UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

JODIE SMOOK, by VICKY and RANDY SMOOK, her parents, individually and on behalf of all persons similarly situated, Plaintiff, -vs- MINNEHAHA COUNTY, SOUTH DAKOTA; JIM BANBURY, individually and as director of Minnehaha County Juvenile Detention Center; and John and Jane Doe DETENTION CENTER OFFICERS, Defendants.	CIV 00-4202 MEMORANDUM OPINION AND ORDER

Jodie Smook, the Plaintiff in this purported class action, has filed a Motion to Compel the Defendants to disclose information relating to certain minors who were taken into the custody of the Minnehaha County Juvenile Detention Center. For the reasons stated below, the Motion to Compel is granted, subject to a protective order, on the condition that Plaintiff first obtain release of the records from the Circuit Court of Minnehaha County.

BACKGROUND

Plaintiff alleges that her civil rights were violated at the Minnehaha County Juvenile Detention Center (JDC). According to the Complaint, Plaintiff and three of her minor friends were taken into custody on August 8, 1999, after Sioux Falls policemen found them out after the city's 11:00 p.m. curfew for children under the age of eighteen. At the time, Plaintiff was sixteen years old. She and her friends were transported to the JDC where, allegedly, they were questioned about their religious beliefs and practices, individually ordered into a bathroom, and strip searched. Plaintiff claims that these actions violated her constitutional rights.

Plaintiff also alleges that she and her friends are not the only minors who were asked about their religious beliefs and strip searched at the JDC. According to the Complaint, the JDC had a policy of conducting strip searches of minors, even without probable cause that the minors had weapons or contraband, as well as a policy of questioning juvenile detainees about the religious beliefs and practices. Plaintiff alleges that more than 100 minors were subjected to each of the JDC's policies, and seeks to certify a class consisting of "all persons who have been injured in any way by the unconstitutional practices, acts, and policies of the defendants and their agents."

With an eye toward class certification, which has not yet been granted, Plaintiff has sought discovery relating to the class. In particular, Plaintiff has propounded an interrogatory asking, with respect to each minor who was taken to the JDC for a curfew violation between November 1, 1997 and November 1, 2000: (a) date of birth, (b) social security number, (c) gender, (d) date and time the minor was admitted and released, (e) whether the minor was strip searched, (f) name of the employee or officer who conducted the search, (g) why the strip search was conducted, (h) whether any contraband or weapons were discovered as a result of the search, (i) any charge or charges lodged against the minor, and (j) disposition of the charge brought against the minor. (Pl. First Set of Interrogatories to Def. Banbury ¶ 4.) Plaintiff has also sought the same information with respect to minors who were strip searched during the same time period and who were charged with offenses other than drug offenses, violent offenses, or weapons offenses. (Id. ¶ 5.)

Defendants objected to the above-described interrogatories on the grounds that they seek information from which state law prohibits them from disclosing, and that answering the interrogatories would be unduly burdensome. Plaintiff has brought a motion to compel the Defendants' response.

DISCUSSION

In class actions, it is often necessary for the named plaintiffs to produce factual evidence, in addition to their allegations, before a class may be certified. See General Telephone Co. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 2372, 72 L. Ed. 2d 740 (1982) (noting that "it may be necessary for the court to probe behind the pleadings before coming to rest on a certification question").

Consequently, a federal district court may permit discovery prior to class certification, in order to provide the plaintiff an opportunity to satisfy the requirements for maintaining a class action. Witten v. A.H. Smith & Co., 104 F.R.D. 398, 399 (D. Mary. 1984); see also Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1796.1 (1986); Manual for Complex Litigation (Third) § 30.12 (2000). Of course, discovery should not be allowed to a plaintiff who is seeking facts to support allegations of class-wide injury for which she has no support in the first place. Witten, 104 F.3d at 399.

In this case, it does not appear that the Plaintiff has embarked on a fishing expedition. The Complaint alleges that three minors besides her were strip searched and asked about their religious beliefs and practices. The blank admission form attached to Plaintiff's Motion to Compel also suggests that such actions were matters of policy. The form includes spaces to write down the detainee's "religious preference" and "attendance," as well as spaces to inventory pants, shirts, socks, and "briefs/panties." The local news media also carried articles on the JDC's alleged strip search policy. While the Plaintiff may be unsure whether her claims are typical of those of the purported class and whether she can adequately represent that class, there is a sufficient factual basis for her allegations of class-wide harm to permit further discovery.

The principal obstacle to further discovery is South Dakota's policy of confidentiality with respect to records of juvenile delinquency. One South Dakota statute provides:

> The records of law enforcement officers and agencies concerning all children taken into temporary custody or issued a summons or citation [under certain statutes pertaining to juvenile justice] shall be maintained separately from the records of arrest and any other records regarding detention of adult persons. The records concerning children, including their names, may not be inspected or disclosed to the public except:
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> (1) By order of the court;
> (2) If the court orders the child to be held for criminal proceedings, as provided in chapter 26-11;
> (3) If there has been a criminal conviction and a presentence investigation is being made on an application for probation; or

> (4) Any child or the child's parent or guardian may authorize the release of records to representatives of the United States military for the purpose of enlistment into the military service.

SDCL 26-7A-27. Another statute provides:

> No fingerprint, photograph, name, address or other information concerning the identity of any child taken into temporary custody or issued a summons or citation [under the same statutes pertaining to juvenile justice] may be released or transmitted to the federal bureau of investigation or any other person or agency except in the following instances:
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> (1) To the person or party specifically authorized by order of the court; and
> (2) To courts, law enforcement agencies, prosecuting attorneys, court services officers and the department of social services if the child is an adjudicated delinquent offender.
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> * * *

SDCL 26-7A-28. Neither of these statutes specifies the circumstances under which "the court" may order the release of information.

The Court is inclined to grant the Motion to Compel. However, under the statutes quoted above, this Court has no power to order the release of records from the JDC. The statutes do not provide for the release of information by order of "a court," they require an order of "the court." SDCL §§ 26-7A-27(1), 26-7A-28(1). For purposes of these statutes, the term "court" is expressly defined as the State circuit court. SDCL 26A-7A-1(10). In order to obtain release of the records, the Plaintiff must apply to the Circuit Court of Minnehaha County.[1]

If Plaintiff eventually obtains such records, the records will be subject to a protective order issued by this Court. Such an order may issue, as justice requires, "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). The issuance of a protective order is particularly appropriate in a case which, like this one, requires the

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[1] Under appropriate conditions, South Dakota law permits the disclosure of confidential juvenile records. See E.P. v. Riley, 604 N.W.2d 7, 18-19 (S.D. 1999).

disclosure of confidential information for the development of the plaintiff's case. See Pearson v. Miller, 211 F.3d 57, 72-73 (3d Cir. 2000); Gillard v. Boulder Valley School Dist RE-2, 196 F.R.D. 382, 386 (D. Colo. 2000).

The decision whether to issue such a protective order, as well as the order itself, must balance the Plaintiff's legitimate discovery interests with the legitimate interests that potential class members have in keeping their juvenile records secret. See Pearson, 211 F.3d at 73. It must also weigh South Dakota's independent interest in maintaining the confidentiality of its juvenile justice records. See Riley, 604 N.W.2d at 18-19 (the consent to disclosure of records by a juvenile and his mother did not, by itself, mandate release of the records). Finally, in a class action, the order should also take into account society's interest in the efficient administration of justice.

In this case, the balance of these interests points decidedly toward the entry of a protective order. The disclosure of juvenile justice records will enable the Plaintiff to develop evidence related to class certification and to the merits of her case. The interests of justice favor the development of evidence related to other potential plaintiffs so that as many claims as possible can be resolved in a single lawsuit. At this point in the litigation, however, there is no reason to permit the disclosure of such information to anyone except the Plaintiff's lawyers and her lawyer's employees. See Pearson, 211 F.3d at 73. The Court will take steps to ensure that the identities of juveniles are not disclosed to the public through the Court filings in this case. In addition, in order to protect potential members of the class from undue annoyance or embarrassment, the protective order will prohibit the Plaintiff's lawyers from contacting potential class members through the use of information in the confidential records.

In the meantime, the Plaintiff may still bring a motion for class certification. Given the initial obstacles to discovering relevant information, the Court will take a liberal view toward certification of a class. See Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 381 (D. Colo. 1993); Wright, Miller & Kane, supra, § 1785 at 128-33. If a class is eventually certified, the Plaintiff may issue a notice to potential class members in a manner approved by the Court, see Fed. R. Civ. P. 23(c)(2), and in that way obtain evidence related to her Complaint. Plaintiff's Agreed Motion for

an Extension of Time will be granted. Any motion for class certification must be filed within fourteen days after service of this Order. Accordingly,

IT IS ORDERED:

(1) That the Motion to Compel (Docket No. 19) is granted, subject to the provisions of this Order, and on the condition that the Plaintiff obtain from the Minnehaha County Circuit Court an order authorizing the release of the requested information.

(2) That any confidential information related to juvenile detainees that is released to Plaintiff's counsel pursuant to an order of the circuit court shall not be disclosed to the Plaintiff, her parents, or to any other person, with the exception of persons regularly employed or associated with Plaintiff's counsel whose assistance is required by Plaintiff's counsel in the preparation of this case.

(3) That no records or confidential information obtained pursuant to an order of the circuit court shall be filed with the Court, unless the names and addresses of juveniles who were allegedly detained at the Juvenile Detention Center are first redacted. Information obtained from other sources may be filed with the Court, subject to the next paragraph of this Order.

(4) That no person who was allegedly taken into the custody of the Juvenile Detention Center shall be identified by his or her real name in filings with the Court, unless that person expressly agrees to be so identified. Persons who have not expressly consented to such identification – including persons whose names and addresses are required to be redacted – may be referred to in pseudonym. Whenever persons are referred to in pseudonym in a filing with the Court, the parties shall file under seal a statement of the real names of the parties identified by pseudonym and shall also provide the statement to opposing counsel.

(5) That Plaintiff's lawyers and her lawyers' agents or employees shall not directly or indirectly contact any potential class member, or the family or friends of any potential class member, through the use of records or confidential information obtained pursuant to an order of the circuit court.

(6) That the Plaintiff's Agreed Motion for an Extension of Time (Docket No. 21) is granted, and Plaintiff shall have fourteen days from the service of this Order in which to file any motion for class certification.

Dated this 22nd day of May, 2001.

BY THE COURT:

Lawrence L. Piersol
Chief Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Deb Peterson
(SEAL) DEPUTY