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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

This Court should deny Plaintiffs' Motion to Compel Documents (Motion) (ECF No. 529) in response to their overly broad document requests that exceed the scope of the limitation the Court placed on supplemental fact discovery. Although the Court granted Plaintiffs leave to serve supplemental fact discovery, it substantively limited that discovery:

> The Court grants leave to Plaintiffs to serve one Rule 30(b)(6) deposition notice ***limited to any material changes*** in the subject Step-Down Program and its policies, practices, and conditions of confinement. This notice shall not include more than ten requests for production and ten interrogatories.

ECF No. 524 (March 4 Order) at 2 (emphasis added). Plaintiffs disregarded both that limitation and the limitations in the Federal Rules of Civil Procedure in serving the requests for production (RFPs) that are the subject of their Motion. This Court should not now broaden the scope of the permitted supplemental discovery to accommodate those requests.

BACKGROUND

The Safety Agreement was a measured response to incidents of self-harm, not a material change in the Step-Down Program. From March 2024 to January 2025, nine incidents occurred of inmates at Red Onion State Prison (ROSP) using electrical outlets in their cells to self-inflict burns.

ECF No. 493-1 at ¶¶ 4–5. Five of the inmates were SL-5 at the time of the incident; four of the inmates were SL-S, i.e., in the Step-Down Program, at the time of the incident. *Id.* at ¶ 5. When asked about the reasons for their actions, the inmates indicated a desire to be transferred from ROSP or dissatisfaction with a disciplinary action, not the Step-Down Program. *Id.* at ¶¶ 6–7. In response, ROSP's leadership implemented a Safety Agreement, offered to inmates in the Step-Down Program on January 20, 2025, whereby the inmates could retain the power to the outlets in their cells by agreeing not to engage in acts of self-harm. *Id.* at ¶¶ 13–16. The Safety Agreement also includes incentives for good behavior and consequences for its violation. *Id.* at ¶¶ 17–23, 10–11.

Soon after ROSP implemented the Safety Agreement, Plaintiffs moved, under the auspices of this lawsuit, to enjoin its use, arguing, among other things, that it violated the First Amendment and the Religious Land Use and Institutionalized Person Act, and that it impaired the Court's fact-finding. ECF No. 499 at 9–10. Noting that "'a preliminary injunction may never issue to prevent an injury or harm which not even the moving party contends was caused by the wrong claimed in the underlying action,'" *id.* at 10 (quoting *Omega World Travel, Inc. v. Trans World Airlines*, 111 F.3d 14, 16 (4th Cir. 1997)), this Court denied that relief, *id.* at 11. This Court further found "that the use of the Safety Agreement was not an unreasonable response to the self-harm incidents, considering the deference [the Court] must give to the decisions of prison administrators." *Id.*

In January, the Court directed the Parties to propose an agenda for a virtual conference with the Court on March 2. ECF No. 519. As part of that proposed agenda, "Plaintiffs request[ed] that the Court allow for limited and targeted supplemental . . . discovery." ECF No. 520 at 2. Plaintiffs justified their request by asserting that "[p]olicies, practices, and conditions of confinement related to the Step-Down Program have changed [since the close of discovery], as

has Defendants' knowledge of the risk of harm posed by the program." *Id.* Defendants opposed extensive additional discovery, proposing that "Plaintiffs be permitted to propound one additional interrogatory related to what changes, if any, there have been to the Step-Down Program since the close of fact discovery." *Id.* At the virtual conference, Plaintiffs argued, as they do in their Motion, that, because they seek injunctive relief, they needed supplemental discovery "to present evidence about the program as it exists today." Motion at 2–3. The Court subsequently entered the March 4 Order, limiting Plaintiffs' supplemental discovery to "material changes in the subject Step-Down Program and its policies, practices, and conditions of confinement." ECF No. 524 at 2.

LEGAL STANDARD

"Although the scope of discovery is broad, it is not limitless, and the Court has 'great flexibility to order only that discovery that is reasonable for a case, and to adjust the timing of discovery and apportion costs and burdens in a way that is fair and reasonable.'" *Tominack v. Capouillez*, No. 5:13-CV-121, 2013 WL 6672797, at *3 (N.D. W. Va. Dec. 18, 2013) (quoting *Marens v. Carrabba's Italian Grill, Inc.*, 196 F.R.D. 35, 37–38 (D. Md. 2000)). Here, this Court exercised that flexibility to allow Plaintiffs to take supplemental discovery long after the deadline for discovery expired but also to limit the scope of that discovery. Thus, Plaintiffs' reliance on the broad scope of discovery under the Federal Rules of Civil Procedure, Motion at 6, provides scant guidance to the issue before the Court. As acknowledged by Plaintiffs, "[h]ere, the scope of discovery is defined by this Court's [March 4 Order]." *Id.*

Further, requests that seek "all documents and communications related to" a particular subject typically are deemed overbroad because they "'unfairly place[] the onus of non-production on the recipient of the request and not where it belongs—upon the person who drafted such a sloppy request.'" *James Madison Project v. C.I.A*, No. 1:08CV1323(GBL), 2009 WL 2777961,

at *4 (E.D. Va. Aug. 31, 2009) (*quoting Massachusetts v. U.S. Dep't of Health & Human Servs.*, 727 F.Supp. 35, 36 n. 2 (D.Mass.1989); *see also*, *Regan-Touhy v. Walgreen Company*, 526 F.3d 641, 649 (10th Cir. 2008) (citing Manual for Complex Litigation § 11.434, at 75 as "encouraging courts to 'forbid sweeping requests' and to 'direct counsel to frame requests for the production of the fewest documents possible'"); *TIC Park Centre 9, LLC v. Cabot*, Case No. 16-24569-Civ-COOKE/TORRES, 2017 WL 3034547, at *5 (S.D. Fla. Jul. 18, 2017) (collecting cases finding "vague terms such as 'concerning' or 'relating to'" inappropriate).

ARGUMENT

This case is not about, as Plaintiffs continue to try to make it, every action or program at the Virginia Department of Corrections (VDOC), or even at ROSP, with which they disagree. It is about Plaintiffs' claims that the Step-Down Program violated their Eighth Amendment and Due Process rights during the almost 14 years that it has been in operation. Plaintiffs have received—and continue to receive, despite discovery having closed more than three years ago—broad discovery on those claims. Before the Court ordered supplemental discovery, Defendants already had responded to 89 requests for production (resulting in production of more than 185,000 pages), 25 interrogatories, 100 requests for admission, and a deposition by written question. Depositions have been taken of 53 witnesses. After the close of discovery, Defendants voluntarily produced documents reflecting policy changes. Defendants also already had agreed to produce a refreshed collection of records maintained in CORIS for the named Plaintiffs, including ICA hearing forms, grievance summaries, and disciplinary action summaries, as well as status charts for all Step-Down inmates since discovery closed. These additional efforts already were ongoing when Plaintiffs sought even more discovery.

At the March 2 virtual conference, Defendants, mindful of the fact that Plaintiffs are seeking injunctive relief, did not oppose discovery into changes in the Step-Down Program since the close of discovery. Defendants were concerned, however, about the amount of discovery Plaintiffs sought, given their history of overly broad discovery requests that were, at best, tangential to the issues in this case. Defendants feared such requests inevitably would lead to disputes that do little more than bleed Defendants' (and presumably Plaintiffs') resources while they are working to prepare for a trial in October that is rapidly approaching.

Presumably mindful of the Parties' needs to focus on preparing for trial, this Court charted a middle ground. Although it granted the amount of discovery requested by Plaintiffs, it went beyond Defendants' proposed language—"related to the changes, if any, in the Step-Down Program"—to limit the scope of discovery to only "***material*** changes" in the Step-Down Program and its policies, practices, and conditions of confinement.

In light of the Court's limitation, Plaintiffs' complaint that Defendants have "reserve[d] for themselves alone the determination of what changes may be considered material," Motion at 2–3 perplexes Defendants. Plaintiffs' position seems to be that Defendants must provide whatever discovery Plaintiffs request, i.e., that ***they*** are the sole arbiters of what constitutes a material change, which they define by deciding what discovery requests to make. Defendants disagree. Defendants have an independent obligation to follow the March 4 Order and the right to object to discovery that exceeds the limitations in that Order.

Nothing in the Court's Order, the Proposed Status Conference Agenda, or, to defense counsel's recollection, the discussion of supplemental discovery at that conference, supports compelling the discovery that is the subject of Plaintiffs' Motion. According to Plaintiffs, "most critically, [they] sought discovery relating to the development and implementation of a new

framework of incentives and sanctions, codified in a 'Safety Agreement.'" Motion at 3. Yet, incredibly, Plaintiffs never identified this "most critical[]" need to the Court as the basis of their request for supplemental discovery. Instead, Plaintiffs represented to the Court that "[p]olicies, practices, and conditions of confinement related to the Step-Down Program have changed [since the close of discovery], as has Defendants' knowledge of the risk of harm posed by the program." ECF No. 520 at 2. Further, defense counsel does not recall Plaintiffs' counsel mentioning the Safety Agreement as a basis for needing the discovery during discussion of the supplemental discovery before the Court.

Now, having declined to reveal to the Court that the Safety Agreement was a motivating factor behind their need for multiple discovery requests, much less that it was "most critical[]," Plaintiffs assert it as the primary basis for their Motion. They claim that three of their RFPs, each of which contains multiple subparts, seek information about it, despite the fact that two of them do not even mention the Safety Agreement.

RFP No. 2 does not mention the Safety Agreement and contains no attempt to limit its scope to information about the Safety Agreement:

> **REQUEST FOR PRODUCTION NO. 2**: All documents and communications related to VDOC's preparation for and participation in the Virginia House of Delegates' Public Safety Committee Meeting on December 16, 2024, including but not limited to:
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> (a) any slide presentation(s) used at the hearing and drafts thereof;
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> (b) all drafts and notes used, relied on, or prepared for VDOC officials to use to provide oral remarks at the hearing;
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> (c) communications with legislators or their staff regarding the hearing;
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> (d) communications and documents prepared in response to legislators' questions or requests; and
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> (e) all emails and messages to, from, or among VDOC officials and staff related to the hearing.

More importantly, the Virginia House of Delegates' Public Safety Committee Meeting (the Meeting) on December 16, 2024, that is the subject of RFP No. 2 included no discussion of the Safety Agreement, which Plaintiffs know because at least one of their counsel (Geri Greenspan) attended the Meeting. Ms. Greespan spoke at the Meeting immediately after former VDOC Director Dotson. A video of the full meeting is available by selecting the appropriate date and committee at https://house.vga.virginia.gov/now_playing. That video shows that Dotson gave a 15-page presentation (each page of which is displayed in the video), only the last page of which addressed self-inflicted burning incidents by six inmates that occurred that year. Neither the presentation nor Dotson's verbal remarks contained any mention of a Safety Agreement. Further, Dotson did not discuss the Step-Down Program in relation to the incidents. Later in the Meeting, Dotson and two other VDOC officials answered questions from the delegates for approximately 40 minutes. Those discussions also contained no mention of a Safety Agreement.

RFP No. 2 does not seek information about a Safety Agreement or material changes in the Step-Down Program. It seeks, at least in part—through subparts (c), (d) and (e)—information irrelevant to this litigation based on questions that Plaintiffs' counsel submitted to Dotson through a Delegate before the Meeting. On December 13, 2024, Delegate Simon's chief of staff submitted to Dotson questions, including questions from the ACLU, so he "had an opportunity to include the information in [his] presentation." Exhibit 1. Those questions included a request for information about employee discipline, similar to information that this Court previously refused to compel Defendants to provide in response to an earlier motion by Plaintiffs. *Id.* at 2; Order (ECF No. 226) at 2 (denying motion to compel "production of '[a]ll Documents and Communications relating to

employee discipline' at Red Onion State Prison or Wallens Ridge State Prison" as not relevant or proportional to the Plaintiffs' remaining claims.")[1]

Finally, Plaintiffs stated during the parties' meet and confer that they could seek the same information requested in RFP No. 2 through the Freedom of Information Act (FOIA) and that they intended to do so if Defendants stood on their objections. What Plaintiffs failed to acknowledge is that they could have sought this "most critical[]" information through FOIA ***more than a year ago***, before they even moved to enjoin the use of the Safety Agreement. Apparently they did not consider it critical at the time or at any time until the Court granted them supplemental discovery. But the Court did not grant Plaintiffs supplemental discovery to seek the information in RFP No. 2. And it should not expand the scope of its Order by requiring Defendants to produce that information now.

Like RFP No. 2, RFP No. 4 does not mention the Safety Agreement and contains no attempt to limit its scope to information about the Safety Agreement:

> **REQUEST FOR PRODUCTION NO. 4**: Documents and communications regarding incidents from March 1, 2023 to the present of self-injurious behavior, suicide attempts, or completed suicides by people in the Step-Down Program, including but not limited to:
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> (a) incidents in which individuals in the Step-Down Program used their cell outlets to set themselves on fire or otherwise inflict burns on themselves;
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> (b) communications with the Office of the Corrections Ombudsman regarding any such incidents; and
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> (c) any documents received from or provided to the Office of the Corrections Ombudsman related to such incidents.

[1] In addition, Defendants objected to this RFP on various other grounds that Plaintiffs do not challenge, including the deliberate process privilege, that are likely to apply to any responsive documents.

Further, a plain reading of RFP No. 4 indicates that it has nothing to do with the Safety Agreement. Instead, it is directed to incidents of self-injurious behavior, including suicide attempts or completed suicides, as well as self-burning. But self-injurious behavior is not a material change in the Step-Down Program or its policies, practices or conditions of confinement. And Plaintiffs make no attempt to argue that it is. The Court should not expand the scope of its Order by requiring Defendants to produce documents in response to RFP No. 4.

The only RFP served by Plaintiffs that references the Safety Agreement is RFP No. 3:

> **REQUEST FOR PRODUCTION NO. 3**: All documents and communications related to the Safety Agreement presented to people in the Step-Down Program in or around January 2025, including but not limited to:
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> (a) documents and communications related to the development of and the motivation and basis for the Safety Agreement;
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> (b) drafts of the Safety Agreement;
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> (c) signed Safety Agreements;
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> (d) documents and communications regarding decisions to cut or turn off power to the cell outlets of people who refused to sign the Safety Agreement;
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> (e) documents and communications regarding decisions to restore power to the cell outlets of people who refused to sign the Safety Agreement;
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> (f) documents and communications regarding any incentives provided under the Safety Agreement;
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> (g) documents and communications regarding any other consequences or conditions imposed on people who refused to sign the Safety Agreement;
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> (h) documents and communications regarding reviews and renewals of the Safety Agreement; and
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> (i) any written complaints, regular grievances, and grievance appeals related to the Safety Agreement (to the extent not produced in the updated grievance spreadsheet).

But the Safety Agreement is not a material change to the Step-Down Program. VDOC developed the Step-Down Program to meet identified project goals, primarily creating a workable pathway for inmates to progress from SL-S to lower security levels. *See, e.g.,* ECF No. 482-1 at 8

(identifying project goals). ROSP leadership created the Safety Agreement in response to specific incidents of inmates using their cell's electrical outlets to inflict burns on themselves, ECF No. 493-1 at ¶¶ 11–13, not to meet the Step-Down Program goals. As Defendants acknowledged during the meet and confer process on RFP No. 3, the Safety Agreement did result in changes to the Step-Down Program's conditions of confinement because of the incentives and consequences of violations of the Safety Agreement. Accordingly, Defendants agreed to produce the Safety Agreement itself and documents that reflected those incentives and consequences, which, after investigation, was determined to be the Safety Agreement itself. No more production is warranted under the limitations set by the Court. Accordingly, the Court should deny Plaintiffs' Motion as to RFP No. 3.

In addition to those requests that they assert are related to the Safety Agreement, Plaintiffs also move to compel production of documents in response to RFP No. 6. Plaintiffs and Defendants have resolved the issues raised as to RFP No. 6.

CONCLUSION

For the reasons stated, this Court should deny Plaintiffs' Motion.

May 6, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2026, 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.

By: */s/ Maya M. Eckstein*

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