

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division**

WILLIAM THORPE, *et al.*,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

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Case No. 2:20-cv-00007-JPJ-PMS

**DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ MOTION
TO COMPEL THE PRODUCTION OF DOCUMENTS**

Plaintiffs have waited until the end of the fact discovery period to move this Court to impose upon Defendants an obligation to produce documents in response to overbroad document requests that are not proportional to the needs of this case and that, if nonetheless required, would take months to produce. In an attempt to distract the Court from that basic fact and also that, having known Defendants’ position on the Virginia Health Records Privacy Act (the “Act”) for *years*, Plaintiffs could have moved for a Court order long before now, Plaintiffs misrepresent the Virginia Department of Correction’s (“VDOC”) legitimate concerns about meeting its statutory obligations and completely ignore the significant burden that their proposed discovery would impose on VDOC. This Court should not be distracted from the expansive breadth of what Plaintiffs are requesting but should deny Plaintiffs’ Motion.

FACTS

The dispute that Plaintiffs now bring before the Court is the same dispute over “Health Information” that Plaintiffs attempted to leverage, in part, to obtain a 90-day extension of the

discovery deadlines.¹ In their Motion to Amend Scheduling Order, Plaintiffs represented to the Court that they “intend to file a motion, which Plaintiffs understand may be unopposed at this point, seeking an order of good cause from the Court to allow VDOC to produce documents containing health information, without the need to obtain individual waivers.”² At no point before filing their Motion to Amend Scheduling Order or before filing the current Motion to Compel did Plaintiffs provide Defendants with a draft of such a motion for Defendants to consider whether to oppose it, despite the fact that Defendants expressed a willingness to entertain such a motion.

In their Opposition to Plaintiffs’ Motion to Amend Scheduling Order (“Opposition to Amend Schedule”), Defendants provided a brief history of this dispute, which Plaintiffs knew existed more than three years ago and which was the subject of a compromise between the parties more than a year ago.³ Defendants also outlined the significant burden associated with producing the requested records.⁴

But that outline does not adequately convey the burden Defendants already have borne, resulting from the compromise that Plaintiffs now want to abandon, to provide Plaintiffs with additional documents responsive to Requests for Production (“RFPs”) that Plaintiffs include in their Motion. As a result of that compromise—separate and apart from producing hard copy medical and mental health records of Named Plaintiffs and the results of electronic searches for the same—Defendants have spent more than 490 hours of attorney time and approximately \$300,000 to locate, obtain, review, and prepare for production nearly 50,000 pages of material related to non-Plaintiff inmates and to correspond with Plaintiffs’ counsel regarding that process.

¹ Dkt. No. 249 at 8–9.

² *Id.* at 9.

³ Dkt. No. 256 at 10-11.

⁴ *Id.* at 19.

Defendants estimate that complying with Plaintiffs' incredibly broad proposed order could result in VDOC incurring well over \$1 million in legal fees and expenses.⁵

ARGUMENT

Defendants maintain their position, as they have for more than three years, that the Act prevents VDOC from disclosing records protected by the Act absent compliance with its requirements. But that position is not at the core of the parties' dispute—Defendants acknowledged more than two years ago that the Act would permit disclosure of inmate health records pursuant to a Court order upon good cause shown,⁶ good cause that Plaintiffs now argue exists.⁷ Rather, the core of the parties' dispute is the overbreadth and lack of proportionality inherent in Plaintiffs' requests, which is exacerbated by the fact that Plaintiffs have waited *years*, until the close of fact discovery, to raise the issue with the Court.

A. Plaintiffs' Requests are Overbroad and Not Proportional to the Needs of the Case.

Plaintiffs paraphrase the production of documents they seek⁸ and propose an order that does not detail the production they would have the Court compel,⁹ likely because they know that their requests are overbroad and not proportional to the needs of the case. From their First Set of RFPs, Plaintiffs seek to compel the following documents:

- RFP NO. 35: All Documents sufficient to establish the identity and quantity of Prisoners at ROSP and WRSP classified as SD-M, Class Members who had been admitted to a specialized unit such as a mental health unit or medical infirmary, or other Class Members similarly designated for mental health or medical treatment under similar circumstances, for each three-month period during the Relevant Period.

⁵ Declaration of Meghan Podolny, attached as Exhibit 1.

⁶ Dkt. No. 256 at 10; Va. Code § 32.1-127.1:03(D)(2) (2021).

⁷ Dkt. No. 271 at 8–11

⁸ Dkt. No. 271 at 1–2.

⁹ Dkt. No. 270-1.

- RFP NO. 36: All Documents and Communications relating to the number of Prisoners at ROSP and WRSP classified as SD-M, Class Members who had been admitted to a specialized unit such as a mental health unit or medical infirmary, or other Class Members similarly designated for mental health or medical treatment under similar circumstances, for each three-month period during the Relevant Period.
- RFP NO. 37: All Documents and Communications relating to transfers of Class Members to and from Marion Correctional Treatment Center during the Relevant Period.
- RFP NO. 38: All Documents and Communications relating to individual incidents of self-harming behavior by Class Members during the Relevant Period.
- RFP NO. 39: All Documents and Communications relating to the mental health of Class Members, including, but not limited to, complaints, reports, notes, and memoranda, during the Relevant Period.
- RFP NO. 40: All grievances or other documented complaints and mental health records during the Relevant Period relating to concerns on the part of Class Members or their mental health providers about the effects of solitary confinement, segregation, conditions of confinement, or restrictive housing.
- RFP NO. 41: All Documents and Communications relating to psychiatric evaluations of Class Members at ROSP and WRSP, including, but not limited to, SIRS or PAI, during the Relevant Period.
- RFP NO. 43: All Documents and Communications relating to the provision of mental health services at ROSP and WRSP, including, but not limited to, performance evaluations, internal policies, staffing schedules, meetings with Class Members, and invoices submitted to ROSP, WRSP, or Defendants.¹⁰

Defendants served their objections to these RFPs in *November 2019*. Plaintiffs define the “Relevant Period” as August 2012 to the present, meaning that, to comply with Plaintiffs’ requests, Defendants would have to produce all of the above-requested “Documents and Communications” for each “Class Member”—though no class has been certified and there could be several hundred class members, depending on how the class is defined if one were certified—regardless of whether the inmate was in the Step-Down Program at the time the “Document or Communication” was generated. Further, Defendants asked Plaintiffs to clarify what they mean by “classified as SD-M”

¹⁰ Dkt. No. 271-1 at 13-14.

(RFP Nos. 35 and 36) or to identify the source of their understanding that such a classification exists, but Plaintiffs have failed to do so. Moreover, Defendants have reasonably provided information responsive to several of these requests through the production of data files, interrogatory responses on similar topics, and institutional and medical files of several dozen inmates in the agreed-upon sample of proposed class member (the “Class Sample”) who provided a waiver.

From their Third Set of RFPs, Plaintiffs seek to compel the following documents:

- RFP NO. 1: All Documents related to medical and mental health screenings or appraisals conducted on Named Plaintiffs and/or individuals in the Class Sample upon intake into VDOC and/or transfer from one VDOC facility to another, including but not limited to:
 - (a) completed preliminary medical screening forms (720_F8), as referenced in, *inter alia*, Operating Procedure 720.2 (IV)(B)(2) (eff. date May 1, 2018);
 - (b) completed intra-system transfer medical review forms (720_F9) and Health Screening – Health-Trained Staff forms (720_F10), as referenced in, *inter alia*, VDOC Operating Procedure 730.2 (IV)(A)(3)(a)-(b) (eff. date Dec. 1, 2015);
 - (c) completed Mental Health Appraisal (DOC MH 17) (730_F17) and Mental Health Coding Classification Review/Update (DOC MH-18) (730_F18) forms, as referenced in, *inter alia*, VDOC Operating Procedure 730.2 (IV)(B)-(C) (eff. date Dec. 1, 2015);
 - (d) Documents reflecting assessments or determinations of medical codes and/or location codes, as referenced in, *inter alia*, Operating Procedure 801.3 (IV)(A) (eff. Date July 1, 2016).
- RFP NO. 2: All Documents related to medical and mental health screenings or appraisals, and corresponding management instructions, conducted on Named Plaintiffs and/or individuals in the Class Sample upon their placement in any special housing unit, including restrictive housing units such as long-term restrictive housing. Such documents include without limitation:
 - (a) completed Mental Health Screening: Restrictive Housing Unit Assignment (DOC MH 14) (730_F12) and “At Risk” Offender Notification (MH 14A) (730_F13) forms;
 - (b) completed Mental Health Serious Mental Illness (SMI) Determination (730_F34) forms;
 - (c) completed Mental Health Monitoring Reports (730_F14);
 - (d) documentation of entries into Restrictive Housing: Individual Logs (425_F4) and/or Special Watch Logs (425_F5), including any Special Management Instructions.

- RFP NO. 3: All Documents reflecting an assessment, evaluation, or determination by VDOC or its employees, officials, agents, or contract employees, as to whether or not any of the Class Members is disabled or suffers from a disability.
- RFP NO. 6: All reports of incidents reflecting self-injurious and/or suicidal behavior by any of the Class Members.
- RFP NO. 8: All Documents related to evaluations or referrals of Named Plaintiffs and/or individuals in the Class Sample for placement in the Secure Diversionary Treatment Program, including reviews of such evaluations and/or referrals by VDOC officials, employees, or contractors.
- RFP NO. 10: All Documents relating to consultations between facility unit heads and medical practitioners, between August 1, 2012 and the present, concerning changes in housing, programs, discipline, or transfers for Named Plaintiffs and/or individuals in the Class Sample and who were deemed by VDOC to be “seriously mentally ill,” intellectually disabled, or developmentally disabled, as referenced in, *inter alia*, VDOC Operating Procedure 801.3(IV)(B)(4) (eff. date July 1, 2016) and 730.1(IV)(A)(6) (eff. date Nov. 1, 2012).
- RFP NO. 11: All Documents relating to requests for accommodation, made by, on behalf of, or for the benefit of any putative Class Member, for a mental illness, intellectual disability, or cognitive disability, between August 1, 2012 and the present, whether made on an ADA request form, inmate request form, or any other format.
- RFP NO. 12: All Documents listing, specifying, or otherwise relating to individuals incarcerated at Red Onion or Wallens Ridge between August 1, 2012, and the present, for whom disability accommodations have been provided, requested, or otherwise sought.
- RFP NO. 13: All Documents listing or otherwise specifying individuals incarcerated at Red Onion or Wallens Ridge between August 1, 2012, and the present, who have been designated an “At Risk” offender.¹¹

Defendants served their objections to these RFPs in *September 2021*. Like the First Set of RFPs, the Third Set of RFPs are not limited to the time that an inmate was in the Step-Down Program. The last request is not even limited to inmates who are, or have been, in the Step-Down Program. Nevertheless, Defendants reasonably have provided information responsive to at least RFP Nos. 1, 2, and 10 through the production of institutional and medical files of several dozen inmates in the Class

¹¹ Dkt. No. 271-2 at 5-7.

Sample for whom Plaintiffs provided a waiver. Defendants also have responded to RFP No. 12 by producing multiple iterations of an ADA tracking log. And Defendants have produced more than 1,000 documents related to RFP No. 13. Plaintiffs have failed to specifically identify why that response is not sufficient.

From their Fifth Set of RFPs, Plaintiffs seek to compel the following documents:

- RFP NO. 1: All statistical data, spreadsheets, trackers, reports, and/or other Documents concerning self-injurious and/or suicidal behavior and incidents by Class Members in the Step-Down Program during the Relevant Period, as well as comparable data for self-injurious and/or suicidal behavior and incidents at WRSP and ROSP outside of the Step-Down Program
- RFP NO. 2: All Documents and Communications related to transfers of, or orders to transfer, Class Members for the purpose of receiving medical or mental health treatment as a result of self-injurious and/or suicidal behavior, including all Documents and Communications indicating where such Class Members were subsequently returned and/or transferred to after the receipt of such medical or mental health treatment.
- RFP NO. 3: All spreadsheets, trackers, reports, or other Documents showing the numbers and percentages of individuals with each particular mental health code in the IM Pathway, the SM Pathway, and the various Security Level-6 units/pods (including the Closed Pods, the Step-Down Pods, the Re-Entry Units, SIP and SAM Pods, and all other units referenced in VDOC O.P. 830.A), during the Relevant Period, including those that are generated by VDOC in the normal course of business.¹²

Defendants served their objections to these RFPs in December 2022. Like the First Set of RFPs, the Fifth Set of RFPs purport to cover a “Relevant Period” of August 2012 to the present, and would require the production of the relevant information for all “Class Members.” As to RFP No. 1, Defendants already had produced responsive documents and searched for any additional information in a form that provided statistics, as opposed to individual health records. As to RFP Nos. 2 and 3, Defendants produced data files and External Review Team books from which this

¹² Dkt. No. 271-3 at 5-6.

information can be obtained. Again, Plaintiffs have failed specifically to identify why that response is not sufficient.

Plaintiffs refer to the above 20 requests for production, collectively, as the “Requested Health Materials.”¹³

As an initial matter, Defendants do not broadly agree with Plaintiffs’ assertion that the “discovery sought is relevant,”¹⁴ and have so stated in meet and confers between the parties. Indeed, Defendants’ overbreadth objection to many of the RFPs reflects their position that, although some of the information requested in an RFP may be relevant, all of the information is not. And despite boldly making that assertion in a heading in the Background section of their Motion, Plaintiffs, in that same section, refer in a footnote to some of Defendants’ concerns regarding relevance.¹⁵ Further, as to many of these RFPs, Defendants reasonably have produced what they could without running afoul of the significant privacy concerns inherent in any production of non-party medical records. Plaintiffs have failed to identify in any meet and confer why those responses are insufficient or offer a narrowing of their positions.

1. Plaintiffs’ proposed approach does not obviate the overbreadth and lack of proportionality of their RFPs.

In addition to a nod to Defendants’ concerns, that same footnote in Plaintiffs’ Motion contains a significantly more important assertion: “Any objections based on overbreadth or proportionality as to the Requested Health Materials can be readily addressed through negotiations as to specific search terms and custodians.”¹⁶ That sentence, relegated to a footnote in the

¹³ Dkt. No. 271 at 2.

¹⁴ *Id.*

¹⁵ Dkt. No. 271 at 3, fn. 1.

¹⁶ *Id.*

Background section of Plaintiffs' Motion, carries the full weight of Plaintiffs' Motion. With its inclusion, Plaintiffs attempt to absolve themselves of any responsibility to explain to the Court why their requests, as served and for which Plaintiffs seek to obtain an order compelling production, are not overbroad and not proportional to the needs of the case. Further, Plaintiffs have had plenty of time to negotiate search terms and custodians with Defendants on these topics, when both parties would be equally motivated to find compromise, but have failed to do so.

Plaintiffs' proposed approach suffers from multiple issues. In essence, Plaintiffs propose an order that states little more than that their "Motion is **GRANTED**,"¹⁷ with no guidance as to the scope of the discovery to be provided, while at the same time acknowledging that negotiations regarding scope will be required. Plaintiffs' proposed approach is backwards. In the normal course, the parties negotiate discovery disputes and, only if no compromise can be reached, the party seeking the discovery seeks the Court's intervention. Plaintiffs seek to turn this typical process on its head.

Moreover, Plaintiffs ignore that, after extensive meet and confers and email exchanges over several months in 2021, the parties did negotiate a compromise: Plaintiffs would obtain waivers for an agreed-upon number of sample class members, i.e. the Class Sample, with the production of information covered by the Act being made each time a waiver was provided.¹⁸ The parties honored this compromise through most of 2022, with Defendants producing the requested information for 37 inmates for whom Plaintiffs provided waivers and with the parties agreeing on

¹⁷ Dkt. No. 270-1.

¹⁸ See, e.g., Dkt. No. 249-8 at 23 ("Class Plaintiffs agree to obtain waivers from the prisoners contained in the random sample prior to Defendants' production of such records."); and at 21 ("Class Plaintiffs agree to Defendants' first alternative, namely to produce the agreed-upon CORIS exports, followed by the hardcopy institutional files and medical records upon receipt of a signed waiver for the 70 agreed-upon prisoners.")

modifications to the agreement in response to Plaintiffs’ expressed concerns about obtaining waivers.¹⁹

Only during the last couple of months of 2022 did Plaintiffs approach Defendants about what Defendants would agree to produce if the Act were no longer a factor. At Plaintiffs’ request, the parties then began discussing the extent of Defendants’ overbreadth and burden objections about the Requested Health Information, assuming, at Plaintiffs’ suggestion, that Plaintiffs obtained a Court order satisfying the Act, the source of Plaintiffs’ “understand[ing that the motion] may be unopposed at this point.”²⁰ During those negotiations, in addition to questioning the relevance of some of the RFPs being discussed, Defendants made clear that they were willing to discuss further searching for information with regard to several RFPs, but that the key considerations in that discussion must be the number of inmates for whom Plaintiffs would seek the requested information, the number of custodians whose documents would be searched, the scope of the sources and topics to be searched, and the search terms to be used. Those negotiations ended ahead of Plaintiffs filing their Motion to Amend Scheduling Order with Plaintiffs never having made any proposal on any of those key variables. Instead, Plaintiffs filed this Motion.

Plaintiffs’ proposed approach—an order compelling production followed by negotiation of the scope of that production—would be meaningless with one caveat noted below. The Federal Rules of Civil Procedure already provide the impetus for Defendants to produce documents in response to Plaintiffs’ requests, subject to Defendants’ objections and negotiation of those objections between the parties. The proposed approach just adds an extra step—the proposed

¹⁹ *Id.* at 1–20.

²⁰ Dkt. No. 249 at 9.

order—that wastes this Court’s time and likely leads to the parties being back before the Court if no negotiated agreement can be reached.

Hence the caveat: Plaintiffs’ purported “negotiations” would be a farce in the face of the order they propose. Defendants would be hamstrung in any such negotiation because, if they did not accede to Plaintiffs’ demands, Defendants would risk potential sanctions for violation of a Court order.

If Plaintiffs were interested in negotiating for a reasonable amount of Requested Health Materials, they would have done so and likely been able to file an unopposed motion for a Court order satisfying the Act’s requirements. But they apparently were not interested in such an even-handed negotiation and certainly will not be going forward if the Court grants a blanket order compelling production of documents in response to requests that are overbroad and not proportional to the needs of the case under the guise that the parties would then negotiate the scope of the order.

2. Plaintiffs seek to impose an incredible burden on Defendants.

Further, even negotiations conducted without a thumb on the scales could not “readily address[]” Defendants’ overbreadth and proportionality concerns. Plaintiffs devote the majority of their discussion about the Requested Health Materials to the burden associated with their efforts to obtain 40 waivers for purposes of receiving “institutional records, medical and mental health files, and the results of health-related ESI searches.”²¹ Notably, these types of records are not subject to negotiation as to search terms or custodians. As noted in the Opposition to Amend Schedule, these records are in hard copy and located in multiple institutions, requiring that the

²¹ Dkt. No. 271 at 4-5.

records be located, collected, scanned, and reviewed before production.²² As further noted in the same filing, Plaintiffs did not state then the number of additional inmates for whom they would be seeking this information.²³ And they continue to withhold that information in this Motion. But the fact that Plaintiffs note that VADOC-00037970 needs to be updated before certain VACORIS searches are run suggests a number.²⁴ VDOC produced VADOC-00165196, the updated version of VADOC-00037970, on February 15, 2023—the file identifies 1,012 individual inmates.

The burden to Defendants of producing hard copy files for 1,000+ inmates is enormous.²⁵ It would take months to make such a production. As noted in the Opposition to Amend Schedule and detailed above, producing the materials for the 40 inmates for whom Plaintiffs provided waivers imposed a significant burden on Defendants, especially because some inmates did not specifically release information related to substance abuse or expressly permit the specific release of HIV/AIDS-related information, meaning that the inmate's files had to be reviewed to determine if they contained any such information so it could be redacted. If the Court were to issue an order finding that good cause exists to release certain health records, that order, presumably, would also satisfy Va. Code § 32.1-36.1, which provides that tests to determine HIV information may be released “to persons or entities permitted or authorized to obtain protected health information under any applicable federal or state law.” But neither Plaintiffs’ Motion nor their Proposed Order address 42 CFR Part 2, § 2.61, issued pursuant to 42 U.S.C. § 290dd-2 which requires a Court order issued under that subpart specifically to authorize release of substance abuse-related information. Absent such an order, Defendants still would be required to review all pages of the

²² Dkt. No. 256 at 19.

²³ *Id.*

²⁴ Dkt. No. 271 at 5, fn. 4.

²⁵ Exhibit 1; Declaration of Amee Duncan, attached as Exhibit 2.

record to identify and redact that information. Finally, even if the Court issued an order that completely absolved VDOC of any responsibility for violating the privacy interests of the inmates in its custody, VDOC still would have to locate, collect, scan, review, and produce the hard copy documents and search VACORIS for hundreds of inmates, review those results, and produce them. That monumental effort would cover just one aspect of the production that Plaintiffs are moving the Court to compel.

Then there would be the electronic searches that the parties would, presumably, negotiate with Defendants, who would be facing the threat of a motion for sanctions for violating a Court order. That aspect of the production would require Defendants to search the email and electronic files of some unidentified number of VDOC custodians for the names, along with potential variations of those names, of hundreds of inmates and some as-yet unidentified set of search terms. Defendants would then have to review those documents for responsiveness, privilege, and information associated with any inmates for whom the Court's order did not absolve VDOC of any responsibility for violating their privacy interests, and produce them.

Finally, the remaining time in the discovery period only exacerbates the burden on Defendants. Given Plaintiffs' assertion in their Motion to Amend the Scheduling Order that they would need time to review the documents ahead of certain depositions,²⁶ Plaintiffs will want Defendants to complete their efforts in less than a month. That timeline is unrealistic.

3. Plaintiffs cannot establish that their requests are proportional to the needs of the case.

Consistent with their assertion that the scope of the Court's order can somehow be negotiated by the parties after it is entered, Plaintiffs make little effort to explain why the broad discovery they requested is proportional to the needs of this case, particularly in light of the

²⁶ Dkt. No. 249 at 9.

voluminous amount of information VDOC already produced. To the contrary, they concede, in that same pivotal footnote, that at least one of their requests should be limited.²⁷ Instead, Plaintiffs merely assert that the discovery is relevant to their claims;²⁸ that they seek the Requested Health Materials to evaluate [speculative] harms to individual, putative class members;²⁹ that “[t]here is no real dispute that the Requested Health Materials bear directly on the impact of the Step-Down Program”³⁰—recognizing that Plaintiffs do not accept Defendants’ positions as “real,” Defendants absolutely dispute that all of the Requested Health Materials bear directly on the impact of the Step-Down Program—and that Plaintiffs will be prejudiced in their ability to show how the Step-Down Program negatively impacts inmates without the data.³¹

This last assertion echoes Plaintiffs’ previous assertion, in support of a motion to extend the deadline for filing their Motion for Class Certification, that “certain medical and other records” for selected putative class members, i.e., the same medical and other records that Plaintiffs received for 37 inmates in the Class Sample and now ask this Court to compel for *all* putative class members, were “necessary to prepare their motion for class certification.”³² Having achieved their goal—the Court granted Plaintiffs’ motion³³—Plaintiffs apparently determined that the records were not so necessary after all, as they cited *none* of the produced health records in their class certification briefing.³⁴

²⁷ Dkt. No. 271 at 3, fn. 1

²⁸ Dkt. No. 271 at 2.

²⁹ *Id.* at 8.

³⁰ *Id.* at 10.

³¹ *Id.* at 11.

³² Dkt. No. 134 at 3.

³³ Dkt. No. 135.

³⁴ *See* Dkt. No. 256 at 6.

Regardless, Plaintiffs' justification for needing medical/mental health files, along with electronic searches for hundreds, if not more than a thousand, inmates, despite the significant burden to Defendants of providing such material, lacks any clarity. Plaintiffs' oft-repeated refrain that this is an important class-action lawsuit is not sufficient. First, no class has been certified. Second, even if some class, the contours of which are not yet known, is certified, a class-action lawsuit is not intended as a vehicle for Plaintiffs' counsel to collect information on enough purported class members to search through it in hopes of developing the "perfect plaintiff" pieced together for litigation."³⁵ Defendants have produced substantial document volumes and information provided in interrogatory responses related to the alleged effects of the Step-Down Program and medical conditions of at least 49 inmates, including Named Plaintiffs who allege to be representative of all members of the putative class. That is in addition to the thousands of documents produced related to the progression through the Step-Down Program of all members of the putative class. Plaintiffs have received more than sufficient information to pursue their claims and have failed to specify how the information already provided, at significant expense to VDOC, is not enough. Compelling more production is not going to be more illustrative on this point—it will just be more records obtained at an overwhelming burden to VDOC, a Commonwealth agency with limited resources.

B. Defendants Do Not Dispute That Good Cause Existed for Entry of an Order Under the Act Permitting VDOC to Disclose Health Records for Members of the Class Sample; Defendants Dispute That Good Cause Exists to Compel Production of the Requested Health Materials.

The Health Records Privacy Act imposes on VDOC obligations to protect certain information. Defendants were not adverse in December of last year to entry of an appropriately

³⁵ *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998)

scoped Court order that would have relieved VDOC of those obligations in this case. Defendants shared that position with Plaintiffs during discussion of whether Defendants would agree to an unopposed motion for entry of such an order. Defendants' primary focus in those discussions was the scope of the Requested Health Materials that Plaintiffs would be asking Defendants to provide upon entry of such an order, in particular the number of proposed class members for whom Plaintiffs would be requesting institutional records, medical and mental health files, and the parameters of any health-related ESI searches.

Defendants are adverse to entry of a Court order that, under the guise of finding good cause to relieve VDOC of its statutory obligation to protect the private medical information of non-party plaintiffs, compels Defendants to search for electronic records, locate hard copy records, scan the hard copy records, review all of the records, potentially redact some of the records, and produce tens-of-thousands of pages of additional documents (after the close of document discovery) for the reasons already discussed. Defendants also are adverse to entry of an order, at this point in the case, that would be a prelude to requiring Defendants to negotiate with Plaintiffs, after the entry of such an order and after the close of written discovery, to produce documents ahead of depositions that are approximately one-month away, especially where Plaintiffs could have moved for such an order, and negotiated the scope of any response under such an order, years ago.

C. The Act Obligates VDOC to Protect Health Information Absent an Exception Set Forth in the Act Permitting or Requiring VDOC to Disclose the Information.

The Court need not reach the issue whether the Act blocks production of the Requested Health Materials absent one of the exceptions set forth in the Act because the Court should deny Plaintiffs' Motion to Compel for the reasons already discussed. If, however, the Court needs another reason to deny Plaintiffs' Motion, it should find that the Act obligates VDOC to protect the information absent one of the statutory exceptions.

Similar to their broad assertion regarding Defendants' position on the relevance of Requested Health Information, Plaintiffs assert in one paragraph that "VDOC's position is contrary to settled law,"³⁶ while admitting in the next paragraph that "the Fourth Circuit has not addressed the issue."³⁷ Further, Plaintiffs do not cite a single case that addresses the obligations imposed by the Act, the privacy concerns of the non-party inmates, or the fact that most cases involving production of non-party medical records require the records to be redacted to protect the identity of the non-party individuals who are the subject of any produced materials.³⁸

Regardless, Defendants are not claiming a privilege, such as the physician-patient privilege created by Virginia Code § 8.01-399, as a means of protecting the health information in question. The Act places on VDOC an obligation to protect the information absent compliance with its requirements. The court in *Harvey v. Circle*, faced with a Missouri law that specifically prohibited Defendant from disclosing the documents requested by plaintiffs, denied their production, in part, because of the risk to the defendant of criminal exposure.³⁹ Here, VDOC faces the potential of lawsuits by inmates whose information was provided in violation of the Act, particularly if those records were provided in non-redacted format.

³⁶ Dkt. No. 271 at 6.

³⁷ *Id.* at 7.

³⁸ *See, e.g., N.O. v. Callahan*, 110 F.R.D. 637, 646-47 (D. Mass. 1986) (in a civil rights action filed as a putative class action on behalf of mental health patients in state facilities, denying, in part, motion to compel "the production of the medical records of approximately 200 [putative] class members," finding "that state law does afford a privilege to the medical records of the mentally ill and this privilege is intrinsically meritorious," and balancing this concern by directing that "all references to the patients' identity will be redacted prior to production," and further that, in light of the burden imposed by "production and redaction of the 210 files," limiting production to "every fifth person on the list of [the] 210 [putative class members]").

³⁹ 2020 WL 4472999, Case NO. 4:19-CV-902-NAB, at *2 (E.D. Mo., August 4, 2020).

Finally, even if the Court concludes that VDOC's obligation should be evaluated in the context of a privilege, Plaintiffs ignore a privilege that would be expected to be key in the types of documents that they seek. In *Jaffee v. Redmond*, the U.S. Supreme Court recognized the existence of a psychotherapist-patient privilege in federal law.⁴⁰ Further, that privilege extends to communications between patients and licensed psychiatrists, psychologists, and social workers.⁴¹ Absent a Court order relieving VDOC of its obligation to exclude from production this federally-protected information, Defendants still would be subjected to the burden of having to review the materials produced to Plaintiffs to redact the information.

CONCLUSION

The Court should consider Plaintiffs' Motion for what it is: an attempt to impose on Defendants an incredibly burdensome obligation to produce documents in response to overbroad requests that are not proportional to the needs of the case under the guise of an order addressing the contours of the Act. Neither Defendants nor this Court should be obliged to narrow Plaintiffs' discovery requests for them. The Court should deny Plaintiffs' Motion to Compel in its entirety.

February 27, 2023

Respectfully submitted,

/s/ Maya M. Eckstein

⁴⁰ 518 U.S. 1, 15 (1996).

⁴¹ *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2023 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

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