

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

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CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY  DEPUTY

RAUL MEZA,	§
PLAINTIFF,	§
	§
V.	§
	§
BRAD LIVINGSTON,	§
EXECUTIVE DIRECTOR OF THE TEXAS	§
DEPARTMENT OF CRIMINAL JUSTICE,	§
IN HIS OFFICIAL CAPACITY;	§
BRIAN COLLIER, DIRECTOR OF THE	§
TEXAS DEPARTMENT OF CRIMINAL	§
JUSTICE PAROLE DIVISION, IN HIS	§
OFFICIAL AND INDIVIDUAL	§
CAPACITIES; AND RISSIE L. OWENS,	§
JOSE ALISEDA, CHARLES AYCOCK,	§
CONRITH DAVIS, JACKIE	§
DENOYELLES, LINDA GARCIA, AND	§
JUANITA M. GONZALES, IN THEIR	§
OFFICIAL CAPACITIES AS MEMBERS	§
OF THE TEXAS BOARD OF PARDONS	§
AND PAROLES,	§
DEFENDANTS.	§

CAUSE NO. A-05-CA-1008-LY

ORDER

Before the Court is Defendants Livingston and Collier's Motion to Quash or for Protective Order filed December 15, 2006 (Clerk's Document 53), Plaintiff's Response to Defendants Livingston and Collier's Motion to Quash and for Protective Order and Plaintiff's Motion to Compel filed December 22, 2006 (Clerk's Document 56), Plaintiff's Brief in Support of Motion to Compel Documents Responsive to Plaintiff's Subpoena to Orion Treatment Center filed January 26, 2007 (Clerk's Document 68), Defendants Livingston and Collier's Supplement to Motion to Quash or for Protective Order filed January 26, 2007 (Clerk's Document 67), Plaintiff's Response to Defendants' Supplement to their Motion to Quash or for Protective Order filed February 8, 2007 (Clerk's Document 79), Defendants Livingston and Collier's Second Supplement to Motion to Quash or for

Protective Order filed February 14, 2007 (Clerk's Document 80), Defendants Collier and Livingston's Letter Brief in Support of Motion to Quash or for Protective Order filed February 27, 2007 (Clerk's Document 95), and Plaintiff Meza's letter brief in support of its argument filed March 2, 2007 (Clerk's Document 98). On February 20, 2007, the Court conducted a hearing on the parties' motions at which all parties were represented by counsel. Having considered the motions, the supplemental briefing, the case file, the oral arguments of counsel, and the applicable law, the Court will deny Livingston and Collier's motion to quash or for protective order in part and grant in part, and will grant Meza's motion to compel Orion to produce the subpoenaed documents in part by ordering Orion to produce the documents for *in camera* inspection.

On December 6, 2006, counsel for Meza served Orion Treatment Center ("Orion") with a subpoena commanding Orion to produce and permit inspection and copying of Meza's complete patient file. Orion was under contract with the Texas Department of Criminal Justice ("TDCJ") between December 1, 2000, and February 28, 2006, to provide sex-offender treatment to parolees residing at the Travis County Corrections Center. The Texas Board of Pardons and Paroles ("the Parole Board") determined by majority vote on September 24, 2002, that Meza was required to receive sex-offender treatment. Following the Parole Board's decision, the TDCJ contracted with Orion to provide the mandated sex-offender treatment to Meza, which Meza subsequently attended. Orion remains in possession of Meza's patient file from his treatment period at Orion, although copies of some documents in Orion's file were delivered to the Parole Board and are being kept by TDCJ-Parole Division in Meza's parole file. Meza contends that the records in Orion's possession are relevant because the records were relied on by Defendants to determine Meza's parole conditions, the legality of which form the basis of Meza's lawsuit.

Livingston and Collier move to quash the subpoena, or in the alternative, for the Court to conduct an *in camera* inspection of the subpoenaed documents. In the event the Court denies their motion, Livingston and Collier ask this Court to render a protective order prohibiting Meza's counsel from disclosing any part of the patient file to Meza. Livingston and Collier contend that the patient file is part of Meza's parole file and is therefore protected under the state-law privilege protecting information relating to a parolee. *See* Tex. Gov't. Code Ann. § 508.313 (West 2004). Meza opposes Livingston and Collier's motion and moves this Court to compel Orion to produce the requested patient file.

Privileged Matters in the Federal Rules

Generally, the Federal Rules of Civil Procedure provide that “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party” Fed. R. Civ. P. 26(b). “When considering a federal claim, federal courts apply federal common law, rather than state law, to determine the existence and scope of a privilege.” *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991); *see also Gilbreath v. Guadalupe Hosp. Found., Inc.*, 5 F.3d 785 (5th Cir. 1993) (party is “seeking to enforce subpoenas issued under federal statutory authority [The] right to assert a privilege is therefore dictated by federal law”); *United States v. Moore*, 970 F.2d 48, 49–50 (5th Cir. 1992). The term “privilege,” protecting entities from discovery under the rules of procedure, “refers to ‘privileges’ as that term is understood in the law of evidence.” *United States v. Reynolds*, 345 U.S. 1, 6 (1953). The law of evidence calls for the federal court to apply privileges according to “the principles of the common law . . . in the light of reason and experience.” Fed. R. Evid. 501. A federal court, in determining whether to introduce a privilege from state law into a federal proceeding, considers whether the privilege “promotes sufficiently important interests to

outweigh the need for probative evidence . . . [guided by] [b]oth ‘reason and experience.’” *Jaffee v. Redmond*, 518 U.S. 1, 9–10 (1996).

Livingston and Collier ask for this Court to recognize a federal privilege under Rule 501 that protects parole files from discovery. Before determining whether to recognize a federal privilege for parole files, however, the Court will consider whether Texas’s statutory privilege would apply to the documents sought in this case from Orion.

Livingston and Collier’s Standing

Meza argues that Livingston and Collier do not have standing to move this Court to quash the subpoena served on Orion, a third party. A party does not have standing to raise the issue of a third-party’s amenability to a subpoena if the party is “not in the possession of the materials subpoenaed and [has] not alleged any personal right or privilege with respect to the materials subpoenaed.” *Brown v. Braddick*, 595 F.2d 961, 967 (5th Cir. 1979). “The case law on what constitutes a ‘personal right or privilege’ is scarce; the courts that have considered the issue have generally found standing when the party had an evidentiary privilege as to the documents.” *Jez v. Dow Chem. Co.*, 402 F. Supp. 2d 783, 785 (S.D. Tex. 2005). As Livingston and Collier have claimed a privilege regarding the subpoenaed documents, the question of their standing to move to quash the subpoenas appears to converge with the question of whether or not such a privilege applies to the patient file requested from Orion. The Court will therefore consider whether the state-law statutory privilege protecting parole files applies to the patient file that Meza seeks from Orion.

Texas’s Statutory Parole-File Privilege

Under Texas law, “[a]ny party who seeks to deny the production of evidence must claim a specific privilege against such production.” *In re Union Pac. Resources Co.*, 22 S.W.3d 338, 340

(1999). Only those privileges prescribed under the Rules of Evidence, the constitution, a statute, or by other rules pursuant to statutory authority are recognized under Texas law. Tex. R. Evid. 501. The privilege relied on by Livingston and Collier is contained in Chapter 58 of the Texas Government Code and provides:

[a]ll information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to . . . a releasee. . . .

Tex. Gov't Code Ann. § 508.313(a). A releasee includes a person released on parole. *Id.* at 508.001.

Meza argues that this privilege does not apply to the patient file held by Orion because it is “obtained and maintained” by Orion, while section 508.313 is directed only to the “machinations of the Parole Board.”¹ This Court agrees that the file held by Orion is not necessarily protected by Texas’s statutory privilege. The mere fact that Orion has turned some of Meza’s records over to the TDCJ for inclusion in Meza’s parole file may not justify application of the statutory privilege to a request of the records from Orion itself. However, Texas law is sketchy here. One Texas court has rejected the contention that a document requested from a source other than the parole file, “by virtue of [also] being in the parole file[,] takes on the sanctity of the parole file itself,” reasoning that

[c]arried to its logical extreme, appellant’s argument would preclude the introduction of any evidence obtained from any source just by the fortuitous circumstance of it also appearing in the defendant’s parole file. We do not believe that this was the intent of the confidentiality

¹ The Court presumes that Meza refers to TDCJ rather than the Parole Board in making this argument. Although the statute is not clear as to what entity “obtain[s] and maintain[s]” information protected in section 508.313, TDCJ is the only entity referenced in the section. *See* Tex. Gov’t Code Ann. § 508.313(c); *see also id.* at § 491.001 (defining “department” as TDCJ throughout Title 2, Subtitle G of Texas Government Code).

provisions of [Section 508.313]². [Section 508.313] was enacted to encourage frank and candid disclosures in the parolee's file. . . . It in no way implies that information obtained from a different source should be made confidential by its inclusion in the file.

Wilburn v. State, 636 S.W.2d 771, 777 (Tex. App.—Corpus Christi 1982, no writ). In the present case, TDCJ contracted with Orion to provide treatment to Meza. The contract between TDCJ and Orion includes a provision prohibiting a third party's access to records without written authorization from the Director of Specialized Programs at TDCJ, but grants the TDCJ unlimited access to the records. The fact that portions of Orion's patient file on Meza are also included in Meza's parole file is therefore more than "fortuitous." Livingston and Collier, however, provide no support for their contention that the statutory privilege was intended to be construed so broadly to prevent document production from an entity other than the TDCJ itself.

Although Livingston and Collier contend that it is not in the public interest to reveal to a patient who is also a parolee the notes a counselor has written about him in his treatment file, the Texas Legislature has enacted no statute declaring such records privileged in the hands of a treatment center, thus denying the patient files to the patient himself. This Court is not convinced that the Section 508.313 is so broad in its scope as to reach records beyond those held by TDCJ.

Furthermore, the Texas courts have noted that the privilege protecting parole files at times conflicts with "fundamental principles of due process of law in the fair administration of justice."

Texas Dep't of Corrections v. Dalehite, 623 S.W.2d 420, 424 (Tex. Crim. App. 1981). In those

² Prior to 1985, the Texas statute concerning the parole-file privilege was codified at article 42.12 of the Code of Criminal Procedure. From 1985 to 1997, the provision was found in article 42.18 of the Code of Criminal Procedure. In a nonsubstantive act effective September 1, 1997, the Texas Legislature repealed article 42.18 and relocated the provision to section 508.313 of the Texas Government Code. The provision has remained substantially unchanged regarding the confidentiality of parole files, and the case law cited in this Order interpreting the earlier provisions is equally applicable, despite the later amendments to the provision.

situations, the “determination of what will or will not be made available to either party from the parole records [is placed] within the discretion of the trial court.” The presumption in favor of upholding the parole-file privilege can be rebutted if there is “demonstration of the need and relevancy of the requested documents.” *Id.* at 423.

Meza contends that the contents of his patient file will dispute Livingston and Collier’s contention that Meza’s parole conditions are justified because Meza is a continuing threat to the community. Meza has also alleged that Collier “personally communicated with Mr. Meza’s sex offender counselors employed by Orion in furtherance of the campaign to deny Mr. Meza release from TCCC.” Livingston and Collier admit that portions of the patient file were admitted to the Parole Board to be considered in determining the conditions to be imposed on Meza during his parole. Meza’s claims are based on the “qualitatively different conditions of confinement” imposed on him by Defendants from other parolees similarly situated. Accordingly, the information considered by Defendants in determining Meza’s conditions of parole is likely relevant to whether Defendants are imposing conditions that are “irrational, arbitrary, and capricious,” as Meza claims.

The state-law privilege may not apply to information concerning Meza in whomever’s hands, to the extent that it is relevant and necessary to adjudication of Meza’s claims. Meza has demonstrated that information maintained by Orion may prove relevant in adjudicating his constitutional due-process claims. The Court will order *in camera* inspection of the subpoenaed documents to determine their relevance and necessity before determining whether to order production of the subpoenaed documents. *See Dalehite*, 623 S.W.2d at 423; *Texas Bd. of Pardons & Paroles v. Miller*, 590 S.W.2d 142, 145 (Tex. Crim. App. 1979). This Court will therefore grant Livingston and Collier’s motion as to their request for the Court to conduct an *in camera* review of

the subpoenaed documents, will deny Livingston and Collier's motion in all other respects, and will grant in part Meza's motion to compel Orion to produce the subpoenaed documents.

IT IS THEREFORE ORDERED that Defendants Livingston and Collier's Motion to Quash or for Protective Order (Clerk's Document 53) is **GRANTED IN PART AND DENIED IN PART** and Plaintiff's motion to compel (Clerk's Document 56) is **GRANTED IN PART AND DENIED IN PART** to the following extent:

IT IS ORDERED that Orion Treatment Center shall deliver to the Chambers of United States District Judge Lee Yeakel, Second Floor of the United States Courthouse, 200 West 8th Street, Austin, Texas, **on or before April 27, 2007**, the complete patient file of Raul Meza, Jr., to the extent that such documents are in the possession or under the control of Orion Treatment Center.

IT IS FURTHER ORDERED that the Clerk of this Court shall mail a copy of this Order to Orion Treatment Center, 3625 Manchaca Road, Austin, Texas, 78704, and the United States Marshals Service, in accordance with Federal Rule of Civil Procedure 4.1, shall effect service of this Order on Orion Treatment Center, 3625 Manchaca Road, Austin, Texas, 78704.

SIGNED this 12th day of April, 2007.



LEE YEAKEL
UNITED STATES DISTRICT JUDGE