

# Managing Cases Involving Highly Sensitive Documents (HSDs)

APRIL 28, 2021

UNITED STATES COURT  
OF  
FEDERAL CLAIMS

# What has changed?

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- In early January 2021, disclosures of widespread cybersecurity breaches of government computer systems prompted the federal judiciary to create highly sensitive documents (HSDs) as a new categorization of filings requiring special security protections
- Effective January 11, 2021
  - HSDs may no longer be filed in CM/ECF, under seal or otherwise
  - existing filings in CM/ECF may be re-categorized as HSDs and removed from the electronic filing system

# What documents are deemed HSDs?

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A highly sensitive document (HSD) is any document

- containing information that involves matters of national security, foreign sovereign interests, or cybersecurity
- containing government enforcement information
- describing closely held trade secrets
- implicating the reputational interests of the United States



# What documents are not considered HSDs?

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The following types of documents generally are not considered HSDs:

- any document containing proprietary, source-selection, or similar confidential information
- any document containing medical records or personal identifiers as defined in RCFC 5.2
- most sealed filings

# Submission of HSDs and Proposed HSDs

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- In advance of submitting an HSD, contact the Clerk's Office at 202-357-6406
- Submit an electronic copy using the following protections
  - A FIPS -140-2 level 3 compliant encrypted portable storage device
    - a personal identification number (PIN)
    - a mechanism that deletes the data in the HSD after more than 10 failed attempts to access it
    - Tamper resistant
- Communicate the required access PIN to the Clerk's Office separately

# Submission of HSDs and Proposed HSDs

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- If the HSD is filed pursuant to a court order, include a copy of the order
- Package the HSD in a sealed envelope marked “HIGHLY SENSITIVE DOCUMENT” and attach to the outside of the envelope a copy of the HSD’s caption page (with any highly sensitive material redacted)
- Submission may be made by hand delivery or delivery via secured mail (e.g., FedEx, UPS, or certified mail)

# Submission of HSDs and Proposed HSDs

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- Hand delivery must be made between the hours of 8:30 am and 4:30 pm
- If building restrictions are in place, an HSD may be deposited in the court's night box
  - Absent building restrictions, HSDs should NOT be placed in the after-hours night box



# Filing a Motion For Leave to File an HSD

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- File the motion in CM/ECF using the
  - public event if no information covered by a protective order is included
  - sealed event if protected information is included
- DO NOT attach the HSD itself to the motion
- Separately submit the HSD to the Clerk's Office following the procedures outlined in the previous slides

# Filing a Motion For Leave to File an HSD

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- The motion must explain why the document
  - constitutes an HSD or
  - should otherwise be subject to the heightened protection for HSDs
- Avoid being overinclusive in deciding what may warrant HSD treatment
  - Many pleadings currently filed under seal in CM/ECF do not merit the heightened protections of HSDs





# Service of HSDs and Proposed HSDs

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- The filing party must serve HSDs and proposed HSDs on the other parties by any manner specified in RCFC 5(b)(2)
  - except no service via CM/ECF
- A certificate of service must be included with the HSD or proposed HSD when submitted to the Clerk's Office

# Filing a Motion to Treat a Previously Filed Document as an HSD

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- File the motion in CM/ECF using the
  - public event if no protected information is included
  - sealed event if protected information is included
- The motion must explain why the document constitutes an HSD or should otherwise be subject to the heightened protection for HSDs
- If granted, the document will be removed from CM/ECF and maintained in a filing system separate from CM/ECF

# Redaction Requirements

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- Unless otherwise ordered by the court, the filing party must file a redacted version of an HSD, with the highly sensitive information removed
  - within 7 days of filing an HSD or
  - within 7 days of the issuance of an order directing that an HSD be removed from CM/ECF
- If a court order contains information reflected in an HSD, the court will issue a redacted version of the order with the highly sensitive information removed

# Proceedings Involving Highly Sensitive Information

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- In-person proceeding preferred
- If in-person is not feasible, the parties and the court should agree on a court-approved conferencing technology
  - Minimize discussion of highly sensitive material to the extent possible
- HSD-claiming party should make clear on the record when HSDs are being discussed
- Transcripts

# Maintaining HSDs and Secure Electronic Devices

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- HSDs submitted on secure electronic devices are copied to the court's secure storage system
  - If HSD status is no longer necessary, the court will order the release of the HSD from secure storage and its upload to CM/ECF
- If a motion for leave to file an HSD is denied, the movant may request the return of the proposed HSD or else the court will securely dispose of the secure electronic device or paper document
- Once judgment enters in the case, the HSD filing party may request the return of any submitted secure electronic devices



## How long will these special procedures for HSDs be necessary?

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- There is currently no timeline for how long these HSD processes will be needed
- The Administrative Office of the U.S. Courts is pursuing long-term solutions through changes to national policies and the CM/ECF system to address the additional security concerns related to HSDs

# Additional Information

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Please visit the court's website at <http://www.uscfc.uscourts.gov/node/3274> for more information on highly sensitive documents.

- Amended General Order (March 9, 2021)
- Notice: Highly Sensitive Documents (January 11, 2021)
- Procedures for Filing Highly Sensitive Documents

Questions?

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