the common law standard. *Id.* at 204. This standard presumes access unless there are strong countervailing reasons. *Id.* at 202. To make the determination a court balances the interests supporting access against those asserted for denying

access, while taking into consideration the presumption of access. *Id.* at 202-03.

This standard was applied recently in *Bonzel v. Pfizer*, 2002 WL 1902526 (Minn.App. 2002) (attached). In *Bonzel*, Medtronic AVE, Inc. (“Medtronic”), sought to intervene in a matter to gain access to documents subject to a protective order. *Id.* at *2. The District Court denied the petition to intervene, and Medtronic sought a writ of prohibition, using *Star Tribune* as authority for the position that extraordinary relief was appropriate. *Id.* The Minnesota Court of Appeals not only found that intervention was appropriate, but also determined that the process by which the District Court granted the protective order violated *Star Tribune*. Indeed, the Minnesota Court of Appeals stated “the district court did not fulfill its obligation to act as gatekeeper to insure that the protective order did not become overbroad in its application.” *Id.* at *5. Applying *Star Tribune*, the Minnesota Court of Appeals stated “Each item of information sealed in the court file must be analyzed under the balancing of interests test directed by the *Star Tribune* decision.” *Id.* at *5-6. The District Court was reversed.

B. The Terms of the Protective Order Do Not Adhere to the Law

The Protective Order fails to comply with the law in two respects. First, the Protective Order incorrectly places the burden of demonstrating need on the third-party requesting information. It prohibits third party intervenors from having access to Trade Secret information unless they demonstrate that “the interest they seek to protect reasonably requires it.” *Protective Order*, ¶ 1(c)(F), pg. 3. Instead of requiring Excelsior to overcome the presumption of access, the Protective Order requires the third party to overcome the presumption that access has been properly denied. In addition, the Protective Order requires the party seeking information to object to any documents wrongly classified as containing Trade Secret Information. *Id.* ¶ 3, pg.

4. These burdens are unwarranted and fail to recognize the requirement of conducting a balancing test with a presumption of access to documents. The Protective Order should therefore be amended to routinely allow access to third-parties that are neither a utility nor a power producer unless and until Excelsior makes a compelling showing that some item of evidence cannot be revealed to such parties, even under the protections conferred by the other terms of the Protective Order.

Second, we believe that the terms of the Protective Order fail to recognize the Administrative Law Judge's duty to review documents classified as "Trade Secret." By requiring third parties to object to information classified as Trade Secret, the Court implicitly grants Excelsior the sole authority to determine what documents contain Trade Secret Information. *See id.* ¶ 3, pg. 4. Indeed, the memorandum attached to the third pre-hearing order ("Third Order") fails to indicate whether any of the documents allegedly containing Trade Secret Information have been reviewed by the Administrative Law Judge. Although burdensome, the Administrative Law Judge must engage in such a review prior to restricting access to any information. *Bonzel*, 2002 WL 1902526 at *6 (Minn.App. 2002) (stating that reviewing the documents "is a responsibility with which the district court is burdened"). The Protective Order should therefore be amended to require that the Administrative Law Judge review any documents that Excelsior wishes to protect as Trade Secret prior to refusing access to those documents to third-parties that are neither a utility nor a power producer. *Id.*

C. Proposed Revision

We recognize the need to keep certain information confidential. But we believe any restrictions on access to information should have limits. Because we are willing to execute a

confidentiality agreement, we propose the following revised paragraph 1(c)(F) in the Protective Order:

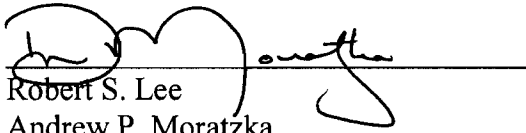
(F) Non-utility or non-power producer Parties that have been granted party status to this proceeding and have executed the attached Nondisclosure Agreement, shall be entitled to be a Requesting Party and entitled to receive Trade Secret Information and Nonpublic Data unless Excelsior demonstrates that the interests in protecting such information greatly outweigh the interests in providing access to such information.

IV. CONCLUSION

The Protective Order must be revised to balance the interests supporting access to information against the interests asserted for denying access, while keeping in mind the presumption in favor of access. Furthermore, the Protective Order must be revised to require a review by the Administrative Law Judge of any documents to which Excelsior desires to restrict access, prior to granting such protection to any individual document. We respectfully request that the Administrative Law Judge adopt the proposed revised paragraph 1(c)(F) of the Protective Order.

Respectfully submitted,

MACKALL, CROUNSE & MOORE, PLC

A handwritten signature in black ink, appearing to read "Robert S. Lee", is written over a horizontal line. The signature is stylized and cursive.

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 480A.08(3).

Court of Appeals of Minnesota.
 Tassilo BONZEL, Respondent,
 v.
 PFIZER, INC., a Delaware Corporation, et al.,
 Defendants,
 SCHNEIDER (U.S.A.), et al., Respondents,
 MEDTRONIC AVE, INC., applicant in
 intervention, Appellant.
 No. C4-02-298.

Aug. 20, 2002.

Hennepin County District Court, File No.
 CT00011184.

William M. Hart, Jeffrey M. Thompson, Damon L.
 Highly, Meagher Geer P.L.L.P., Minneapolis, MN,
 for respondent Bonzel.

Marianne D. Short, Paul J. Robbennolt, Christopher
 A. Young, Dorsey Whitney, LLP, Minneapolis,
 MN, for respondents Schneider (U.S.A.) n/k/a
 Boston Scientific Scimed, Schneider (Europe)
 GmbH, and Boston Scientific Corporation.

Michael V. Ciresi, Tara D. Sutton, David S. Toepfer
 , Adam Samaha, Robins, Kaplan, Miller Ciresi,
 LLP, Minneapolis, MN, for appellant.

Considered and decided by TOUSSAINT,
 Presiding Judge, SCHUMACHER, Judge, and
 PETERSON, Judge.

UNPUBLISHED OPINION

ROBERT H. SCHUMACHER, Judge.

*1 Medtronic AVE, Inc. appeals from the district
 court's denial of its motion to intervene in the
 respondents' lawsuit for the limited purpose of
 challenging a protective order sealing certain

documents from that lawsuit in the district court
 file. We reverse and remand.

FACTS

Respondent Tassilo Bonzel is the inventor of a
 particular type of catheter ("device") used in
 angioplasty procedures for heart surgery. In the mid
 1980's, Bonzel sought and received patents for his
 device in the United States and Europe. Bonzel then
 entered into a license with Pfizer, Inc., by way of
 Pfizer's Medical Technology Group, to manufacture
 and market the device. Included in the Group were
 Schneider (U.S.A.) Inc., and Schneider (Europe)
 AG. These entities subsequently became
 respondents Boston Scientific Scimed, Inc. and
 Schneider (Europe) GmbH, respectively. Schneider,
 as licensee, assumed the responsibility to protect
 Bonzel's patent by way of patent-infringement
 prosecution and defending challenges to the patent.
 In 1992 Appellant Medtronic AVE, Inc. ("
 Medtronic") received a sub-license from Schneider
 (Europe). Medtronic manufactures and sells
 medical devices including catheters and stents used
 by cardiologists.

In 1991, Schneider pursued a patent infringement
 action against SciMed Life Systems, Inc. This
 action resulted in an award of approximately \$63
 million in 1994. Schneider also successfully
 prosecuted other patent infringement actions.
 SciMed was later purchased by respondent Boston
 Scientific in 1995. In November 1997, Pfizer
 decided to dissolve Schneider (Europe) AG and
 transferred some of its assets, including the Bonzel
 license, into a new division, Schneider (Europe)
 GmbH. Bonzel apparently was not told of this
 transfer. Then, in June 1998, Pfizer sold Schneider
 Worldwide (including Schneider GmbH) to
 respondent Boston Scientific. This sale included the
 license on the Bonzel patent. ^{FN1}

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FN1. Included in the sale was the Schneider (U.S.A.) Inc. entity, which was apparently renamed Boston Scientific SciMed, Inc., a subsidiary of Boston Scientific Corporation. The "Boston Scientific" entities and the "Schneider" entities are jointly represented and the parties have referred to them collectively as "Boston Scientific." This opinion does likewise.

In March 2000, Boston Scientific initiated a patent-infringement action against Medtronic in California federal court. Boston Scientific represented itself as the assignee of the Bonzel patent pursuant to exclusive licensing agreements. Medtronic removed the matter to arbitration and the parties engaged in discovery. In August of 2000, Bonzel began this action in Hennepin County District Court. Bonzel's action contained many claims and allegations against Boston Scientific, among them that Boston Scientific's claimed assignment of the license was either void or voidable. Bonzel alleged that some or all of the movement the license experienced amounted to transfers of the license for which Bonzel's consent was required. Bonzel also alleged that some of the transfers occurred without adequate consideration, and that he had not received appropriate compensation for any such transfers or other "proceeds" from the license as set forth in the licensing agreement.

Boston Scientific did not produce any of the pleadings from this action to Medtronic in the arbitration proceeding, or otherwise inform Medtronic of Bonzel's pending lawsuit. In April 2001, Medtronic and Boston Scientific submitted the case to the arbitration panel. While awaiting the arbitration panel's decision, Medtronic learned of Bonzel's lawsuit alleging Boston Scientific did not possess a valid license on the Bonzel patent. Medtronic claimed that at least some of its discovery requests to Boston Scientific encompassed documents and information from the Bonzel suit, and asked the arbitration panel to reopen the case for additional evidence prior to issuing its decision. The panel did not order any additional discovery or allow for supplementing the

record.

*2 Also in April 2001, Hennepin County District Court ordered the file sealed as per Bonzel's proposed protective order. The order set forth parameters for the "confidential" designation. The order stated that the parties could designate documents "confidential," subject to challenge by another party to the lawsuit. Absent any such challenge, the documents designated "confidential" would be sealed within the district court file. Many documents were designated as such, and sealed, within the district court file. Medtronic was denied access to these documents.

On July 17, 2001, the arbitration panel issued its decision. The panel decided Medtronic had infringed the patent, awarded Boston Scientific approximately \$170 million, and enjoined Medtronic from selling the "accused" devices "for the duration of [Boston Scientific's] ownership of the Bonzel patent." Medtronic sought to have the arbitration decision vacated by federal district court in California. The federal court affirmed the award, and Medtronic has appealed that decision to federal appeals court. The federal appeals court's decision is pending.

Meanwhile, on August 30, 2001, Medtronic moved to intervene in Bonzel's suit against Boston Scientific in Hennepin County District Court. Medtronic sought intervention as a matter of right under Minnesota Rule of Civil Procedure 24 for the limited purpose of challenging the protective order and gaining access to the sealed documents, or at least some portion thereof. Medtronic sought to intervene to assess the validity of its sublicense as purportedly granted by Boston Scientific, and to exercise its right of "public access" to the court files. On December 27, 2001, the district court denied Medtronic's intervention motion, holding that neither purpose held up to scrutiny. The district court decided that Medtronic's concerns regarding the validity of its sublicense were moot because Bonzel and Boston Scientific "assured [the district] court that [Bonzel] no longer seeks to terminate his license." The district court decided that Medtronic's right to access was overcome by the parties' interests in protecting confidential and proprietary

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information from a competitor.

Subsequently, on January 15, 2002, the district court issued an order acknowledging that Bonzel and Boston Scientific had “conditionally settled” some of Bonzel’s claims—those alleging that Boston Scientific’s license was either void or voidable—and ordering the remaining claims severed and dismissed without prejudice for forum non conveniens, and indicating that the case should be heard in Germany. The documents memorializing Bonzel’s settlement with Boston Scientific was not actually filed with the district court; they appear in the district court file only for purposes of the district court’s in camera review as sealed exhibits to a motion filed by Bonzel to compel performance under the agreement.

Medtronic sought a writ of prohibition from this court, arguing that extraordinary relief was appropriate under *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn.1986). On February 12, 2002 this court denied that request, holding that a direct appeal from the district court’s order denying intervention was the appropriate process. Medtronic then filed its notice of appeal and this appeal followed.

DECISION

*3 Medtronic sought to intervene under Minn. R. Civ. P. 24.01—as a matter of right—and under Rule 24.02—permissive intervention. The district court’s decision regarding intervention of right is a question of law subject to de novo review by this court. *Norman v. Refsland*, 383 N.W.2d 673, 676 (Minn.1986). The decision on permissive intervention is reviewed under an abuse of discretion standard. *Id.* If intervention were allowed, Medtronic would need to demonstrate that the protective order as issued and enforced, and a refusal to modify it, amount to an abuse of discretion. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 206 (Minn.1986).

1. The Minnesota Rules of Civil Procedure set forth that intervention *shall be permitted* when an applicant for intervention meets four criteria: (1)

timely application, (2) “an interest relating to the property or transaction which is the subject of the action,” (3) the disposition of the action “may as a practical matter impair or impede the applicant’s ability to protect that interest,” and (4) the existing parties to the action do not adequately represent the applicant’s interest. Minn. R. Civ. P. 24.01; *Star & Tribune*, 392 N.W.2d at 207. In the *Star & Tribune* case, the supreme court confirmed that the proper procedure for a third-party seeking access to information sealed in court files is to request intervention as of right under Rule 24.01. *Id.* As the district court noted, Rule 24 is to be liberally construed so as to encourage all legitimate interventions. *Norman*, 383 N.W.2d at 678; *BE & K Constr. Co. v. Peterson*, 464 N.W.2d 756, 759 (Minn.App.1991).

The *Star & Tribune* case addressed First Amendment issues given that the press was involved as applicant-in-intervention there. 392 N.W.2d at 203. The supreme court concluded, however, that the common law right of access to inspect public records—i.e. court files—was the proper standard to apply. *Id.* at 205. The common law right of access involves a balancing test in which the “interests supporting access, including the presumption in favor of access, are balanced against the interests asserted for denying access.” *Id.* at 202-03. Access should be denied only when the interests asserted in favor of denial are “strong enough to overcome the presumption [for access].” *Id.* at 203.^{FN2}

FN2. In *Star & Tribune*, the supreme court specifically limited its holding to “what standard should apply when a party seeks to restrict access to settlement documents or transcripts made part of a civil court file by statute. We do not intend this decision to apply to other civil trial records or documents.” 392 N.W.2d at 203. In emphasizing the “narrowness of [its] decision” as such, arguably the *Star & Tribune* case is not binding precedent on this court under the present set of circumstances. It would seem, however, that a *more* stringent burden would be

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indicated when a party seeks to restrict access to court documents made part of the file as part of the general course of litigation, as opposed to those documents that appear in the file only because a specific statute requires it. Accordingly, the *Star & Tribune* decision would seem (at least) very instructive on the issues currently before this court.

Accordingly, the district court is to conduct a balancing test of the competing interests for, and against, access to the information at issue. The district court decided that the parties' interests in confidentiality and guarding its proprietary information from a competitor trumped Medtronic's presumptive interest in access to public records, and Medtronic's individualized interest in ascertaining the validity of its own sub-license as purportedly granted to it by Boston Scientific. For this reason, the district court denied Medtronic's motion to intervene. The district court dismissed Medtronic's second stated interest in the Bonzel suit finding "that Medtronic AVE has no real interest since its limited-field license is no longer in danger of being terminated."

*4 Prior to performing an analysis of the substantive issues involved in a potential challenge to the protective order, the court must first determine whether the potential challenger should be allowed as a procedural matter to make the challenge. See *Star & Tribune*, 392 N.W.2d at 201 (Star & Tribune's motion to intervene granted by district court, and then its substantive challenge to protective order addressed by district court). Medtronic has satisfied the requirements for intervention as a matter of right under Rule 24.01. It is undisputed that Medtronic's motion was timely. Medtronic has stated two interests in the action, either of which is sufficient on its face. Also, given that the parties have sealed the documents at issue, denied Medtronic access to the sealed documents, and access is the purpose of intervention, Medtronic has satisfied the remaining two requirements. Accordingly, Medtronic's intervention motion must be granted.

2. We turn then, to the substantive issues

surrounding the protective order. The district court approved the protective order the federal court had adopted, as submitted by Bonzel before the matter was remanded to state court. The protective order allowed the parties to designate the documents confidential at their own discretion and thereby sealed in the court file. The parties' designations would not then be subject to judicial review unless *another party to the lawsuit* challenged the designations. The order sets forth the categories of documents to be included in a "confidential" designation, gives examples of these, and also indicates certain types of documents not to be classified as confidential (including documents filed in other courts and not currently under seal).

For the most part, the protective order appears sound. In and of itself, the order is not overly broad, defining the proprietary and other confidential material that is to be designated as such by the parties and filed under seal. The problem arises in that the order does not allow for any review of the parties' designations except by one another. The court is not involved in the process unless and until another party to the action objects to a particular document being designated "confidential." Because the opposing party receives a copy of these "confidential" documents, objections will not occur unless the opposing party later wants to disclose the document to an individual not directly involved in the lawsuit (such as an expert) as a party or member of the legal team. As such, the protective order, while sufficiently narrow in its language and on its face, becomes extremely over-broad in its application. A review of the voluminous documents sealed in the court file reveals many of which (and/or parts of which) would not appear to fall within the parameters for "confidential" status as defined in the protective order.

In *Star & Tribune*, the supreme court stated that, "in order to overcome the presumption in favor of access, a party must show strong countervailing reasons why access should be restricted." 392 N.W.2d at 205-06. Without this showing,

*5 a court may not restrict access to settlement documents and transcripts that have been filed with the court. It should also be noted that simply because a party requests that access be restricted

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does not mean that the court may automatically do so. The court must make its own legal determination in each case.

Id. at 206. In the present case, by allowing the parties to make the determinations as to which documents will be filed under seal, without conducting its own review of these documents, the court has in effect made the “automatic restriction” forbidden under *Star & Tribune*. *Id.* Although the district court made an initial assessment of the competing interests and concluded that the parties to the lawsuit had a legitimate reason for restricting Medtronic's access to the public records, the legitimate reason passes muster only when the *specific information* being sealed in the file furthers that reason. If the information being sealed is not truly confidential, the parties do not have a legitimate reason for denying access to that particular information, pleading, or exhibit. Thus, that purported interest would not trump the interest in access to the court file with respect to that specific item of information. A review of the documents sealed in the court file also indicates that on some occasions the parties may have sealed an entire document or submission even though only a portion of that submission contains arguably confidential material. Sealing a portion of a document, to protect confidential information, without restricting access to the remainder, would seem more appropriate under the *Star & Tribune* balancing test.

Even though the standard of review is stringent on this issue—an abuse of discretion—Medtronic has made the required showing. In this case, the district court did not exercise its discretion. As the reams of documents sealed in the district court file attest, by allowing the parties to designate basically any and all documents (and all portions thereof) “confidential,” the district court did not fulfill its obligation to act as gatekeeper to insure that the protective order did not become overbroad in its application. The mere fact that Medtronic is a competitor of the parties, and that some of the information necessary to be filed with the court could be of a proprietary and therefore an arguably confidential nature suitable for filing under seal, does not mean that all of the information the parties

might not want Medtronic to see rises to a level sufficient to overcome the general presumption of access. Also, we do not agree, necessarily, that Bonzel's surrendering his challenges to the validity of Boston Scientific's purported license conclusively settles the issue. Bonzel claimed not only that he had the right to void the license, but alternatively that the license *was already void*, irrespective of any affirmative action on his part. Medtronic's interest in determining the validity of Boston Scientific's license is not necessarily rendered moot by the settlement.

*6 At a minimum, the case law indicates that the court must take steps to insure that the parties can make the requisite showing before restricting access. *Star & Tribune*, 392 N.W.2d at 205-06. We agree with the district court's conclusion that some of the information the parties filed with the court could very well contain confidential or proprietary information. The parties have an interest in keeping this information from Medtronic. This recognition provides the legal justification for an order limiting what would otherwise be complete access to the court file. It does not, however, provide legal justification for denying access to any and all documents the parties wish sealed in the court file. Also, although portions of a document or documents submitted for filing may contain confidential information suitable for sealing, this does not mean that other documents, pleadings, exhibits, or portions thereof, are also suitable for sealing in the file. Each item of information sealed in the court file must be analyzed under the balancing of interests test directed by the *Star Tribune* decision. We recognize the arduous task of reviewing the many documents purported to be “confidential.” However, this is a responsibility with which the district court is burdened given the competing interests at stake here as set forth in the case law.

3. Medtronic has also requested access to the settlement documents and other documents and information never filed in district court. Unlike those documents filed in court, to which the public access doctrine applies creating the presumption requiring a competing interest before access can be denied, Medtronic has no right to these other

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documents.

Reversed and remanded.

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