

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JOSEPH LEWIS, JR., KENTRELL PARKER, FARRELL SAMPIER, REGINALD GEORGE, JOHN TONUBBEE, OTTO BARRERA, CLYDE CARTER, CEDRIC EVANS, EDWARD GIOVANNI, RICKY D. DAVIS, LIONEL TOLBERT, and RUFUS WHITE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BURL CAIN, Warden of the Louisiana State Penitentiary, in his official capacity; STEPHANIE LAMARTINIERE, Assistant Warden for Health Services, in her official capacity; JAMES M. LEBLANC, Secretary of the Louisiana Department of Public Safety and Corrections, in his official capacity; and THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS,

Defendants.

CIVIL ACTION

15-318-BAJ-RLB

PROTECTIVE ORDER GOVERNING PROTECTED AND INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION

I. General Provisions and Definitions

1. “Defendants” means the individuals and entities listed in the above caption, their counsel and persons employed by their counsel.

2. “Discovery” means all information, documents, and things subject to discovery or used as evidence in this action, whether produced by any party or a third party, including, but not limited to, documents and information produced pursuant to Fed. R. Civ. P. 26, testimony

adopted at depositions pursuant to Fed. R. Civ. P. 30 or 31, answers to interrogatories pursuant to Fed. R. Civ. P. 33, documents produced pursuant to Fed. R. Civ. P. 34, information obtained from inspections of premises or things pursuant to Fed. R. Civ. P. 34, and answers to requests for admissions pursuant to Fed. R. Civ. P. 36.

3. “Parties” means Plaintiffs, Defendants, their respective counsel and persons employed by their counsel.

4. “Plaintiffs” means Plaintiffs named in the above-captioned action and members of the putative class.

5. “Plaintiffs’ Counsel” means Plaintiffs’ attorneys, as well as other attorneys employed by or associated with Plaintiffs’ attorneys for purposes of this litigation, non-attorney employees of Plaintiffs’ attorneys, and contractors retained by Plaintiffs’ attorneys for purposes of this litigation.

6. “Protected Health Information” (hereinafter, PHI) has the meaning set forth in the Health Insurance Portability and Accountability Act, 45 C.F.R. § 160.103.

6.1¹ “Individually Identifiable Health Information” (hereinafter, IIHI) has the meaning set forth in the Health Insurance Portability and Accountability Act, 45 C.F.R. § 160.103.

II. Access to and Protection of Records Containing PHI and IIHI

7. **Applicability:** All documents containing IIHI and/or PHI shall be presumed without further designation to be subject to the provisions set forth below in paragraphs 9-21.

8. Notwithstanding paragraph 7, above, a Party may opt to designate any document as containing PHI or IIHI by stamping it with the following statement “Contains PHI/IIHI: Subject to Protective Order.” Any Party may challenge the applicability of this Order to documents so

¹ The court has renumbered this paragraph to clarify and preserve the numerical references in the Protective Order as submitted by the parties.

stamped by notifying the opposing counsel in writing. Should the Parties be unable to resolve the dispute, any Party may file an appropriate motion with the Court pursuant to L.R. 37 and Fed. R. Civ. P. 26(c).

9. Plaintiffs' Counsel Access: Plaintiffs' Counsel may have access through the Disclosure and Discovery Rules in Title V of the Federal Rules of Civil Procedure to health care records or other documents containing PHI or IIHI in the possession and control of the Louisiana Department of Corrections or its employees, agents, contractors, and subcontractors that relate to the health care of prisoners currently housed or who have been housed or who will be housed at the Louisiana State Penitentiary at Angola (LSP) that may otherwise be subject to confidentiality restrictions.

10. Limits on Disclosure: Except upon express permission of the subject of the medical or mental health record, or their legal representative or other person authorized to provide such permission, the Parties will not disclose PHI or IIHI except to: (1) the subject of the health record; (2) the Parties' counsel's staff, experts or consultants retained for the purpose of this litigation, subject to the limits set forth below; (3) LSP health care staff to the extent necessary for providing health care to the subject of the record or to the extent necessary to defend or prosecute litigation; (4) deponents and trial witnesses, subject to the limits set forth below; (5) court reporters and other court personnel as is necessary to conduct this litigation; or (6) any other person agreed upon by the Parties and confirmed in writing.

11. Permissible Uses: Persons authorized to access unredacted documents containing PHI or IIHI under this Order shall use the information only for the purpose of this specific action/litigation specified by the style above (including appeals and trials), and shall not use such information for any other purpose.

12. **Deponents and Witnesses:** A deponent or trial witness may, during preparation for deposition or trial, or during deposition or trial, be shown and examined about PHI or IIHI to the extent that such information is relevant to his or her testimony. In such instances, deponents and trial witnesses shall be informed of, familiar with, and subject to the disclosure provisions of this Order.

13. **Experts and Consultants:** All experts and consultants retained by the Parties for the purpose of this litigation shall review and be familiar with the terms of this Order.

14. **Protection of Information:** All persons allowed access to PHI or IIHI pursuant to this Order shall take reasonable and necessary steps to maintain all such materials and information, and any copies, notes, extracts, summaries, or descriptions of such materials, as confidential and shall not disseminate such confidential information, except as permitted by this Order.

15.² **Intentionally Blank.**

III. Use of PHI and IIHI During Litigation

16. **Acceptable Procedures for Filing Documents or Records with Court:** A Party wishing to submit to the Court documents, exhibits, transcripts, or other records containing PHI or IIHI shall either: (1) pursuant to L.R. 79, move to file the unredacted records or documents under seal; or (2) prior to filing, redact all information identifying the subject(s) of the records of documents and provide to counsel and the Court a key to the identities of the subject(s). Should any Party choose the latter method, the said key shall be subject to the same restrictions and safeguards respecting the disclosure of documents containing PHI or IIHI under this Order. **Any**

² The court has included this paragraph to clarify and preserve the numerical references in the Protective Order as submitted by the parties.

document filed under seal with the court shall be filed in accordance with the court's Administrative Procedures.³

17. Any Party may challenge the sufficiency of or need for redactions made pursuant to this Order by notifying the other Party in writing as to the reasons therefor, after which the Parties shall confer and attempt to resolve the dispute. After doing so, should the Parties be unable to resolve the dispute, any Party may file an appropriate motion with the Court pursuant to L.R. 37 and Fed. R. Civ. P. 26(c).

18. **Use of Information at Trial.** Subject to the Federal Rules of Evidence, stamped confidential material may be offered in evidence at trial or any court hearing, provided that the proponent of the evidence gives seven (7) days' advance notice to any Party or other person that designated the information as confidential. Any Party may move the Court for an order that the evidence be received *in camera* or under other conditions to prevent unnecessary disclosure. The court will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information at the trial.

IV. Special Provisions Regarding HIPAA

19. This Order authorizes Defendants to produce protected health information as discovery to Plaintiffs' Counsel or to permit inspection, copying, and/or scanning of same by Plaintiffs' Counsel, even if the protected health information concerns prisoners who are nonparties. When producing any protected health information, Defendants shall attempt to designate it as confidential material; however, such designation shall not be necessary for

³ **The Administrative Procedures for Filing Electronic Documents in the United States District Court for the Middle District of Louisiana can be located at the court's website (<http://www.lamd.uscourts.gov>) under "E-Filing," "CM/ECF Info," "Administrative Procedures." (See pages 10-11).**

documents like medical records whose nature as protected health information is otherwise self-evident. Moreover, the failure of any Party to designate protected health information as confidential material shall not excuse the Party utilizing or relying upon the same from any duties imposed herein or by law respecting protected health information.

20. This Order constitutes a “qualified protective order” pursuant to the Privacy Rules, 45 C.F.R. § 164.512(e)(1)(v), promulgated under the Health Insurance Portability and Accountability Act (HIPAA).

21. A person’s acquisition or disclosure of his or her own protected health information is not governed by this Order in any way. Disclosure of protected health information to the person who is the subject of that medical record is not governed or restricted by the Order in any way.

V. Additional Provisions

22. **No Impact on Arguments Regarding Privilege:** This Order shall not limit either Party’s ability to make arguments regarding privilege, including arguments regarding the applicability or inapplicability of a privilege or the presence or absence of a waiver thereof.

23. **Modification, Objection, and Further Application Permitted:** Nothing in this Order shall prevent any Party or other person from: a) applying to the Court for modification of this Order or further protective orders relating to discovery in this litigation; b) applying to the Court for an order seeking the addition or removal of a redaction or designation of a document as containing PHI and/or IIIHI; c) objecting to a discovery request; or d) applying to the Court for an order compelling production of documents or an answer to a discovery request.

24. **Continuing Jurisdiction:** The terms of this Protective Order shall survive the final termination of this litigation and shall continue to fully apply to all materials containing IIIHI and/ or PHI until further order of this Court. Following the final termination of this litigation, the

court shall retain and have jurisdiction over the Parties and all persons who received access to such materials.

25. Return or Destruction of Protected Health Information: Upon the final termination of this litigation, any protected health information accessed pursuant to this Order shall be returned or destroyed (including any copies made thereof) as required by the Privacy Rules, 45 C.F.R. § 164.512(e)(1)(v)(B), promulgated under the Health Insurance Portability and Accountability Act (HIPAA), except where such information has been incorporated into Attorney Work Product. If destroyed, that fact shall be certified by affidavit and submitted to Defendants. **Any document filed under seal with the court shall be handled by the court in accordance with its procedures at the conclusion of the litigation.**⁴

IT IS SO ORDERED.

Signed in Baton Rouge, Louisiana, on December 16, 2015.



RICHARD L. BOURGEOIS, JR.
UNITED STATES MAGISTRATE JUDGE

⁴ Under the court's General Order No. 93-1, "Pleadings and other papers filed under seal in civil . . . actions . . . shall be maintained under seal for thirty (30) days following final disposition of the action. After that time, all sealed pleadings and other papers shall be placed in the case record unless the District Judge or Magistrate Judge, upon motion, orders that the pleading or other paper be maintained under seal."