

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

WILLIAM THORPE, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Case No. 2:20-cv-00007-JPJ-PMS
VIRGINIA DEPARTMENT OF	)	
CORRECTIONS, <i>et al.</i> ,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

This matter is before the court on the Plaintiffs’ Motion To Compel The Production Of Documents, (Docket Item No. 270) (“Motion”). Based on the arguments and representations of counsel, presented in the Motion, Defendants’ Opposition To Plaintiffs’ Motion To Compel The Production Of Documents, (Docket Item No. 282) (“Response”), and Plaintiffs’ Reply Memorandum Of Law In Support Of Motion To Compel The Production Of Documents, (Docket Item No. 290) (“Reply”), and presented at the March 10, 2023, hearing, the Motion is **GRANTED in part and DENIED in part**, for the reasons that follow.

Remaining at issue on the Motion are various inmate records for a sample of the proposed class. Counsel agree that the defendants have turned over the requested records of the sample inmates who have executed a Consent for Release of Confidential Health and/or Mental Health Information Form, (“medical waiver”), allowing the defendants to share their medical records and information with plaintiffs’ counsel. The defendants argue that the Virginia Medical Records Privacy Act, VA. CODE ANN. § 32.1-127.1:03(A) (2022 Supp.), prevents them from

voluntarily providing any inmate's records who has not signed a medical waiver, absent a court order finding good cause for the production, pursuant to Virginia Code Annotated § 32.1-127.1:03(D)(2) (2022 Supp.). The plaintiffs argue that the Health Insurance Portability and Accountability Act of 1996, ("HIPAA"), permits disclosure of medical records in a judicial proceeding where, as here, a HIPAA-qualified protective order is in place. *See* 45 C.F.R. § 164.512(e)(ii)(B) (2021).

While the parties agree that the Court of Appeals for the Fourth Circuit has not specifically addressed the issue, this court has recognized that state privacy statutes with stricter confidentiality provisions than federal law do not control discovery in federal court litigation when jurisdiction is based on a federal question. *See Lovelace v. Bassett*, No. 7:07cv00506, 2009 WL 3157367, at * 5 (W.D. Va. Sept. 29, 2009) (citing *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 925 (7th Cir. 2004) (holding that a stricter state confidentiality law did not apply in a federal question suit)). Therefore, I hold that the Virginia Medical Records Privacy Act, VA. CODE ANN. § 32.1-127.1:03(A), does not apply in this federal question litigation to prevent the disclosure of these records containing medical and mental health information.

Nonetheless, I am persuaded that the burden and expense to the defendants of compiling the remaining requested discovery, except as set out below, outweighs its likely benefit. *See* FED. R. CIV. P. 26(b)(1) (if the burden of proposed discovery outweighs its likely benefit, it is outside the scope of permissible discovery). According to plaintiff's counsel, only three categories of documents remain in dispute on the Motion. Those documents include:

1. Medical records for the 30 inmates in the class sample from whom plaintiffs have been unable to obtain medical waivers;
2. Data from defendants' CORIS database pertaining to grievance summaries for the entire putative class; and
3. Any additional documents (e.g., MH-14A forms, SMI forms, etc.) that defendants have withheld solely on the basis of the Virginia Medical Records Privacy Act.

The defendants concede they can easily produce grievance summary data for all proposed class members, if they are not required to redact any medical or mental health information contained in the data. Based on the court's ruling above that the Virginia Medical Records Privacy Act does not apply to bar production of health information in this litigation, I will order the production of this information. However, I will deny the Motion insofar as it seeks to order the production of the institutional files and medical records for an additional 30 inmates in the class sample.

The defendants have produced evidence to the court, in the form of the Declaration of Amee Duncan, Operations Manager at Red Onion State Prison, (Docket Item No. 282-2) ("Duncan Declaration"), that states that to retrieve and copy and print the entirety of an individual inmate's file takes from five to 15 hours of Virginia Department of Corrections, ("VDOC"), employee time. (Duncan Declaration at 4.) According to the Declaration of Meghan A. Podolny, defense counsel, (Docket Item No. 282-1) ("Podolny Declaration"), the defendants, to date, have provided the hard copy medical and mental health records of the named plaintiffs, extensive CORIS reports for 129 inmates and hard copy medical and

mental health records for 35 additional inmates. (Podolny Declaration at 3.) The defendants have produced nearly 50,000 pages of documents and, in doing so, have spent nearly 490 hours of attorney time at a cost of approximately \$300,000 producing this discovery. (Podolny Declaration at 3.) According to Podolny, the defendants would incur approximately 10 hours of attorney time at a cost of approximately \$6,000, to locate, arrange for copying, review and produce each additional inmate's hard copy records. (Podolny Declaration at 4.)

In light of the defendants' productions to date, and based on the evidence outlined above, I find that that the burden and expense to the defendants of compiling the remaining requested discovery outweighs its likely benefit. *See* FED. R. CIV. P. 26(b)(1).

Therefore, the Motion is **GRANTED** only insofar as it is **ORDERED** that the defendants shall produce grievance summary data for all proposed class members without medical and mental health information redacted. This information shall be produced within 14 days of the date of entry of this Order and shall be treated as Highly Confidential material under the parties' Stipulated Protective Order, (Docket Item No. 62).

The Motion is **DENIED** insofar as it seeks to compel the defendants to produce the institutional files and medical records for the 30 inmates in the class sample from whom plaintiffs have been unable to obtain waivers, based on the court's finding that the burden and expense to the defendants of compiling this information outweighs its likely benefit.

The Clerk is requested to send copies of this Order to all counsel of record.

ENTERED: March 31, 2023.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE