

**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.

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

**PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO
COMPEL THE PRODUCTION OF DOCUMENTS**

For more than a year, Defendants have refused to produce documents in response to certain of Plaintiffs' discovery requests based on a Virginia statute that Defendants claim prevents them from producing relevant documents, absent the receipt of waivers from putative class members or an order from the Court compelling the production of documents. For more than a year, Plaintiffs have tried to accommodate Defendants' concerns—and avoid unnecessary litigation—by seeking waivers from an agreed-upon sample of 70 putative class members (the “class sample”), thereby obviating Defendants' objections to Plaintiffs' requests. Plaintiffs have worked diligently to secure the requested waivers, but with the end of discovery fast approaching, Plaintiffs' attempt to secure waivers from the entire class sample has proven to be impractical. Plaintiffs have therefore filed this motion to compel the requested documents.

Incredibly, Defendants' opposition makes no meaningful attempt to defend their reliance on the Virginia statute as a basis for withholding the requested documents. Defendants fail to cite a single case holding that the statute applies in the context of federal court discovery. Nor do Defendants make any attempt to distinguish the cases cited by Plaintiffs that make clear that the

statute does *not* apply. Instead, Defendants refer the Court to two out-of-Circuit decisions, neither of which supports their arguments. Indeed, in one of the cases, the court *granted* plaintiffs' motion to compel, underscoring the flaws of Defendants' position.

Instead of defending their reliance on the Virginia statute, Defendants focus almost exclusively on the purported burden of producing the requested documents. But in advancing their arguments, Defendants completely ignore the parties' extensive meet-and-confer history, pursuant to which Plaintiffs agreed to narrow certain of their discovery requests and Defendants agreed to produce documents in response to those requests after they received waivers from putative class members. To crystallize the dispute, Plaintiffs' motion to compel seeks the production of three categories of documents:¹

- Institutional files and medical records for the 30 inmates in the class sample from whom Plaintiffs have been unable to obtain waivers;
- Data from Defendants' CORIS database pertaining to grievance summaries and disciplinary charges for the entire putative class; and
- Any additional documents (*e.g.*, MH-14A forms, SMI forms, etc.) that Defendants are withholding solely on the basis of the Virginia statute.

Defendants cannot claim a burden with respect to these categories of documents, as they have already agreed to produce them. Plaintiffs seek no wider set of documents pursuant to this motion.

With respect to the three categories of documents that Plaintiffs request, there is no undue burden in responding. As to the first category of documents—institutional files and medical records for the 30 inmates in the class sample from whom Defendants have been unable to obtain waivers—Defendants have already agreed that “[i]f the Court were to find good cause for disclosing medical and mental health information for class members, Defendants would be willing

¹ Plaintiffs have included an amended proposed order attached to this Reply reflecting the narrowed dispute before the Court.

to produce the hard-copy institutional, medical, and mental health files for the remainder of the class sample.” Dkt. 271-8, at 3. Good cause exists for the production of such materials, for the reasons stated in Plaintiffs’ opening brief. Dkt. 271, at 8–11. As to the second category of documents—class-wide CORIS data—Plaintiffs seek the results of search queries to be inputted into Defendants’ CORIS database. This is an automated process that imposes no undue burden on Defendants. While Defendants claim they need to redact certain information from CORIS printouts, no such redaction is necessary. The Court is free to order the production of the CORIS data—free from redaction—under both state and federal law. Finally, as to the third category of documents—other documents that Defendants are withholding based solely on the Virginia statute—there can similarly be no credible burden argument.

For all of these reasons, Plaintiffs’ motion should be granted and Defendants should be ordered to produce the requested materials.

ARGUMENT

I. The Virginia Health Records Privacy Act Does Not Shield the Requested Discovery from Production.

For more than a year, Defendants’ only consistent objection to Plaintiffs’ discovery requests was that the Virginia Health Records Privacy Act, Va. Code Ann. § 32.1-127.1:03, restricts their ability to comply with Plaintiffs’ requests as written. As Plaintiffs explain in their opening brief, however, the Virginia Health Records Privacy Act is inapplicable to discovery produced in federal court proceedings. Dkt. 271, at 6–8. Defendants offer no meaningful response to this argument. Defendants make no attempt to distinguish the cases that Plaintiffs cite in their motion. Nor do they cite any case law of their own holding that that the statute does apply in federal proceedings.

Instead, Defendants cite two out-of-Circuit cases in support of their position: *N.O. v. Callahan*, 110 F.R.D. 637 (D. Mass. 1986), and *Harvey v. Circle*, 2020 WL 4472999 (E.D. Mo. August 4, 2020). Neither case supports their argument.

In *Callahan*, the court was tasked with determining whether medical records could be produced in a federal court proceeding, notwithstanding a Massachusetts statute that made medical records “absolutely exempt from mandatory disclosure.” 110 F.R.D. at 646. As a threshold matter, the statute in *Callahan* is readily distinguishable from the Virginia Health Records Privacy Act, which (unlike the Massachusetts statute) permits the disclosure of health records “pursuant to court order upon good cause shown.” Va. Code Ann. § 32.1-127.1:03(D)(2). More fundamentally, *Callahan* does not support Defendants’ argument that class members’ records are necessarily non-discoverable. To the contrary, *Callahan* held that the medical records in that case *were* discoverable—notwithstanding the Massachusetts statute—because they were “necessary for [the] full development of the facts.” 110 F.R.D. at 646. The same is true here.²

Harvey is also inapposite. In *Harvey*, a federal court in Missouri denied a motion to compel the production of medical records where the plaintiff stated his intent to “publicly disclose the documents.” 2020 WL 4472999, *2. The court rejected the plaintiff’s request, reasoning that, under the circumstances of the case, the production of the documents raised the possibility of “criminal prosecution,” and that, in all events, the requested discovery could “be obtained from” other sources, including “the State of Missouri.” *Id.* Here, Plaintiffs have no intention of publicly

² Defendants further assert that *Callahan* required “all references to the patients’ identity . . . be redacted” and limited production to “every fifth person on the list of . . . 210 putative class members.” Dkt. 282 (quoting *Callahan*, 110 F.R.D. at 646–47 (alterations omitted)). Defendants neglect to mention, however, that it was *plaintiffs* who “agreed that all references to the patients’ identity will be redacted prior to production,” *Callahan*, 110 F.R.D. at 646, and it was *plaintiffs* who “proposed limiting production to the medical records of every fifth person in the list of 210.” *Id.* at 647.

disclosing the requested materials, Defendants face no credible risk of criminal prosecution, and Plaintiffs have no alternative source for the discovery. *Harvey* is completely irrelevant.

Without any case law to support their arguments, Defendants assert a brand new theory for withholding documents: the supposed application of the psychotherapist-patient privilege. Dkt. 282, at 18. To be clear, this privilege was never raised in Defendants' Responses and Objections to Plaintiffs' Requests for Production. *See* Dkt. 271-4, 271-5, & 271-6. And during the meet and confer process, Defendants expressly disclaimed reliance on the psychotherapist privilege, stating that their objection to Plaintiffs' requests "is not one of privilege, but rather based on a statutory requirement." Dkt. 271-8, at 15.

To the extent that Defendants seek to assert a privilege now, it is far too late to invoke that objection. *See, e.g., Hanwha Azdel, Inc. v. C & D Zodiac, Inc.*, 2013 WL 3660562, at *5 (W.D. Va. July 11, 2013) ("[F]ailure to make specific legitimate objections to particular interrogatories or requests for production within the time allowed may result in a court deeming any objections waived."). Even if the objection were timely, it fails insofar as Defendants have identified no facts in support of the privilege. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 267 (D. Md. 2008) (holding that after a privilege is challenged, the "asserting party . . . bears the burden of establishing an evidentiary basis—by affidavit, deposition transcript, or other evidence—for each element of each privilege/protection claimed for each document or category of document."). The psychotherapist privilege simply does not provide a basis for withholding the requested documents.

There is one category of information that does require a court order before it can be produced: "substance abuse-related information." Dkt. 282, at 12 (citing 42 C.F.R. Part 2, § 2.61). Good cause exists, however, for issuing such an order. As Plaintiffs explained in their opening

brief, Plaintiffs seek the production of putative class members' health information, including information about substance abuse issues, to evaluate how class members were harmed by VDOC's Step-Down Program and whether any member of the putative class needed accommodations under the ADA or RA that VDOC failed to provide. Moreover, there is little risk of injury to class members, as Plaintiffs seek the production of health information for a proper purpose and Defendants' production will be governed by a HIPAA-compliant protective order. Faced with similar requests, courts have not hesitated to compel the production of health-related information, including information related to substance abuse. *See, e.g., Vannoy v. Fed. Reserve Bank of Richmond*, 2014 WL 2601765, at *6 (E.D. Va. June 10, 2014) (holding that good cause existed to produce substance abuse records because the need for disclosure outweighed any potential injury to the patient).

II. The Discovery that Plaintiffs Seek Does Not Impose a Substantial Burden on Defendants.

Plaintiffs' motion seeks three categories of documents:

- Institutional files and medical records for the 30 members of the class sample from whom Plaintiffs have been unable to obtain waivers;
- Data from Defendants' CORIS database pertaining to grievance summaries and disciplinary charges; and
- Additional documents that Defendants are withholding solely on the basis of the Virginia Health Records Privacy Act.

Defendants have not established that the production of these documents would impose any undue burden. Indeed, Defendants have acknowledged the absence of any undue burden by *previously agreeing to produce the documents*, provided that they received waivers from class members or were so ordered by the Court. By making burden arguments now, Defendants seek to renege on the deal they previously struck with Plaintiffs.

A. Class Sample Medical Records

As Defendants acknowledge in their opposition brief, the parties previously reached an agreement with respect to certain of Plaintiffs' discovery requests whereby Defendants would agree to produce hard-copy institutional files and medical records for 70 inmates in an agreed-upon sample. Defendants agreed to produce such documents provided that they received waivers from the inmates in the sample. Dkt. 282, at 9 n.18 (citing Dkt. 271-8, 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."). In response, Plaintiffs successfully collected waivers for 40 sample inmates, and Defendants have continuously produced the files and records for these inmates as the waivers came in.³ Dkt. 282, at 12.

To date, Plaintiffs have been unable to obtain waivers from the remaining 30 inmates, necessitating the filing of this motion. By moving to compel, Plaintiffs seek only to hold Defendants to the bargain the parties previously struck—*i.e.*, the production of institutional files and medical records for a total of 70 putative class members in an agreed-upon sample. Defendants have already produced the records for 40 of these class members; they should be compelled to produce the rest. Indeed, as recently as December 29, 2022, Defendants represented that "[i]f the Court were to find good cause for disclosing medical and mental health information for class

³ Contrary to Defendants' assertion, Plaintiffs have provided 40 waivers to Defendants, not 37. *See* Dkt. 282, at 9–10. Plaintiffs understand Defendants to be in the process of producing documents related to the three additional putative class members for whom they have recently received waivers.

members, Defendants would be willing to produce the hard-copy institutional, medical, and mental health files for the remainder of the class sample members.” Dkt. 271-8 at 3.⁴

Contrary to Defendants’ assertion, there is no undue burden associated with the production of these institutional files and records. The documents that Plaintiffs seek have already been organized in hard-copy files; Defendants need only scan and produce them. That Defendants apparently failed to locate and scan the files before Plaintiffs filed their motion is not a basis for withholding them now. Defendants have known about the need to produce files for the class sample for months, providing ample time for Defendants to locate and scan the documents. Defendants’ burden concerns are meritless.

B. CORIS Database Information

In addition to the medical records of individuals in the class sample, Plaintiffs seek aggregate search results for the entire putative class from Virginia’s CORIS database. Specifically, Plaintiffs seek the results of aggregate CORIS searches related to (1) grievance summaries, and (2) disciplinary charges.

Plaintiffs’ understanding is that Defendants have withheld these files *solely* because Defendants believed they could not produce them without waivers from putative class members or an order from the Court. *See, e.g.*, Dkt. 271-8, at 4 (explaining that Defendants have already “pulled the summary grievance data for all class members from CORIS,” and “[i]f the Court were to find good cause of disclosing medical and mental health information for class members, Defendants would produce this information”). As explained in Plaintiffs’ opening brief, however, Defendants’ insistence on waivers or a court order rests on a misunderstanding of the Virginia

⁴ *See also* Dkt. 282, at 15–16 (“Defendants were not adverse in December of last year to entry of an appropriately scoped Court order that would have relieved VDOC of those obligations in this case.”).

Health Records Privacy Act. That statute does not apply in federal court proceedings, and thus the statute does not provide a basis for withholding the requested information. Dkt. 271, at 6–8. Even if it did, good cause exists for producing the documents, as Plaintiffs have explained. *Id.* at 8–11.

Contrary to Defendants’ assertion, there is nothing unduly burdensome about producing CORIS data for the entire putative class. As Defendants confirmed during the meet-and-confer process, CORIS can be used to generate spreadsheets “tracking convictions and disciplinary charges” as well as “plaintiffs’ mental health code assignments over time.” Dkt. 271-8, at 14. The generation of these spreadsheets involves a relatively simple process whereby a user inputs the relevant inmate IDs into the database and identifies the categories of data to be pulled. The database then generates a spreadsheet with the requested information. There is nothing unduly burdensome about this process.

Defendants argue that Plaintiffs’ request for CORIS data is burdensome because it requires Defendants to apply redactions to the data. But as explained above, such redactions are unnecessary insofar as the Virginia Health Records Privacy Act does not apply to this action. *See supra* at 3–6. While references to substance abuse may need to be redacted, the Court can obviate the need for such redactions with an appropriate court order. Plaintiffs submit that redactions are particularly unnecessary here, given the existence of a HIPAA-compliant protective order that would govern the production and review of such documents. *See* Stip. Protective Ord., Dkt. 62.

C. Other Documents that Defendants Are Withholding Solely on the Basis of the Virginia Health Records Privacy Act

Finally, Plaintiffs seek the production of any other documents (*e.g.*, MH-14A forms, SMI forms, etc.) that Defendants are withholding solely on the basis of the Virginia Health Records Privacy Act. Defendants cannot claim a burden with respect to these documents. Indeed, in some

cases Defendants have been waiting to make productions until their burden was significantly lessened by categorical resolution of this issue.⁵

CONCLUSION

For the reasons above, Plaintiffs ask the Court to enter an order directing Defendants to produce the following categories of documents:

- Institutional files and medical records for the 30 members of the class sample from whom Plaintiffs have been unable to obtain waivers; and
- Data from Defendants' CORIS database pertaining to grievance summaries and disciplinary charges.
- Any additional documents that Defendants are withholding solely on the basis of the Virginia Health Records Privacy Act.

⁵ See Dkt. 278-8, at 20–21 (“Hunton is willing to conduct a similar search for class sample members over the documents it collected and set aside and to further discuss with Plaintiffs what it considers reasonable to produce from that additional population, but only after Plaintiffs have confirmed they have collected and provided all medical waivers they anticipate being able to collect and provide. Hunton explained this was to avoid the burden of running the search on an iterative basis as waivers are provided.”).

Dated: March 6, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of March, 2023, I electronically mailed the foregoing
Plaintiffs' Reply Memorandum of Law in Support of Motion to Compel to the following:

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**[AMENDED PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL
THE PRODUCTION OF DOCUMENTS**

Before the Court is Plaintiffs' Motion to Compel the Production of Documents

("Motion"). Having reviewed the Motion, it is **ORDERED** as follows:

The Motion is **GRANTED** because Virginia Code Annotated § 32.1-127.1:03 is not applicable to this case. Additionally, the Court finds that good cause exists under 42 C.F.R. Part 2, § 2.61 for the production of:

1. Institutional files and medical records for the 30 inmates in the class sample from whom Plaintiffs have been unable to obtain waivers;
2. Data from Defendants' CORIS database pertaining to grievance summaries and disciplinary charges; and
3. Any additional documents that Defendants are withholding solely on the basis of Virginia Code Annotated § 32.1-127.1:03.

IT IS SO ORDERED.

ENTERED:

United States Magistrate Judge