

**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

**STIPULATED ORDER GOVERNING THE DISCLOSURE OF
PRIVILEGED INFORMATION**

The parties, by and through their respective counsel, have jointly stipulated to the terms of this Stipulated Order Governing the Disclosure of Privileged Information, and with the court being fully advised as to the same, it is, hereby, **ORDERED:**

APPLICABILITY

1. This Order shall be applicable to and govern all deposition transcripts and/or videotapes, and documents produced in response to requests for production of documents, answers to interrogatories, responses to requests for admissions, affidavits, declarations, and all other electronically stored information, (“ESI”), or hard copy documents or material produced, made available for inspection, or otherwise submitted by any of the parties in this litigation as well as testimony adduced at trial or during any hearing, (collectively “Information”).

**DISCOVERY MATERIALS CONTAINING
POTENTIALLY PRIVILEGED INFORMATION**

2. Pursuant to Rule 502(d), except as provided herein, a party's production of any privileged or otherwise protected or exempted Information, whether inadvertent or otherwise, shall not itself be deemed a waiver or impairment of that party's claims of privilege or protection, including, but not limited to, the attorney-client privilege, the work product doctrine, executive privilege, deliberative process privilege, or by another legal privilege protecting Information from discovery, in this case or in any other federal or state proceeding, provided that the producing party notifies the receiving party, in writing, of the production after the producing party's discovery of same, ("Identified Material").

3. A party claiming privilege or other protections for Identified Material, ("Designating Party"), shall promptly notify any and all parties that received the Identified Material, ("Receiving Party"), and provide within five business days of such notification sufficient information to the Receiving Party regarding the privilege or protection asserted as to the Identified Material, pursuant to Rule 26(b)(5) of the Federal Rules of Civil Procedure and the Joint Rule 26(f) Report filed on October 11, 2019. The Designating Party also must promptly update its privilege log to reflect the new claim of privilege or other protection over the Identified Material.

4. A Designating Party's failure to object to a Receiving Party's use of a privileged document in a deposition or motion within 72 hours of such use shall forever constitute a waiver of any claim of privilege or applicable protection as to the contents of that document.

5. Upon receiving notification from a Designating Party of Identified Material (except when the Designating Party has waived applicable protections or privileges per the previous paragraph), all such information, and all copies thereof, shall be returned to the Designating Party or destroyed or deleted within 10 business days of receipt of such notice and any analyses, memoranda, or notes that were internally generated based upon such Identified Material shall be sequestered. The Designating Party must retain a copy of the document until the resolution or termination of this case, including any post-judgment motions and appeals. The Receiving Party also shall attempt, in good faith, to retrieve and return or destroy all copies of the Identified Material in electronic format in databases or other locations used to store the documents. The Receiving Party may make no use of the Identified Materials during any aspect of this matter or any other matter, including in depositions or at trial, unless the documents are later designated by a court of competent jurisdiction as not privileged or protected.

6. In the event that the Receiving Party discovers a document that they believe to be privileged, the Receiving Party promptly will notify the Designating

Party of the document it believes to be privileged, (but no Receiving Party will be found in violation of this Order for failing to initially identify a privileged document), so that the Designating Party may make a determination of whether it wishes to have the document determined to be Identified Material returned or destroyed pursuant to this Stipulation and Order.

7. Nothing in this Order overrides any attorney's ethical responsibilities to refrain from examining or disclosing materials that the attorney knows or reasonably should know to be privileged and to inform the Disclosing Party that such materials have been produced.

8. The contents of the Identified Material shall not be disclosed to anyone who was not already aware of the contents before the notice was made.

9. If the Receiving Party believes that a claim of privilege or other applicable protection does not apply to the Identified Material, the parties will promptly meet-and-confer in an attempt to resolve the dispute. If the parties are unable to resolve the dispute, the Receiving Party may move the court for an order compelling production of some or all of the material returned or destroyed, but the basis for such a motion may not be the fact or circumstances of the production or any of the factors listed in Federal Rule of Evidence 502(b). The party asserting privilege shall file its opposition and must submit a copy of the document in question for in camera ex parte review by the court.

10. The Designating Party retains the burden, upon the Receiving Party's challenge, of establishing the privileged or protected nature of the Identified Material.

11. If the Receiving Party has any notes or other work product reflecting the contents of the Identified Materials, the receiving party will not review or use those materials unless a court of competent jurisdiction later designates the Identified Material as not privileged or protected.

12. This Stipulated Order does not constitute a concession by any party that any Information is subject to protection by the attorney-client privilege, the work product doctrine, executive privilege, deliberative process privilege, or any other potentially applicable privilege or doctrine. This agreement also is not intended to waive or limit in any way either party's right to contest any privilege claims that may be asserted with respect to Information produced except to the extent stated in this agreement.

13. By entering this Order, a party is not giving up its right to review its documents for privilege or any other reason (including to identify non-responsive documents) and the existence of this Order cannot be used to compel a party to produce documents without review.

SO STIPULATED AND AGREED:

/s/ Alyson Cox

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SO ORDERED.

ENTERED: May 27, 2020.

/s/ Pamela Meade Sargent

UNITED STATES MAGISTRATE JUDGE