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United States District Court,
E.D. California.

Jay Lee GATES, et al., Plaintiffs,
v.
George DEUKMEJIAN, et al., Defendants.

CIV S–87–1636 LKKJFM. | July 27, 1988.

Attorneys and Law Firms

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John K. Van de Kamp, Atty. Gen., Steve White, Chief Asst. Atty., Gen., James Ching, Supervising Deputy Atty., Gen., James E. Flynn, Deputy Atty. Gen., Sacramento, Cal., for defendants.

Opinion

ORDER

KARLTON, Chief Judge.

***1** Plaintiffs' motion to compel production of documents came on regularly for hearing May 19, 1988. Warren E. George, Michael W. Bien, Christopher C. Magorian and Donald Specter appeared for plaintiffs. James E. Flynn and Allen Crown, Deputy Attorneys General, appeared for defendants. Upon review of the motion and the documents in support and opposition, upon hearing the arguments of counsel and good cause appearing therefor, THE COURT MADE THE FOLLOWING FINDINGS AND ORDERS and announced them to the parties in open court:

This civil rights suit alleges that defendants are committing numerous constitutional violations in their operation of the Correctional Medical Facility-Main and the Northern Reception Center The discovery disputes before the court concern two categories of documents. Plaintiffs, recently certified as a class, seek to compel the production of correspondence between defendants and the California Medical Facility ("CMF") and the United States Department of Justice ("DOJ") in connection with the DOJ's investigation of CMF pursuant to 42 U.S.C. § 1997a, and the minutes of various hospital committee meetings.[1]

I. The DOJ documents.

In March of 1985 the United States Department of Justice initiated an investigation of the conditions present at the California Medical Facility. The DOJ proceeded under the authority of 42 U.S.C. § 1997a, which allows the DOJ to investigate and file suit for the correction of "egregious or flagrant conditions which deprive [prisoners) ... of any rights, privileges, or immunities secured or protected by the Constitution...." Plaintiffs seek the correspondence between the parties to the investigation.[2]

The relevance of materials documenting an investigation of the conditions alleged in plaintiffs' complaint is not open to serious dispute. Defendants have raised three main arguments in support of their claim to confidentiality. The first theory of confidentiality is based on an agreement between the CDC and the DOJ concerning documents generated during the CRIPA investigation.[3] The relevant portions of the agreement, paragraphs 3 and 5, state that the "U.S. Department of Justice agrees that it will not disclose the contents or substance of any information or provide copies of any documents received from CDC during the course of this investigation to any person or agency not directly connected with this investigation and will not disclose such documents, records, reports, papers, or other information, of any nature, without prior written consent of CDC," and that any "person or agency who does have access to information in accordance with this Agreement will be similarly bound by the terms of this Agreement." The agreement prohibits the DOJ and any other person or agency with access to the information from distributing materials received during the investigation without prior written consent of the CDC. The agreement does not prohibit the CDC from producing documents to persons not party to the agreement. Paragraph 5 does not convince this court otherwise. The interpretation urged by defendants would have the convoluted result of requiring the CDC to get its own prior written permission before it could release documents. The agreement does not prohibit the CDC from producing the documents, whether it be in the context of this litigation or under other circumstances. This objection is overruled.

Defendants' second theory of confidentiality is a rather creative but unsupportable extension of the Freedom of Information Act, 5 U.S.C. § 552(b). Sections 552(b)(5), (6), and (7) of the Act authorize nondisclosure of inter-agency or intra-agency memoranda which would not be available by law to a party other than an agency in

litigation with the agency; personnel, medical, and similar files whose disclosure would constitute an invasion of privacy; and investigatory records compiled for law enforcement purposes. Defendants claim standing to raise the FOIA because of the confidentiality agreement with the DOJ, arguing that they are raising the privilege because the DOJ stated it would raise the privilege if a similar request was directed toward it. Flynn Declaration, ¶ 33. The facts of this motion, however, are not as defendants would have them. The request for production was directed to a state agency which does not have the authority to claim protection for documents under the FOIA. *See* 5 U.S.C. §§ 551(1) and 552. The DOJ's promise to refrain from distributing any of the requested materials has no bearing on defendants' ability to claim protection for documents under the FOIA. This objection is overruled.

***2** Lastly, defendants urge the court to apply the deliberative process privilege to protect the materials from production to plaintiffs. The deliberative process privilege is intended to shield agency documents which reflect advisory opinions, recommendations and deliberations recorded as part of the governmental decision and policy making process from disclosure. The purpose of the privilege is to encourage frank discussions, thereby insuring the quality of the resultant policy or decision. *Mobil Oil Corp. v. Department of Energy,* 520 F. Supp. 414, 416 (N.D.N.Y. 1981), *rev'd on other grounds,* 659 F.2d 150 (TECA), *cert. denied,* 454 U.S. 1110 (1981). Defendants must establish the applicability of the privilege as well as demonstrate that the reasons for upholding the privilege outweigh plaintiffs' need for the material.

Defendants have failed to complete the first step. Defendants have not presented an affidavit by an agency head or other appropriate official which states that the privilege has been claimed after personal consideration of the allegedly privileged information. *Mobil Oil Corp. v. Department of Energy,* 102 F.R.D. 1 (N.D.N.Y. 1983). As noted by plaintiffs, defendants have also sought to protect the wrong class of documents. The deliberative process privilege was intended to cover only internal discussion concerning potential policy concerns. *See In re Franklin Nat. Bank Securities Lit.,* 478 F. Supp. 577, 581 (E.D.N.Y. 1979)(privilege protects intra-governmental deliberations). Documents sent between the CDC and the DOJ cannot be characterized as internal documents.

Defendants argue that documents shared between the CDC and the DOJ should be protected under the deliberative process privilege because of the legislative history of 42 U.S.C. S 1997 ("CRIPA"), which strongly encourages informal resolution of disputes regarding conditions of confinement. Defendants essentially argue that documents voluntarily given to the DOJ should be protected from disclosure so that candid negotiations between the DOJ and prison officials will not be discouraged. Defendants' advocacy of such an extension of the deliberative process privilege is novel but ultimately unpersuasive in view of the complete absence of any provisions regarding confidentiality within CRIPA. *Cf. Olitsky v. Spencer Gifts, Inc.,* 842 F.2d 123 (5th Cir. 1988)(discussing express provisions for nondisclosure of certain materials in Title VII cases).

Defendants' claims of privilege for the documents sent from the CDC to the DOJ are overruled. Plaintiffs' motion to compel production of these documents is granted.

II. Minutes of hospital staff meetings.

***3** Defendants object to the production of minutes from several clinical staff meetings under the authority of California Evidence Code § 1157, which prohibits the discovery of minutes of hospital committee meetings charged with the responsibility of improving the quality of care provided by the hospital.[4] Plaintiff's cause of action, 28 U.S.C. § 1983, is federal, so state rules of privilege provide persuasive weight only. Fed. R. Evid. 501; *Lewis v. United States,* 517 F.2d 236 (9th Cir. 1975). However, unlike the majority of state privileges reviewed by this court, Cal. Evid. Code § 1157 would constitute an absolute bar to disclosure of hospital committee meetings charged with the responsibility of improving the quality of medical care in the case at hand. In *West Covina Hospital v. Superior Court,* 41 Cal.3d 846, 226 Cal.Rptr. 132 (1986), the court noted that in order to improve hospital care the legislature determined that doctors must be absolutely free to speak candidly about hospital conditions without the fear of being dragged into malpractice actions. 41 Cal.3d at 851–852.[5]

After balancing the policy considerations presented by the strength of the privilege and plaintiffs' need for the material, *Baird v. Koerner,* 279 F.2d 623 (9th Cir. 1960), the court concludes that an order requiring production would be premature. Plaintiffs are just beginning their discovery, and are understandably unable to determine whether they will be able to gain the desired information from other sources. Defendants have not supplied the court with enough information about the contents of the minutes to accurately balance plaintiffs' need for the particular information against defendants' need to protect it from disclosure. Plaintiffs' motion to compel disclosure of hospital committee meeting minutes is denied at this time. This ruling is made without prejudice to renewal of the motion further along in discovery at a time when the parties can supply the information alluded to above. The law and motion date of August 25, 1988 is reserved for further hearing should the parties desire it.

Footnotes

1 Plaintiffs seek to compel the production of the minutes of the following committees: infection control, psychiatric, medical and other clinical staff meetings.

2 The parties dispute whether interrogatory # 21 requests internal documents generated by the CDC but not given to the DOJ. After reviewing the interrogatory this court concludes that the interrogatory does not request internal documents.

3 The agreement in its entirety reads as follows:

AGREEMENT

1. This Agreement is in reference to any and all documents, records, reports, papers, and information, of any nature, disclosed or released to the United States Department of Justice or its agents in connection with the investigation of the California Medical Facility (CMF) under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. Section 1997.

2. The parties to this agreement are the California Department of Corrections (CDC), an agency of the State of California, and the U.S. Department of Justice, an agency of the United States of America.

3. The U.S. Department of Justice agrees that it will not disclose the contents or substance of any information or provide copies of any documents received from CDC during the course of this investigation to any person or agency not directly connected with this investigation and will not disclose such documents, records, reports, papers and other information, of any nature, without prior written consent of CDC.

4. Further, the Department of Justice agrees not to obtain, through CDC, any individually identifiable medical record except in connection with the use of a voluntarily executed Authorization to Release Medical Information from the inmate about whom the information is sought.

5. Any person or agency who does have access to information in accordance with this Agreement will be similarly bound by the terms of this Agreement.

4 California Evidence Code § 1157 provides in relevant part that:

> (a) Neither the proceedings nor the records of organized committees of medical, medical-dental, podiatric, registered dietitian, psychological, or veterinary staffs in hospitals having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, or medical or dental review or dental hygienist review or chiropractic review or podiatric review or registered dietitian review or veterinary review committees of local medical, dental, dental hygienist, podiatric, dietetic, veterinary, or chiropractic societies, or psychological review committees of state or local psychological associations or societies having the responsibility of evaluation and improvement of the quality of care, shall be subject to discovery....

Defendants have also asserted confidentiality under the "selfcritical analysis" privilege in federal common law. In view of the court's holding below regarding Cal. Evid. Code § 1157, the court need not reach the question of federal privilege at this time. The court notes, however, that the record regarding the content of the documents and the competing needs for production and nondisclosure is flawed in a manner similar to the records regarding the state privilege.

5 Plaintiffs argue that the *Covina* case compels the conclusion that the privilege is inapplicable because *Covina* noted that § 1157 is "aimed directly at malpractice actions in which a present or former hospital staff doctor is a defendant." 41 Cal.3d at 854, *quoting Matchett v. Superior Court,* 40 Cal.App.3d at 628–634. While the statute might be aimed at these actions, *Covina* also noted that the "obvious general purpose of section 1157 is to improve the quality of medical care in the hospitals by the use of peer review committees." 41 Cal.3d at 851. This purpose would.be served by prohibiting discovery of the minutes.