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RICHARD W. WIEKING
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U.S. DISTRICT COURT
NO. DIST OF CA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al.,

No. C01-1351 TEH

Plaintiff,

**ORDER RE PLAINTIFFS' MOTION
TO COMPEL PRODUCTION OF
DOCUMENTS**

v.

GRAY DAVIS, et al.,

Defendants.

INTRODUCTION

This is a state-wide class action concerning medical care at all California state prisons. The case was settled in January 2002 with the entry of a Stipulation for Injunctive Relief ("Stipulated Injunction"). The settlement does not establish a position for a special master, instead leaving much of the monitoring and enforcement work to plaintiffs' counsel and a team of medical experts. While defendants have agreed to produce certain documentation to plaintiffs' counsel to facilitate the monitoring function, the parties disagree on the full extent of documents that should be produced. Consequently, plaintiffs have filed a Motion to Compel Production of Documents. Having carefully considered the parties' briefs, the oral argument of counsel, and the record herein, the Court rules as follows.

FACTUAL BACKGROUND

At the time of settlement in this case, the parties were able to agree on some of the documentation plaintiffs' counsel would need to facilitate the monitoring process, and the Stipulated Injunction provides that defendants will supply plaintiffs' counsel with these

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1 items. In general terms, the Stipulated Injunction provides that plaintiffs' counsel "shall have
2 reasonable access to ... documents necessary to properly evaluate the adequacy of the medical
3 care delivery system and the proposed remedies therefor..." Stipulated Injunction p. 5, ¶ 9.
4 Similarly, the Stipulated Injunction provides that plaintiffs' counsel shall have "reasonable
5 access to information reasonably necessary to perform their responsibilities required by this
6 Stipulation without unduly burdening defendants." *Id.*

7 In the paragraph following that general provision, the Stipulated Injunction provides
8 that the parties would negotiate an informal discovery plan which would include, but not be
9 limited to, access to the following documents:

- 10 a. Class member medical files;
- 11 b. Internal reviews and audits of medical services provided to class members;
- 12 c. Non-privileged documents that relate to the amount budgeted for providing
13 medical care to prisoners;
- 14 d. A variety of information from the individual institutions, such as audits, emergency
15 response drill reports, etc.
- 16 * * *
- 17 g. CDC medical training for a one year period.

18 Stipulated Injunction, p. 6, ¶ 11.

19 The parties agreed that "[p]laintiffs shall not have access to personnel files." *Id.*, p. 7,
20 ¶ 11.e. As to further documentation sought by plaintiffs, the parties agreed to disagree by
21 including the following provision:

22 The parties have been unable to agree on whether plaintiffs must be provided with the
23 minutes of continuous quality improvement meetings, including attachments, and
24 death reviews, utilization management data logs, and other peer review documents.

25 The parties agree the Court will decide this issue.

26 *Id.*, p. 7, ¶ 11.f.

27 In April 2003 the Court approved a Stipulation and Order re Production and Access to
28 Documents and Other Information ("Production Order") and a Stipulated Protective Order.

1 The Production Order provides a detailed listing of various categories of documents that
2 defendants are obligated to produce to plaintiffs' counsel on a regular basis. By footnote, the
3 Production Order also states:

4 The parties have not come to an agreement regarding the production of and plaintiffs'
5 counsels' access to CDC Death Review Reports (with supporting documentation),
6 peer review documents and reports prepared by the Office of the Inspector General
7 and the CDC Office of Internal Affairs. The parties agree that the Court shall decide
8 this issue.

9 Production Order, p. 4 n. 2.

10 Plaintiffs presently request production of the following documents:

- 11 1. CDC death review documents;
- 12 2. Medical peer review documents;
- 13 3. Utilization management data;
- 14 4. Office of the Inspector General (OIG) reports provided to CDC relating to medical
15 care;
- 16 5. CDC internal affairs reports and investigation files relating to medical care;
- 17 6. Budget Change Proposals (BCPs) relating to health care that were submitted by the
18 CDC to the Department of Finance and were rejected.

19 DISCUSSION

20 A. Plaintiffs' Entitlement to Further Discovery

21 Defendants launch a broad attack on plaintiffs' entitlement to any discovery beyond
22 that which already has been agreed upon and ordered. In defendants' view, "document
23 production [is] an element of injunctive relief," and plaintiffs' motion is a request for "a
24 major modification [of the Stipulated Injunction] and new grant of prospective relief."
25 Opposition at 6:4, 7:9. The Court emphatically disagrees. Post-judgment discovery
26 facilitates monitoring and enforcement; it does not, by itself, expand the boundaries of
27 defendants' substantive obligations to improve medical care to meet constitutional standards.
28

1 Furthermore, defendants' position that the discovery requests would create a
2 modification of the Stipulated Injunction fails to acknowledge that most of the requests were
3 explicitly incorporated into that document and/or the Production Order as items to be
4 adjudged by the Court. (The only request outside the scope of the Stipulated Injunction and
5 the Production Order is for the rejected Budget Change Proposals). Thus, defendants knew
6 that they could be obligated to abide by these provisions, and that such obligations would not
7 constitute an unconstitutional extension of the terms of the Stipulated Injunction.

8 **B. Plaintiffs' Specific Document Requests**

9 The Court will address each category of the documents requested by plaintiff below.
10 As a general guideline, the Court notes that because there is no special master in this case,
11 plaintiffs' role in evaluating and monitoring defendants' efforts to comply with the terms of
12 the Stipulated Injunction is even more important than in cases where a master has been
13 appointed. Plaintiffs' ability to fulfill that role depends largely upon their access to an
14 appropriate scope of information that is ordinarily within defendants' sole possession and
15 control.

16 **1. Death Review Records**

17 The Stipulated Injunction requires defendants to conduct "minimally adequate death
18 reviews." It also requires defendants to implement Health Care Services Division Policies
19 and Procedures ("P&P's"). The P&P's require defendants to conduct reviews of each inmate
20 death, which include the gathering of extensive information, such as death reports,
21 crime/incident reports, medical records, death review executive summaries, and more.
22 Plaintiffs seek production of all of these documents in order to monitor the death review
23 provision, and to identify other problems in the delivery of care that may have contributed to
24 an inmate's death.

25 Defendants argue that prisoner deaths can result from a variety of causes, only one of
26 which is medical error. Therefore, in defendants' view, only when the cause of death is
27 medical error should plaintiffs be entitled to death records. As they state, documents would
28 not be produced when "there is no *Plata* issue that has been definitively identified and no

1 corrective action taken that would impact systemic delivery of medical care.” Opposition at
2 8:19-20. The problem with this argument is that in this scenario the determination of the
3 cause of death remains a function of defendants’ interpretation and discretion. The point of
4 discovery in the remedy phase is to provide plaintiffs with enough information to be able to
5 *independently* verify whether defendants’ decisions are medically justified. Furthermore,
6 problems in “systemic” delivery of medical care cannot be identified solely by reference to
7 documentation at the systemic level. The whole is the sum of its parts, and only by viewing
8 the details of defendants’ practices can plaintiffs be expected to adequately monitor the
9 system.

10 Therefore, death review records shall be produced.

11 **2. Peer Review Documents**

12 All health care providers in the CDC are required to engage in Clinical Quality
13 Review, and the Stipulated Injunction requires each institution to perform adequate quality
14 management proceedings. Stipulated Injunction, p. 11, ¶ 22.c. Plaintiffs seek production of
15 all minutes, reports, and other documents generated during Clinical Quality Review
16 meetings.

17 The Stipulated Injunction already provides that plaintiffs receive all internal reviews
18 and audits of medical services (including QMAT and 602 surveys), and access to prisoner
19 records as necessary to confirm compliance with clinical practices. While these documents
20 certainly assist plaintiffs in reviewing defendants’ internal review procedures, they do not
21 specifically address the functioning of the peer review process. Since the Stipulated
22 Injunction requires the prisons to conduct “minimally adequate” quality management
23 proceedings, it is appropriate for plaintiffs to have access to the records of those meetings to
24 ensure compliance.

25 **3. Utilization Management Logs**

26 The CDC policies and procedures require defendants to implement and maintain a
27 “Utilization Management Program” aimed at ensuring that all services are medically
28 necessary and are provided at the appropriate level of care, that prisoner-patients have an

1 appropriate length of stay for each hospitalization, and that selected procedures and
2 hospitalization services are properly authorized. Plaintiffs seek all documents generated by
3 this program.

4 Defendants argue that plaintiffs already receive documents relating to audits, service
5 request forms, inmate appeals, appointment logs, and medical tracking logs. However, the
6 production of some relevant documents is not a basis for denying others. Defendants do not
7 argue that providing the documents requested would be overly burdensome, nor do they
8 argue that the documents are irrelevant. In the interest of providing full access to facilitate
9 plaintiffs' monitoring role, the Court grants this request.

10 **4. Internal Affairs Investigation Reports**

11 Medical staff who violate CDC policies and procedures are subject to a system of
12 progressive discipline. Staff misconduct is investigated by the CDC Office of Internal
13 Affairs or by the institution's investigative team. Plaintiffs seek production of the documents
14 generated by all CDC staff who investigate misconduct, including all formal and informal
15 measures taken. Plaintiffs' request does not include individual personnel files, and plaintiffs
16 offer to protect confidentiality to the extent provided by the Protective Order.

17 Defendants argue that some correctional staff will be "tempted to avoid the formal
18 investigative process" if they know that even minor incidents "would be subject to second-
19 guessing and plaintiffs' micro-management efforts." Opposition at 11:9-11. Plaintiffs
20 respond by noting that defendants have produced the investigative files to plaintiffs in the
21 *Madrid* litigation for several years, and that defendants have not demonstrated that disclosure
22 has impeded or interfered with the investigative process at Pelican Bay.

23 The Court finds that defendants' concern, while having some validity on the surface,
24 is exaggerated and is outweighed by the necessity of providing sufficient oversight of the
25 investigative process to ensure compliance with the Stipulated Injunction. Furthermore,
26 defendants can address the potential temptation for staff to avoid formal investigation by
27 providing clear direction to all staff as to the circumstances in which such investigations are
28 expected and required.

1 **5. Office of the Inspector General Reports**

2 The Office of the Inspector General (OIG) is an independent state agency charged
3 with investigating and responding to complaints of misconduct at various state institutions,
4 including all CDC prisons. The OIG provides its written audit reports to CDC officials, and
5 it provides investigative reports to the CDC and the state Legislature. Plaintiffs contend that
6 the OIG review team has greater investigative powers than are provided to plaintiffs' counsel
7 through the Stipulated Injunction. For example, plaintiffs' counsel's prison tours require
8 advance notice and counsel are accompanied by defense counsel and custody staff.
9 However, plaintiffs fail to show that the OIG tours are any different than plaintiffs' tours.
10 Plaintiffs also point to a recent OIG audit of the Substance Abuse and Treatment Facility and
11 State Prison at Corcoran, where the team interviewed the warden, staff, and inmates,
12 administered a questionnaire to medical staff, conducted on-site visits, and reviewed logs and
13 records.

14 Defendants argue that plaintiffs have sufficient access and that plaintiffs have failed to
15 cite a single instance in which the current limits on production have restricted plaintiffs'
16 ability to ensure compliance. The Court does not believe that plaintiffs have made a clear
17 showing of the difference in access between the OIG and plaintiffs' counsel. Nonetheless, if
18 the OIG reports identify deficiencies in medical care that plaintiffs have not observed in their
19 regular monitoring, it would seem to benefit the monitoring process and the overall goal of
20 compliance to allow plaintiffs access to the information. It is difficult to see where there is
21 any significant burden on defendants -- production of the OIG reports does not impose any
22 extra work on defendants, and if the scope of the deficiencies identified by the OIG exceed
23 the scope of the Stipulated Injunction then defendants would be free to take the position that
24 any follow-up by plaintiffs' counsel would be unwarranted. Therefore, regardless of whether
25 the OIG has significantly greater powers than plaintiffs' counsel, the Court finds that
26 production of the OIG reports is warranted.

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1 **6. Budget Change Proposals**

2 The Production Order requires defendants to produce “non-privileged documents
3 relating to the amount budgeted for providing medical care to prisoners.” Production Order,
4 p. 2. While defendants agree to comply with this provision regarding Budget Change
5 Proposals (BCP’s) that are granted by the state, they refuse to produce BCP’s that are denied.

6 Defendants would have the Court limit plaintiffs’ access to the Budget Change
7 Proposal process to the terms of the agreed upon provision. However, it is abundantly clear
8 that the discovery provisions contained in the Stipulated Injunction and Production Order
9 were only those upon which the parties were able to reach mutual agreement at the time, and
10 that other items were reserved for the Court’s determination. The Court does not see any
11 relevance to the fact that this category of documents was not explicitly reserved by the parties
12 for judicial resolution in the Stipulated Injunction or the Production Order, since plaintiffs
13 were never required to provide an exhaustive list of all potential discovery. Indeed, the
14 Stipulated Injunction provides that plaintiffs’ counsel “shall have reasonable access to ...
15 documents necessary to properly evaluate the adequacy of the medical care delivery system
16 and the proposed remedies therefor...” Stipulated Injunction p. 5, ¶ 9. Thus, the lack of
17 specific mention of this category of documents in the past stipulated orders does not provide
18 a basis for denying production.

19 Defendants also argue that the “deliberative process privilege,” which protects
20 internal communications by governmental decision-makers in formulating public policy,
21 should apply here. Plaintiffs argue that this privilege is qualified, rather than absolute.
22 Indeed, protected materials may be discoverable if “the need for the materials and the need
23 for accurate fact-finding override the government’s interest in non-disclosure.” *FTC v.*
24 *Warner Communications*, 742 F.2d 1156, 1161 (9th Cir. 1984). Factors to be considered in
25 making this determination include “(1) the relevance of the evidence; (2) the availability of
26 other evidence; (3) the government’s role in the litigation; and (4) the extent to which
27 disclosure would hinder frank and independent discussion regarding contemplated policies
28 and decisions.” *Id.*

1 The rejected BCP's could be relevant to this action because they may show
2 defendants' own analysis of gaps in their health care delivery system that require greater
3 resources. The rejected BCP's also may raise questions as to how the CDC will fill those
4 gaps given the absence of additional state funds. An understanding of those questions, and
5 monitoring how defendants find answers to them, could be relevant to plaintiffs' ability to
6 monitor systemic deficiencies in the provision of medical care. As for the availability of
7 other evidence, while plaintiffs have access to a wide range of documentation, defendants'
8 own analysis of their budgetary needs could be a potential source for identifying at least the
9 financial sources of deficiencies. As for defendants' role in the litigation, by agreeing to
10 have plaintiffs perform the monitoring role defendants are not in a position to deny them
11 relevant information. With respect to the last factor, the Court is concerned that in some,
12 though not all, instances, knowledge that rejected BCP's would be disclosed could
13 realistically have a chilling effect on the Department's ability to engage in frank and
14 independent discussions regarding policy judgments.

15 Balancing potential relevance against possible chilling effect at this stage, the Court
16 determines that plaintiffs' motion for categorical production of all rejected BCP's should be
17 denied. This ruling is without prejudice to plaintiffs' right to make future requests for
18 specific rejected BCP's, or for rejected BCP's relating to specific subject matter(s), upon a
19 particularized showing of relevance. In such an instance, the Court may consider *in camera*
20 review as an intermediary step.

21 C. Defendants' Objections

22 Even though plaintiffs' motion discusses at length the objections they anticipated
23 defendants would make, defendants chose not to assert most of their objections here, instead
24 seeking to reserve the "right to raise all proper objections should any order issue...and leave
25 their objections, if any, to be considered in the context of disclosing any given document or
26 category of documents at the time of demand and disclosure." Opposition at 6:23-24. The
27 Court rejects defendants' proposal. Plaintiffs' motion was properly noticed and the issue of
28 categorical objections to the production requests was extensively briefed. Defendants'

1 failure even to adopt most of the objections attributed to them by plaintiffs is inexcusable,
2 and the objections are waived. The Court recognizes that defendants relied on their argument
3 that the discovery requests constitute an unwarranted extension of the Stipulated Injunction,
4 but this does not relieve defendants of the necessity of addressing the terms of the motion by
5 arguing in the alternative. *See Doi v. Halekulani Corp.*, 276 F.3d 1131, 1140 (9th Cir. 2002) (
6 where party has the “opportunity to present evidence or argument in opposition” and fails to
7 raise an objection, the party waives the right to subsequently challenge the issue).

8 Nonetheless, if particular objections that have not been addressed by plaintiffs (and
9 therefore waived by defendants) arise during production, such as attorney-client privilege,
10 defendants may assert them and, if necessary, the Court will entertain limited requests for *in*
11 *camera* review.

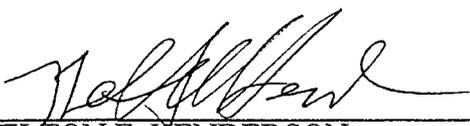
12 **CONCLUSION**

13 For the reasons discussed above, and with GOOD CAUSE APPEARING, the Court
14 hereby ORDERS as follows:

15 Plaintiffs’ Motion to Compel Production of Documents is granted with respect to the
16 production of all documents sought, with the exception of documents relating to Budget
17 Change Proposals that have been rejected by the State.

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19 **IT IS SO ORDERED.**

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21 DATED 8/13/03
22



THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA,
Plaintiff,

Case Number: CV01-01351 TEH

CERTIFICATE OF SERVICE

v.

GARY DAVIS,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 13, 2003, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: August 13, 2003

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CV01-01351 THE