UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KEITH ROGERS,	)	
	)	
Plaintiff,	)	No. 15 C 11632
	)	
v.	)	
	)	Judge Edmond E. Chang
SHERIFF OF COOK COUNTY and COOK COUNTY, ILLINOIS,	)	
	)	
Defendants.	)	

ORDER

This Order addresses the pending motions.

County's motion [59] for protective order as to OTP Committee documents. The County moves to withhold the contents of certain parts of documents generated by the Opioid Treatment Program (OTP)[1] Committee. In support, the County relies on the privilege created by the Illinois Medical Studies Act. In pertinent part, the Act creates a privilege for all information used by health care facilities for "internal quality control":

> All information, interviews, reports, statements, memoranda, recommendations, … or other data of … health care delivery entities or facilities … or committees of licensed or accredited hospitals or their medical staffs … used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care … shall be privileged, strictly confidential and shall be used only for … the evaluation and improvement of quality care … .

735 ILCS 5/8-2101. The defense acknowledges that, because Plaintiff Keith Rogers brings a federal-law claim (namely, for deliberate indifference to medical needs

[1] The minutes of the Committee use the acronym "OPT" to refer to the Committee, but most other documents use "OTP," including the agendas that accompany the minutes. The OPT headers on the minutes appear to be typographical error.

under the Fourteenth Amendment's Due Process Clause), state-law privileges like the one created by the Act are not necessarily applicable. Cty.'s Mot., R. 55 at 5 (citing Fed. R. Evid. 501). The County argues, however, that Federal Rule of Evidence 501—which instructs federal courts to apply "reason and experience"—should be invoked to allow the privilege's application in this case.

Rogers resists the privilege's application, first by arguing that the information used by the OTP Committee, and the recommendations generated by it, would not be covered by the Act at all, even if this were a state-law case. This is a close question: on the one hand, the County argues that the Committee clearly is reviewing the results of the Opioid Treatment Program and making recommendations. That characterization is borne out by the unredacted version of the documents sought to be withheld (the Court has reviewed those unredacted documents, which were filed at the Court's direction as R. 60 on the docket). As the already-disclosed table-header of the minutes reveal, the Committee engages in a discussion ("Discussion Details"), assigns tasks in reaction to that discussion ("Action/Responsibility"), and then proposes a follow-up to that assignment ("Follow-Up"). *E.g.*, Bates 626, 629, 632. Also, many of the withheld documents relate to "Unusual Occurrences" concerning patients in the Opioid Treatment Program. *E.g.*, Bates 647, 663. The Country reasonably argues that the information and recommendations are "used in the course of internal quality control or of medical study … for improving patient care." 735 ILCS 5/8-2101.

On the other hand, Rogers points out that the OTP Committee actually approves the opioid taper protocols, which are the primary issue in this case. The Opioid Treatment Program is governed by Cermak Health Services Policy G-06.1 (2012), which Rogers attached to his response (the defense did not dispute, in its reply, that this is the governing Policy). R. 56, Exh. 1. The Program is administered with the following structure: Cermak's chief medical officer designates a "program medical director." Policy § A(1). The program medical director is a licensed physician who is responsible for either delivering or overseeing the Program's medical services. Policy, Definitions at 1.[2] Under the Policy, the program medical director also will "[u]pdate this policy and any related policies for the program as needed, within the larger framework of the institutional policies of Cermak Health Services." Policy § A(4)(a).

[2] This is actually the definition drawn from regulations governing federal accreditation of opioid treatment programs (which dispense controlled substances). 42 C.F.R. § 8.2 (defining "medical director").

Going beyond the direct delivery of medical services, there is a "program administrator" who has various duties, including "[c]onven[ing] a multidisciplinary OTP Committee with representatives from the departments of Medicine, Mental Health, Pharmacy, and Laboratory." Policy § A(3)(d). This is the Committee at issue. The Policy makes only one other reference to the Committee: the program medical director must develop "a set of protocols for linear taper" and must "[s]ubmit the protocols for *approval by the OTP Committee*." Policy § A(4)(g), (h) (emphasis added).

That approval is the problem with the County's argument: the Committee is not so much conducting a peer review or, in the words of the Act, an "internal quality control" so much as it is actually *setting* the taper protocols. Again, this is a close call because the Policy also dictates that it is the medical director who has responsibility for updating the Policy itself. Policy § A(4)(a). But the Policy then specifically says that the medical director must submit the protocols to the OTP Committee for approval. Policy § A(4)(g), (h). This is unlike the primary case cited by the County, where a truly separate Patient Safety and Quality Improvement Committee reviewed the treatment provided to a particular detainee who passed away while in custody. *Warren v. Dart*, 2013 WL 5835771, at *3 (N.D. Ill. Oct. 30, 2013) (Kim, M.J.). In light of the Policy here, the County has not met its burden to show that the privilege applies, as a factual matter.

Even if what the Committee was doing factually met the definition of "internal quality control" under the Act, the Court is skeptical that reason and experience would justify the privilege's application to a deliberate indifference case like this one. Rogers is pursuing a *Monell* claim, and one way to establish *Monell* liability is to show that policymakers knew of a substantial risk that a serious medical need would not be met. In the run-mill medical malpractice claim, the overall policies of a health care facility are not directly at issue, but in a *Monell* claim, that is the heart of the case. In the run-mill medical malpractice claim, knowledge is not an element of the claim for negligence, but in a *Monell* claim, unless the risk of a constitutional violation is obvious (this distinguishes what "deliberate indifference" means in individual-defendant cases versus municipal liability), actual knowledge of the risk is an important way to establish liability. Contrary to the County's argument, R. 55 at 7, this is not the sort of evidence that Rogers can obtain simply from examining the medical records of the detainees.

One more point is worth making: the County, as the invoker of the privilege, bears the burden of establishing it, yet did not supply a survey of other states that might have adopted a similar privilege. *See Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996) (psychotherapist privilege recognized in all 50 States). That might have strengthened the case for its applicability, even in *Monell* cases. In any event, because of the factual deficiency in the County's argument, the privilege does not apply.

Accordingly, the motion [55] for protective order as to the Committee documents is denied. The County must disclose the unredacted versions of the documents by October 10, 2017. The County may do so, however, under the Confidential Information designation in its proposed discovery confidentiality order. As noted earlier, this was a very close question, and Illinois state courts might disagree with whether the Act covers this situation. Discovery is not generally conducted in public, so the County ought to be able to preserve the argument for any state-court cases, and allowing public dissemination during federal-court discovery would thwart that legitimate argument. If and when the use of this information becomes the basis for judicial decision-making, then the Court will consider again whether the information should be made public (and in what form). The County shall email a copy of the proposed confidentiality order to the Proposed Order email account.

Rogers's motion [64] to compel data and the County's motion [76] to quash 30(b)(6) notice. Rogers's motion to compel data is granted in part and denied in part. First, the last known address and phone number of the 197 methadone-recipient detainees at issue is information that is relevant to the *Monell* claim, because Rogers is entitled to try contacting these detainees to discovery what treatment they received and how effective it was. Surely Rogers will place a self-limit on the number of detainees he will try to contact, but in the first instance it should be up to him to decide whom to contact. The defense argues that the request is too burdensome, but the supplemental reply says that it would take about one month to compile, R. 73 at 2. And that is a reasonable burden: if the County pulls the information for just 10 detainees per day, the task will be done in 20 business days. The Count shall disclose this information by October 31, 2017.

Second, the request for prior-stay information is denied. Rogers does not articulate a relevancy theory to this information. Right now, the discovery period as to the detainees themselves (the Court broadened the period as to policy generation) is September 20, 2013 through January 20, 2014. If and when the facts justify an

expanded time period for discovery, then the information for all the methadone-recipient detainees will be relevant (not just the ones who also were treated in the four-month period). This request is denied.

Third, the request to identify the correct booking numbers for the 13 mismatched detainees is granted. Rogers explains, without rebuttal, that the format of the booking numbers provides the entry date into the Jail. The entry date is relevant to how quickly the detainees receive their first dose of methadone. That information too shall be provided by October 31, 2017. In light of these decisions, the County's motion [76] to quash the related 30(b)(6) is granted.

Rogers's motion [74] to certify class. This motion is terminated without prejudice as premature. Fact discovery has not yet concluded, nor has expert discovery, which might very well be relevant to arguing that a tapering policy generally affects persons in the same way, or to resisting that conclusion. The motion itself makes assertions about tapering policies as increasing the chances of relapse; although that might very well be true, discovery on that issue has not concluded. There also was no class allegation in the amended complaint, R. 24, so the defense was not put on notice of the potential for class treatment by the formal pleading. At the next status hearing, the Court will discuss the discovery plan with the parties. The status hearing is set for October 11, 2017, at 10 a.m.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: September 29, 2017