

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANGELA LOWE,	)	CASE NO. 1:08-CV-01339-DCN
)	
Plaintiff,	)	JUDGE DONALD C. NUGENT
)	
v.	)	<u>DEFENDANTS CUYAHOGA</u>
	)	<u>COUNTY/BOARD OF COUNTY</u>
CUYAHOGA COUNTY/BOARD OF	)	<u>COMMISSIONERS, GERALD T.</u>
COUNTY COMMISSIONERS, <i>et al.</i>,	)	<u>MCFAUL, KENNETH KOCHEVAR,</u>
	)	<u>CHRISTINE DUBBER, JANE</u>
Defendants.	)	<u>LAWRENCE, CHRISTINE MAIN</u>
	)	<u>AND CYNAMON ALI'S BRIEF IN</u>
	)	<u>OPPOSITION TO PLAINTIFF'S</u>
	)	<u>MOTION TO COMPEL DISCOVERY</u>
	)	<u>OF MORTALITY REVIEWS AND</u>
	)	<u>DOCUMENTS RELATED TO THE</u>
	)	<u>CONTINUOUS QUALITY</u>
	)	<u>IMPROVEMENT PROGRAM</u>

Defendants Cuyahoga County/Board of County Commissioners, Gerald T. McFaul, Kenneth Kochevar, Christine Dubber, Jane Lawrence, Christine Main and Cynamon Ali, through counsel, respectfully file their opposition to the plaintiff's motion to compel mortality reviews and documents related to the Continuous Quality Improvement Program.

These documents are privileged pursuant to Rule 501 of the Federal Rules of Evidence by the common law peer review privilege, which is also known by some courts as the self critical analysis privilege or some variant. Additionally, the peer review privilege found in R.C. § 2305.252 should

be applied because of the various state law claims that exist in this case. Furthermore, there is precedent, in this circuit, for the application of this privilege. Therefore, the plaintiff's motion to compel should be denied. These reasons are more fully set forth in the attached memorandum.

Respectfully submitted,

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MEMORANDUM

I. INTRODUCTION

The plaintiff has requested copies of mortality reviews, done pursuant to policy J-A-10, "Procedure in the Event of an Inmate's Death." Plaintiff requests this information for decedent Sean Levert and a list of other inmates. The stated purpose of policy J-A-10 is to "determine the appropriateness of care and to identify trends that require further study." According to the policy, a clinical mortality review is conducted by a physician, and the findings are documented, shared, and discussed for quality improvement initiatives. A copy of policy J-A-10 is attached hereto as Exhibit A.

Additionally, the plaintiff has requested documents related to policy J-A-06, Continuous Quality Improvement Program("CQI"). The stated policy of this program is to "maintain quality and provide information that may be used to enhance or alter current practices." Committee members are chosen, and meetings are held at least quarterly to discuss and follow up on "action items," and recommendations for change. The discussion includes, but is not limited to, infection control issues and morbidity/mortality reviews. A copy of policy J-A-06 is attached hereto as Exhibit B.

Both sets of documents encompass candid and retrospective reviews of patient treatment and health care practices within the jail, and are not contemporaneous medical records generated by treating health care providers or medical examiners. The stated purposes of these policies are clear, and maintaining the confidentiality of these documents is essential to the quality improvement process. Thus, any disclosure of these documents would have a chilling effect.

The plaintiff does not argue that the requested documents would be excepted from any established privilege, but rather she argues that no such privilege exists under federal law, and that the well recognized privilege codified in Ohio (R.C. § 2305.252) law does not apply to this case, in

which there is a federal question with pendant state law claims. The plaintiff cites to many cases which either have chosen not to apply this privilege, failed to recognize this privilege, or simply noted a perceived non-existence of this privilege. This is distracting, but these cases are easily distinguishable, and the plaintiff has simply ignored §1983 prison health care cases, **in this federal circuit**, that have recognized and applied this privilege. For these reasons, the plaintiff's motion to compel should be denied.

II. LAW AND ARGUMENT

1. The mortality reviews and CQI documents are privileged pursuant to Rule 501 of the Federal Rules of Evidence by the common law peer review privilege, which is also known by some courts as the self critical analysis privilege or some variant.

While the U.S. Supreme Court and several other Federal Courts have refused to allow a so-called peer review privilege in contexts such as academic tenure (*University of Pennsylvania v. EEOC*, 493 U.S. 1982 (1990)), and mortgage loans (*Harding v. Dana Transport, Inc.*, 914 F.Supp. 1084, 1100 (D.N.J. 1996)), many courts have recognized a privilege for morbidity and mortality reviews and related healthcare quality control programs. See, e.g. *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970) (recognizing the self-critical or self-evaluative privilege in the context of a hospital peer review conference on the care and treatment of patients).

In *Bredice*, the court stated:

As doctors have a responsibility for life and death decision, the most up-to-date information and techniques must be available to them. There is an overwhelming public interest in having [morbidity and mortality review meetings] held on a confidential basis so that the flow of ideas and advice can continue unimpeded....These...meetings being retrospective with the purpose of self-improvement, are entitled to a qualified privilege on the basis of this overwhelming public interest. *Bredice* at 251.

Other federal cases where courts have recognized a peer review privilege include *Balk v. Dunlap*, 163 F.R.D. 360, 363 (D. Kan. 1995) (finding minutes of OB/GYN meeting called to discuss the quality of patient care protected under Kansas medical peer review statutes), *Brem v. Decarlo, Lyon, Hearn & Pazoureck, P.A.*, 162 F.R.D. 94, 98-99 (D.Md. 1995) (magistrate, in federal question case, recognizing application of Maryland state statutory medical peer review privilege and noting privilege in other jurisdictions), *Spinks v. Children's Hospital National Medical Center*, 124 F.R.D. 9, 12 (D.D.C. 1989) (denying motion to compel production of morbidity and mortality conference and finding such materials subject to District of Columbia's statutory privilege), *Utterback v. Yoon*, 121 F.R.D. 297 (W.D. Ky. 1987) (finding Board of Investigation memorandum and Veterans Administration quality assurance records confidential and free from discovery in Federal Tort Claims Act medical malpractice claim against the United States), and *Gillman v. United States*, 53 F.R.D. 316, 318-319 (S.D.N.Y. 1971) (citing *Bredice*, 51 F.R.D. 187, and holding Plaintiff not entitled to reports of a hospital's Board of Inquiry investigating suicide)).

In fact, the U.S. Supreme Court, in recognizing the psychotherapist-patient privilege for the first time in *Jaffee v. Redmond*, 518 U.S. 1 (1996), realized that "it is important to treat a consistent body of policy determinations by state legislatures as reflecting both [the] 'reason' and 'experience' Rule 501 requires in the recognition of a new privilege." *Id.* at 13. See also *Thompson Co. v. General Nutrition Corp.* 671 F.2d 100, 103 (3rd Cir. 1982) (holding that a federal court may "resort to state law analogies for the development of a federal common law of privileges in instances where the federal rule is unsettled").

Relying on the Court's analysis in *Jaffee*, the district court in *Weekoty v. United States*, 30 F. Supp.2d 1343 (D.N.M. 1998), reversed, as contrary to law, a Magistrate's Order granting a plaintiff's motion to compel documents relating to a morbidity and mortality review. Instead, the court found

there was a federally recognized self-critical analysis privilege. The *Weekoty* court noted that similar to the psychotherapist-patient privilege in *Jaffee*, the peer review privilege in *Weekoty* has been codified by almost every state. In finding such a privilege, the court stated,

However, as the Fifth Circuit observed, Congress has recognized the importance of confidentiality in the peer review context. *United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 101 (5th Cir. 1992) (citing 42 U.S.C. § 11101(5) (Congressional finding of overriding national need for confidentiality for physicians engaging in effective professional peer review) *** see also 38 U.S.C. § 3305 (stating that records and documents of Veterans Administration medical quality assurance programs are confidential and privileged and setting out exceptions)). *Weekoty* at 1347.

The *Weekoty* court also found that the peer review at issue in its case was not a part of a patient's medical treatment, but rather was where physicians evaluate the quality and appropriateness of the techniques and procedures used in a patient's care, and which must not be subject to discovery or else the physicians would not be as frank or candid and the "goal of improving medical care would be substantially undermined." *Weekoty* at 1345-1346.

In conclusion, the *Weekoty* court stated, "Given the 'overwhelming public interest' in providing physicians with a confidential context in which to evaluate the effectiveness of life-saving techniques and procedures, the Court is compelled to recognize the self-critical analysis privilege in the context of morbidity and mortality conferences and will apply it in this case." *Weekoty* at 1347-1348. The court continued, "This effort to reform past practices makes morbidity and mortality conferences analogous to a subsequent remedial measure which would usually be excluded from evidence. *See* FED. R. EVID. 407. Thus, the loss of the opportunity to discover this material will have a minimal impact on the Plaintiff." *Id.*

Therefore, based upon the authorities cited above, including *Bredice*, *Jaffee*, and *Weekoty*, and those authorities relied upon therein, it is respectfully requested that this court also recognize the peer review/self-critical analysis privilege, as authorized by Fed. R. Evid. 501.

2. The peer review privilege found in R.C. § 2305.252 should be applied because of the various state law claims that exist in this case.

Additionally, the defendants argue that the peer review privilege found in R.C. § 2305.252 should be applied because of the various state law claims that exist in this case. R.C. § 2305.252 states:

Proceedings and records within the scope of a peer review committee of a health care entity **shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action** against a health care entity or health care provider, including both individuals who provide health care and entities that provide health care, arising out of matters that are the subject of evaluation and review by the peer review committee. No individual who attends a meeting of a peer review committee, serves as a member of a peer review committee, works for or on behalf of a peer review committee, or provides information to a peer review committee **shall be permitted or required to testify in any civil action** as to any evidence or other matters produced or presented during the proceedings of the peer review committee or as to any finding, recommendation, evaluation, opinion, or other action of the committee or a member thereof. *** **An order by a court to produce for discovery or for use at trial the proceedings or records described in this section is a final order.** (Emphasis added.)

The purpose of the statute is to protect the integrity of the peer review process in order to improve the quality of health care. *Giusti v. Akron Gen. Med. Ctr.* (Summit App. 2008), 178 Ohio App. 3d 53 (citing *Gureasko v. Bethesda Hosp.* (1996), 116 Ohio App. 3d 724, 730 (citing *Gates v. Brewer* (1981), 2 Ohio App. 3d 347, 349 (upholding the constitutionality of R.C. 2305.251, the former version of the peer review statute))).

The plaintiff has cited *Keen v. Hancock Cty. Job & Fam. Services*, 581 F. Supp.2d 893 (N.D. Ohio 2008) for the proposition that the Sixth Circuit will not apply a state law privilege even if the information it protects would be relevant to pendent state law claims. However, even in *Keen*, the court noted that "[t]o decide whether to recognize Ohio's statutory privilege, a federal court must balance the policy interests served by recognizing the state's privilege against the policy interests

served by allowing the claimant to access the requested information." *Keen* at 895 (citing *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983)).

In *Keen*, which was an action to enforce a subpoena for records to be used in a federal court habeas corpus proceeding in Tennessee, the plaintiff Keen sought production of records in the possession of the Hancock County Job and Family Services Agency, which were protected by R.C. § 5153.17. Keen alleged that those documents contained information regarding his own childhood development, which might be helpful for mitigation at a capital sentencing proceeding. The court decided that it must weigh Keen's interests with Ohio's interest, codified in R.C. § 5153.17, in familial privacy. *Keen* at 895. The court also held that in order to do so, it would conduct an in camera inspection before determining whether or not to release the records to Keen's habeas counsel. *Id.*

Unlike the records in *Keen*, which were records pertaining to plaintiff Keen's own childhood that could potentially spare his life, the records sought by the plaintiff in the instant action are records that were made in compliance with Cuyahoga County Jail policy for the express purpose of health care quality control. They are expressly within the realm of records that are protected under R.C. § 2503.252. They are not medical records made in the course of treatment, but rather a candid and retrospective review of the care provided to a patient for the purpose of continuously improving health care standards in the Cuyahoga County Jail. The very purpose of the County's policies and R.C. § 2305.252 would be compromised by releasing this information. As noted above, the policy interests in keeping such information confidential is so strong that the policy and privilege is codified in every state. For this additional reason, plaintiff's motion to compel should be denied.

3. Cases in the Sixth Circuit have recognized and applied the peer review privilege.

Despite plaintiff's statements to the contrary, there is indeed Sixth Circuit precedent to support the application of R.C. § 2305.252 in a federal question case. In *Talwar v. Catholic Healthcare Partners*, 258 Fed. Appx. 800 (6th Cir. 2007), the Sixth Circuit affirmed the district court's decision to grant summary judgment to the defendant hospital based on the peer review immunities found in R.C. § 2305.252, and to deny the plaintiff doctor's motion to compel records based on the peer review discovery privilege in the same statute.¹ The district court had applied this state law rule of privilege despite the fact that one of the doctor's claims was made pursuant to 42 U.S.C. §1981.

Additionally, courts in the Sixth Circuit have recognized and applied a peer review privilege for medical review documents in prisoner civil rights cases. Particularly instructive to the instant case, though blatantly ignored by the plaintiff², is the district court's decision in *Hadix v. Caruso*, 2006 U.S. Dist. LEXIS 72967 (W.D. Mich. 2006). In *Hadix*, which was a §1983 case concerning prison healthcare, the court affirmed a magistrate judge's decision to deny the plaintiff's motion to compel production of peer review medical documents requested in discovery based on the peer review privilege. *Id.* at *3. In doing so, the court relied on *United States v. Michigan*, 940 F.2d 143, 161-166, at footnote 12 (6th Cir. 1991), in which the Sixth Circuit criticized the district court's

¹ The district court's decision is reported at *Talwar v. Catholic Healthcare Partners*, 2006 U.S. Dist. LEXIS 88280 (N.D. Ohio 2006).

² In her motion to compel, the plaintiff cites to *Jenkins v. DeKalb Cty., Ga.*, 242 F.R.D. 652 (N.D. Ga. 2007) for the proposition that "there appears to be no case from the Supreme Court or Sixth Circuit Court of Appeals that recognizes a peer review privilege under federal common law, and Congress has not codified such a privilege." (See plaintiff's motion to compel at p. 10.) The plaintiff's reliance on this case is mysterious as *Jenkins* is not a Supreme Court or Sixth Circuit case. Even more mysterious is the fact that the *Jenkins* court cites to *Hadix*, a case from a district court within the Sixth Circuit, and notes that "one district court, however, has held that a peer review privilege should exist for medical peer review in prisons." *Jenkins* at 660.

failure to recognize a peer review privilege.³ *Hadix* at *4. Instead of just briefly noting the existence/non-existence of the peer review privilege, or commenting on its various application in cases with facts dissimilar to those found in *Hadix*, or the instant case, the *Hadix* court conducted a multi-page **compelling and meaningful analysis** of the peer review privilege's history and purpose.

The court in *Hadix* reasoned that many of the decisions which have relied on *University of Pennsylvania*, cited supra, have applied it "over broadly to contexts which were not intended by the Supreme Court and which belie the intent of Rule 501 (to allow a flexible approach to the federal common law of privilege which serves important national interests)." *Hadix* at *5.

In its discussion, the court cited *Bredice* and *Weekoty*, both supra, and noted that all 50 states have laws protecting medical peer review. *Hadix* at *6. The court stated that the "purpose of these laws is obvious on their face. If medical malpractice suitors are permitted access to institutionally self-critical analysis, then the self-critical analysis and attendant improvements of medical services will stop." *Id.* at *7. (citing *HCA Health Servs. of Va. Inc. v. Levin*, 260 Va. 215, 230 (Va. 2000)).

The court in *Hadix* also discussed how it found the peer review privilege analysis of other courts either non-applicable or unpersuasive. *Hadix* at *8. The court stated:

Additionally, the four Sixth Circuit cases also cited by the plaintiff in the same paragraph are not § 1983 prison health care cases.

³ The Sixth Circuit court in *United States v. Michigan*, while recognizing this privilege, reversed a decision permitting access to the subject documents because the subject order "unduly modified the underlying Consent Decree" and not because of the privilege per se. *Hadix* at *4.

Prisoner civil rights cases founded on Eighth Amendment claims that doctors failed to provide adequate medical care are the federal equivalent of state medical malpractice suits (with the caveat that liability in such suits depends on a showing of intentional or reckless disregard of the prisoner's rights). These suits are the very object of the state statutes which create the peer review privilege, especially as it relates to peer review of prison facilities. *Id.* at *9.

The *Hadix* court also found that discovery of the subject materials is **not necessary to protect a prisoner's Eighth Amendment interests, whose interests are protected by an "individualized review of the prisoner's own medical records."** *Id.* at *9 (emphasis added). In applying the privilege, the court noted that "a contrary ruling would eliminate candor in the peer review process and translate it into a kind of perfunctory administrative review which would not protect prisoner life or health." *Id.* The court went on to state:

Peer review of medical performance is important in any institution and has added importance as to public health care of a vulnerable (prison) population. Peer review is also essential to the prison context because non-medical administrators lack the expertise to review the competence of medical doctors and staff. *Id.* at *10 (citing *Casiano v. Gonzales*, 2006 U.S. Dist. LEXIS 3593 (N.D. Fla. 2006)(discussing peer review system of a U.S. Bureau of Prison's facility in Florida) (emphasis added)).

Like the documents in *Hadix*, the documents being sought by the plaintiff in the instant case are not essential to protect a prisoner's Eighth Amendment rights, and discovery of these documents would have a chilling effect on the peer review process embodied in the relevant county policies. Again, they are not medical records made in the course of treatment, but rather a candid and retrospective review of the care provided to a patient for the purpose of continuously improving health care standards in the Cuyahoga County Jail. The very purpose of the County's policies would be compromised by releasing this information.

III. CONCLUSION

Based on the overwhelming public interest of keeping mortality reviews and related quality control programs confidential in an effort to continuously improve the policies relating to prisoner health care, the peer review/self-critical analysis privilege is applicable under Fed. R. Evid. 501. This position is supported by *Jaffee*, *Bredice*, *Weekoty*, *Talwar*, *United States v. Michigan*, *Hadix* and related authority. Additionally, the peer review privilege found in R.C. § 2305.252 applies to the documents requested by the plaintiff.

Therefore, for all of these reasons, defendants respectfully request that the plaintiff's motion to compel be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that on February 15, 2010, a copy of the foregoing **DEFENDANTS CUYAHOGA COUNTY/BOARD OF COUNTY COMMISSIONERS, GERALD T. MCFAUL, KENNETH KOICHEVAR, CHRISTINE DUBBER, JANE LAWRENCE, CHRISTINE MAIN AND CYNNAMON ALI'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY OF MORTALITY REVIEWS AND DOCUMENTS RELATED TO THE CONTINUOUS QUALITY IMPROVEMENT PROGRAM** was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

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