IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

TIMOTHY GUMM,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 3:15-cv-00043-CAR-CHW**
	:	
ERIC SELLERS, *et al.*,	;	
	:	
	:	**Proceedings Under 42 U.S.C. § 1983**
Defendants.	:	**Before the U.S. Magistrate Judge**

ORDER

On October 26 and 27, 2017, Plaintiff's expert, Dr. Craig Haney, visited the Special Management Unit at Georgia Diagnostic and Classification Prison. As part of his site visit, Dr. Haney interviewed eleven prisoners. Plaintiff has requested that Defendants provide the medical, mental-health, and institutional files of the eleven inmates Dr. Haney interviewed, pursuant to Rule 26(b)(1) of the Federal Rules of Civil Procedure. Doc. 116, p. 3-4. Plaintiff contends that the records are directly relevant to Dr. Haney's expert report, and that the evidence will be "one of the key factors" in establishing Plaintiff's Eighth and Fourteenth Amendment claims. *Id.* at 5-6. Plaintiff also contends that his request is not unduly burdensome due to the Georgia Department of Corrections' ("GDC") resources and expertise in providing similar records in prison-condition cases. *Id.* at 6.

Defendants obejct that that the requested records are not relevant to the matters at hand, contending that the institutional files contain "confidential state secrets" under Georgia law and that the records could range "from hundreds to thousands of pages," that would create an undue burden on Defendants. Doc. 115, p. 1-2. Defendants also contend that the eleven non-party

inmate interviewees have not consented to the GDC releasing their records to Plaintiff, and that privileges and privacy restrictions under federal law (HIPPAA) and Georgia law, prevent Defendants from releasing the records.

Under Rule 26(b)(1), the records Plaintiff requests are directly relevant to Plaintiff's Eighth and Fourteenth Amendment Claims, and are proportional to the needs of Dr. Haney for formulating his report. Haney Decl. pp. 5-6. The physical and psychological impacts of confinement in the SMU are material both to Plaintiff's due process claim and to his conditions of confinement claim. Dr. Haney has testified that his standard methodology for evaluating conditions of confinement includes not only inspection of facilities and confidential interviews with inmates, but also review of inmate records. Haney Aff., Doc. 116-1, ¶ 14. As Dr. Haney explains,

> Institutional and medical files provide a documentary record of a prisoner's behavior, physical health, and mental health over the course of his incarceration. These records typically contain valuable additional information (of the sort that is difficult to acquire at cell-front and even in a confidential interview) as well as general background information that provides useful context for the data collected directly from the prisoners in the course of interviewing them.

Id. at ¶ 16. Dr. Haney has reviewed Plaintiff's own institutional file, and notes that "these files contain a large amount of information that does not appear to be categorized in a way that would allow me to designate in advance those portions that would be relevant," but that "most of the documents in the file are relevant and potentially significant" to his review. *Id*. at ¶ 18. These records are thus reasonably related to the issues in this case.

The burden on Defendants to produce these records is not unduly burdensome. Defendants are in sole possession of these records. Although Defendants note that the files may be hundreds, or even thousands of pages, Plaintiff is requesting only eleven files out of a possible

class of approximately two-hundred inmates. Defendants have been on notice of the identity of these eleven inmates since Dr. Haney's visit in October, and should not have difficulty in preparing these records. Plaintiff states he is willing to hire a third-party copying service to scan the requested records on-site, to defray the costs of copying and scanning the documents. Id. at 6. Because the factual issues in this case are complex and the allegations are serious, the benefit to Plaintiff in having the records outweighs the inconvenience to the Defendants in producing them.

Defendants may not rely on state law privileges to avoid disclosure. In federal courts, privileges are governed by Rule 501 of the Federal Rules of Evidence which states:

> The common law [. . .] as interpreted by United States courts in the light of reason and experience [. . .] governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court [. . . .] But in a civil case, state law governs privilege regarding a claim or defense for which *state law supplies* the rule of decision.

Fed. R. Evid. 501 (emphasis added). In accordance with Rule 501, federal courts have held that where a plaintiff's asserted claims arise only under federal law, federal privilege law governs. *Hancock v. Hobbs*, 967 F.2d 462, 467 (11th Cir. 1992)("We therefore hold that the federal law of privilege provides the rule of decision in a civil proceeding where the court's jurisdiction is premised upon a federal question [. . . .]"); *Matter of Int'l Horizons, Inc.*, 689 F.2d 996, 1003 (11th Cir. 1982)("it is clear at this point that this is a federal law proceeding and that the Bankruptcy Court is not required to apply the Georgia accountant-client privilege."); *In re Sealed Case (Med. Records)*, 381 F.3d 1205, 1212 (D.C. Cir. 2004)("It is thus clear that when a plaintiff asserts federal claims, federal privilege law governs, but when he asserts state claims, state

privilege law applies.").[1]

Plaintiff's claims in this case arise under 42 U.S.C. § 1983, alleging violations of the Eighth and Fourteenth Amendments, with no additional state claims. As state law does not supply any claim or defense to the rule of decision in this case, any privileges present will be governed by applicable federal laws.

Federal law and regulations allow the requested documents, specifically the medical and mental-health records, to be disclosed by an Order from this Court. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), with corresponding regulations, allows entities to disclose private health information in a judicial proceeding:

> (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
> (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal [. . . .]

45 C.F.R. § 164.512(e)(1)(i-ii).[2] The requested disclosure would fall under §164.512(e)(1)(i), as Plaintiff seeks a court order and Defendants have contested Plaintiff's discovery requests under §164.512(e)(1)(ii).[3] Accordingly, this Court has the authority to order the disclosure of the relevant medical and mental-health records pursuant to HIPPA and the corresponding regulations.

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[1] *See also* Inspector Gen. of U.S. Dep't of Agric. v. Griffin, 972 F. Supp. 676, 681 (M.D. Ga.), *aff'd sub nom.* Inspector Gen. of U.S. Dep't of Agric. v. Glenn, 122 F.3d 1007 (11th Cir. 1997).

[2] If the disclosure request is made under §164.512(e)(1)(ii), the requesting party must have made reasonable efforts to give notice of the request to the subject of the protected health information, or secure a qualified protective order. § 164.512(e)(1)(ii)(A-B); *see* § 164.512(e)(1)(v).

[3] Plaintiff's Brief and Response do not indicate that Plaintiff asked for consent, attempted to gain consent, or actually received written consent from the eleven interviewed inmates to review their medical and mental health records. Likewise, there is no evidence that Plaintiff gave the inmates reasonable notice of Plaintiff's request to Defendants of the eleven inmates' files. *See* § 164.512(e)(1)(ii)(A-B). The Court does note that pursuant to this Court's Previous Order (Doc. 114, p. 2 ¶ 5), Dr. Haney was only allowed to interview inmates that voluntarily consented to be interviewed.

Although there is a federal psychotherapist-patient privilege, this privilege does not apply to prohibit the disclosure of the eleven inmates' mental-health files. The Supreme Court has recognized a psychotherapist-patient privilege under Fed. R. Evid. 501. *Jaffee v. Redmond*, 518 U.S. 1, 15-16 (1996)("we hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure [. . . .]"). This privilege generally prohibits the disclosure of confidential communications between licensed psychotherapists and patients, made in the course of diagnosis or treatment. *Id.* at 15; *Guilford v. MarketStar Corp.*, WL 10664964, at *2 (N.D. Ga. Sept. 18, 2009); *United States v. Ghane*, 673 F.3d 771, 782 (8th Cir. 2012) ("In its discussion of the contours of the psychotherapist-patient privilege, the [Supreme Court] only contemplated information gleaned during actual psychotherapy sessions conducted, obviously, by a licensed therapist.").

The federal psychotherapist-patient privilege does not prohibit the disclosure of the eleven inmate's mental-health records, however. Defendants have not contended that the mental health records contain confidential information between the eleven inmates and licensed psychotherapists. Doc. 117, p. 2-6; *See Jaffee*, 518 U.S. at 15-16. Defendants, instead, contend that state-law privileges bar the disclosure of the mental-health records, as state law privileges are stricter than federal law. Doc. 117, pp. 2-6. As noted above, state-law privileges are not applicable. Because Defendants have not demonstrated that the requested mental-health records contain confidential information between the inmates and licensed psychotherapists, the federal psychotherapist-patient privilege does not apply. *United States v. Wilk*, 572 F.3d 1229, 1236 (11th Cir. 2009)(disclosing mental-health records because there was no evidence the records contained information about the plaintiff and psychiatric treatment); *see United States v. Hale*,

No. 2:16-MC-01792-MHH, 2017 WL 3828075, at *2 (N.D. Ala. June 30, 2017)("These mental health records 'draw on source material otherwise unavailable to the plaintiffs, and will likely prove extremely important' as the DOJ attempts to demonstrate 'that the defendant[s'] policies and practices towards mentally ill prisoners [violate the prisoners'] constitutional rights.'" *quoting Dunn v. Dunn*, 163 F.Supp.3d 1196, 1202 (M.D. Ala. 2016)); *see also Jaffee*, 518 U.S. at 15–16 ("[A] psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists.").

To the extent that Defendants request that the Court incorporates a state-law privilege regarding the "state secrets" of the inmates' institutional files into federal law, that argument is unpersuasive. Although federal courts are empowered to "continue the evolutionary development of [evidentiary] privileges," this evolution is "disfavored and should not be lightly created." *Adkins v. Christie*, 488 F.3d 1324, 1328 (11th Cir. 2007)(quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)); *see United States v. Nixon*, 418 U.S. 683, 710 (1974). When creating an evidentiary privilege, four factors should be evaluated: 1) the needs of the public good; 2) whether the privilege is rooted in the imperative need for confidence and trust; 3) the evidentiary benefit of the denial of the privilege; and 4) consensus among the states. *Adkins*, 488 F.3d at 1328; *Jaffee v. Redmond*, 518 U.S. 1, 10-16 (1996).

It appears that Defendants attempt to rely on the first two factors of *Jaffee*, contending that the inmates' institutional files are "state secrets" and "security-related materials." Doc. 117, p. 1; Doc. 115, p. 2. Although these files may contain sensitive materials, as well as what Defendants call "mundane documents," establishing a privilege in this matter must be considered against the "corresponding and overriding goal," the disclosure of essential evidence to determine whether there have been constitutional violations. *Adkins*, 488 F.3d at 1328-29.

Although Defendants have a legitimate interest in maintaining and protecting the confidentiality of prison files, especially files for the inmates in Tier III of SMU, certain established means can maintain the Defendants' interest while achieving a reasonable disclosure. *Adkins*, 488 F.3d at 1329 ("In the absence of the privilege, the district court retains its authority to protect [the defendant's] interests through other established means such as protective orders, confidentiality agreements, and when appropriate, by disclosure only after an in-camera review of these documents."). Here, there is already a Protective Order (Doc. 111), a means expressly mentioned in *Adkins*, in place. This Order is still in effect, and will adequately preserve the Defendants' interest of security and confidentiality. Accordingly, the institutional files for the eleven inmates interviewed by Dr. Haney do not warrant the protection of an evidentiary privilege in this case.

Upon consideration of the relevancy and the value of the items Plaintiff requests, and pursuant to 42 C.F.R. 164.512(e)(1)(i), Defendants are **ORDERED** to disclose the (1) medical records, (2) mental-health records, and (3) institutional files for the eleven inmates Dr. Haney interviewed on October 26 and 27, 2017. Regarding the institutional files mentioned above, these Documents are to be labeled "CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER", pursuant to this Court's previous Protective Order (Doc. 111).

Although it does not appear that medical and mental-health disclosures as ordered under 164.512(e)(1)(i) must be made in connection with a qualified protective order (*see* 45 C.F.R. § 164.152(e)(1)(ii)(v)), in an abundance of caution, it is **FURTHER ORDERED:**

1. As used herein, "Protected Health Information" ("PHI") shall mean any information, whether oral testimony or recorded in any form or medium, or any portion thereof, that (a) identifies an individual or, with respect to which, there is a reasonable basis to believe the information can be used to identify the individual and (b) relates to the past, present,

or future physical or mental health or condition of such individual, the provision of health care to such individual, or the past, present, or future payment for the provision of health care to such individual. The term "Protected Health Information" specifically includes "protected health information" as such term is defined 45 CFR § 160.103, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). "Protected Health Information" includes, but is not limited to, medical bills, claims forms, charge sheets, medical records, medical charts, test results, notes, dictation, invoices, itemized billing statements, remittance advice forms, explanations of benefits, checks, notices, and requests. "Protected Health Information" also includes all notes, summaries, compilations, extracts, abstracts, or oral communications that contain, are based on, or are derived from Protected Health Information. "Protected Health Information" does not include any document or information that has all identifiers of the individual removed or redacted.

2. All third-party PHI disclosed in this action shall be treated in accordance with this Order without regard to any designation.

3. All transcripts, exhibits, and videotapes of any deposition or testimony containing third-party PHI shall be treated in accordance with this Order without regard to any designation.

4. A party may, in good faith, object to the designation or treatment of any document or information as PHI by stating its objection (including a statement of the legal or factual basis for the objection) in writing to the party or third party making the designation or otherwise treating the information as PHI, and it shall make a good faith effort to resolve the dispute with counsel for the party or third party so designating or treating the

document. If the parties cannot reach agreement as to the treatment of the information, the objecting party may move the Court for an order determining whether such document is PHI. Pending a final ruling by the Court on the motion, the initial designation or treatment and the terms of this Order shall remain in effect.

5. Third-party PHI may be disclosed only to:

(a) The members of the legal or support staff of the parties' attorneys, including paralegals and consulting or testifying experts;

(b) The Court and its personnel;

(c) Any court reporter, videographer, or similar person with a legitimate need to take custody of documents or records containing PHI;

(d) Such persons as appear on the face of the document to be its author or a recipient, provided that any portion of the document which such persons may not have seen is redacted; or

(e) The person whose PHI is included on the face of the document provided any other person's PHI is redacted.[4]

6. Any document containing third-party PHI shall be filed under seal with the Court.

7. With the exception of documents containing PHI, which shall be subject to the terms set forth above, documents contained in third-party prisoners' institutional files shall be handled in accordance with Rule 5.2 of the Federal Rules of Civil Procedure.

8. Within 180 days of the conclusion of this litigation, the parties shall destroy all documents containing third-party PHI, unless the third party whose PHI is at issue has signed a HIPAA-

[4] This Order does not incorporate Subparagraph 5(f) of Plaintiff's proposed protective order. Doc. 116-4. Because the Protected Health Information involves third parties, the parties may not disclose such information by mutual agreement without prior approval of the Court.

compliant release authorizing Plaintiff's counsel to access his PHI. Counsel shall ensure that destruction occurs by a reliable method that precludes further disclosure. The litigation shall be deemed concluded upon the entry of final judgment or the conclusion of any appeal affirming final judgment. If an injunction is entered against Defendants, the litigation shall be deemed concluded upon the entry of a final order terminating injunctive relief.

SO ORDERED, this 21st day of November, 2017.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge