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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

ROSIE BOPARAI, M.D.,)	Case No.: 1:09-cv-01164 AWI JLT
Plaintiff,)	ORDER GRANTING IN PART AND DENYING
)	IN PART PLAINTIFF’S MOTION TO COMPEL
v.)	PRODUCTION OF DOCUMENTS
)	(Doc. 48)
ERIC K. SHINSEKI, et. al,)	
Defendants.)	

Dr. Rosie Boparai was a physician employed by the Department of Veterans Affairs. (Doc. 1) In this role, in July and August 2006 she treated a patient who had a skin rash. (Doc. 49 at 6.) In October 2006, the patient again sought treatment for the rash at the VA’s urgent care facility in West Los Angeles. Id. At that time, the patient was diagnosed with skin cancer. Id. On February 12, 2007, the patient’s family filed a complaint related to the care the patient received. Id. at 7. A few weeks later, the patient died. Id. A group of peers reviewed the case and determined that “most experienced, competent practitioners might have managed the case differently.”¹ (Doc. 49 at 7.)

Before these events, in 2006, Dr. Boporai filed an EEOC complaint claiming that she had

¹It is unclear to the Court whether the peer review process was initiated due to the complaint or due to the patient’s death.

1 suffered discrimination. (Doc. 1) Plaintiff contends that the conclusion of the peer review was incorrect
2 and was retaliation for her earlier EEOC complaint. (Doc 49, Ex. 1 at 5) In furtherance of the retaliation,
3 Plaintiff claims that Defendants also conducted an “open disclosure,” during which they told information
4 to the patient’s family that blamed her for the patient’s outcome. (Doc. 1)

5 In this motion, Plaintiff seeks, in essence, four categories of documents; documents related to
6 the peer review for the patient-case at issue and statistical information related to other peer reviews
7 conducted, the patient’s medical records and demographic information related to other employees of the
8 VA in the Greater Los Angeles (“GLA”) area.

9 On November 8, 2010, the Court heard argument regarding this motion. The Court has read and
10 considered the pleadings and the arguments of Dr. Boparai and counsel. For the reasons discussed
11 below, the Court **GRANTS IN PART** and **DENIES IN PART** the motion to compel.

12 I. Scope of Discovery

13 The scope and limitations of discovery are set forth by the Federal Rules of Civil Procedure and
14 Evidence. Fed.R.Civ.P. 26(b) states:

15 Unless otherwise limited by court order, parties may obtain discovery regarding any
16 nonprivileged matter that is relevant to any party’s claim or defense – including the
17 existence, description, nature, custody, condition, and location of any documents or other
18 tangible things. . . For good cause, the court may order discovery of any matter relevant
to the subject matter involved in the accident. Relevant information need not be
admissible at the trial if the discovery appears reasonably calculated to lead to the
discovery of admissible evidence.

19 Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that
20 is of consequence to the determination of the action more probable or less probable than it would be
21 without the evidence.” Fed.R.Evid. 401. Further, relevance is interpreted “broadly to encompass any
22 matter that bears on, or that reasonably could lead to other matter that could bear on any issue that is or
23 may be in the case.” Oppenheimer Fund, Inc. v. Sanders, 427 U.S. 340, 351 (1978).

24 II. Requests for Production of Documents

25 The propounding party may request documents “in the responding party’s possession, custody,
26 or control.” Fed.R.Civ.P. 34(a). A request is adequate if it describes items with “reasonable
27 particularity;” specifies a reasonable time, place, and manner for the inspection; and specifies the form
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1 or forms in which electronic information can be produced. Fed.R.Civ.P. 34(b). A request is sufficiently
2 clear and unambiguous if it “places the party upon ‘reasonable notice of what is called for and what is
3 not.’” Kidwiler v. Progressive Paloverde Ins. Co., 192 F.R.D. 193, 202 (N.D. W. Va. 2000), quoting
4 Parsons v. Jefferson-Pilot Corp., 141 F.R.D. 408, 412 (M.D.N.C. 1992); see also 2 Schwarzer, Tashima
5 & Wagstaffe, Federal Civil Procedure Before Trial (2003) Discovery, para. 11:1886 (test is whether a
6 respondent of average intelligence would know what items to produce).

7 The responding party must respond in writing and is obliged to produce all specified relevant and
8 non-privileged documents, tangible things, or electronically stored information in its “possession,
9 custody, or control” on the date specified. Fed.R.Civ.P. 34(a). In the alternative, a party may state an
10 objection to a request, including the reasons. Fed.R.Civ.P. 34(b)(2)(A)-(B). When a party resists
11 discovery, he “has the burden to show that discovery should not be allowed, and has the burden of
12 clarifying, explaining, and supporting its objections.” Oakes v. Halvorsen Marine Ltd, 189 F.R.D 281,
13 283 (C.D. Cal. 1998), citing Nestle Food Corp. v. Aetna Cas. & Sur. Co., 135 F.R.D. 101, 104 (D.N.J.
14 1990). Finally, if a party “fails to respond that inspection will be permitted - or fails to permit inspection
15 - as requested under Rule 34,” the propounding party may make a motion to compel production of
16 documents. Fed.R.Civ.P. 37(a)(3)(B)(iv).

17 III. Analysis

18 A. 38 USC § 5705

19 In 38 USC § 5705(a), Congress set forth the requirements for the Veterans Administration to
20 assure the quality of the medicine provided to its veteran-patients. This section reads, in pertinent part,

21 Records and documents created by the Department as part of a medical quality-assurance
22 program (other than reports submitted pursuant to section 7311(g) of this title [38 USCS
23 § 7311(g)]) are confidential and privileged and may not be disclosed to any person or
entity except as provided in subsection (b) of this section.²

24 The Code of Federal Regulations contains an extensive regulatory scheme promulgated to effectuate the
25 privilege created by 38 USC § 5705. Notably, 38 C.F.R § 17.500(a) provides,

26 Section 5705, title 38, United States Code was enacted to protect the integrity of the
27 VA’s medical quality assurance program by making confidential and privileged certain

28 ²The exceptions outlined in subsection (b) do not apply here.

1 records and documents generated by this program and information contained therein.
2 Disclosure of quality assurance records and documents made confidential and privileged
3 by 38 U.S.C. 5705 and the regulations in §§ 17.500 through 17.511 may only be made
4 in accordance with the provisions of 38 U.S.C. 5705 and those regulations.

4 The regulations identify four categories of quality assurance review documents that are protected from
5 disclosure according to 38 USC § 5705. The two that are at issue here are, “(1) Monitoring and
6 evaluation reviews conducted by a facility . . . [and] (2) Focused reviews which address specific issues
7 or incidents and which are designated by the reviewing office at the outset of the review as protected by
8 38 U.S.C. § 5705 and the regulations in §§ 17.500 through 17.51.”³ 38 CFR 17.501(a)(1), (2). In
9 addition, VHA Directive 2008-004 addresses peer review procedures and the confidentiality related
10 thereto. (Doc. 48, Ex 1 at 1) The Directive specifically protects peer documents that identify individual
11 providers, patients or reviewers or which contain “discussions relating to the quality of VA patient care.”
12 Id. at 2. Likewise, it makes confidential all documents related to peer reviews pursuant to 38 USC §
13 5705. Id. at 2-3. The Directive cautions, “All documents associated with the protected peer review need
14 to be treated as strictly confidential, unless determined otherwise after careful review . . . by qualified
15 VHA personnel.”⁴ Id. at 4. The Directive continues, “A protected peer review is to be conducted as part
16 of a facility’s quality management program and may not be disclosed outside of the quality management
17 process.” Id.

18 On the other hand, the Directive permits disclosure of aggregated peer review findings as long
19 as the confidentiality of the identities of those involved and the name of the providers is preserved. (Doc.
20 48, Ex 1 at 4) Likewise, any aggregated information and summary documents that do not identify VA
21 patients, VHA employees or peer reviewers may be disclosed. Id.

22 Courts have considered the confidentiality imposed by 38 USC § 3705 and generally have
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25 ³Notably, 38 CFR § 17.508(e) permits medical personnel who provided care to the patient to have “access to
26 confidential and privileged quality assurance records and documents relating to evaluation of the care they provided.”
27 Therefore, because Dr. Boparai was a doctor who provided care to the patient at issue, it appears that she is entitled to have
28 “access” to the peer review documents. However, this does not resolve the inquiry into whether Dr. Boparai is entitled to
discover and use of these documents in this litigation.

⁴Rather than determining that the peer review documents may be disclosed, the Defendant continues to maintain that
it should remain confidential.

1 refused to allow disclosure of peer review documents in litigation. For example, in Bethel v. United
2 States, 242 FRD 580, 584 (D. Colo. 2007), the Court refused to compel production of peer review
3 documents to a patient who claimed that he had suffered medical malpractice at the VA hospital
4 although it granted disclosure of documents that were not made confidential by 38 USC § 3705, the
5 instituting regulations or the VHA Directive 2002-043. Thus, to the extent that Dr. Boparai seeks peer
6 review documents, *except* aggregated information or peer documents that were created *before* the peer
7 review, the motion is **DENIED**.

8 B. Patient Medical Records

9 Dr. Boparai seeks copies of the medical records associated with the patient at issue and agrees
10 that redaction may occur to preserve the patient's privacy. Defendant objected to producing the
11 documents based upon patient confidentiality but, at the time of hearing, clarified that it did so based
12 upon its obligation to preserve the patient's privacy. Thus, Plaintiff's motion for copies of the medical
13 records of the patient at issue is **GRANTED** in redacted form. Defendant is **ORDERED** to redact
14 copies of the medical record of the patient at issue to remove or obliterate all patient identifiers and all
15 identifying information. The redacted records are **ORDERED** to be produced to Dr. Boparai no later
16 than November 18, 2010.

17 C. Request for Production of Documents - Set One

18 Request No. 1

19 Plaintiff requested documents related to the "open disclosure." Defendant responded that the
20 only document responsive is contained in the patient's medical record. For the reason set forth above,
21 the motion to produce documents responsive to Request No. 1 is **GRANTED** with the proviso that all
22 of the patient's identifiers and all identifying information will be redacted.

23 Request No. 2

24 Plaintiff requested documents related to the peer review, root cause analysis and "any other
25 review" related to the patient's care at issue. Defendant provided policies related to the peer review
26 process and identified the documents generated in the peer review as responsive but refused to produce
27 the documents themselves based upon 38 USC § 5705 and VHA Directive 2008-004. For the reasons
28 set forth above, the motion to produce documents responsive to Request No. 2 is **DENIED**.

1 Request No. 3

2 Plaintiff requested documents relating “Risk Management” as to the care received by the patient
3 at issue. In his written response, Defendant asserted the attorney-client and attorney work product
4 privilege but responded that there were no documents responsive. At the hearing, the Defendant agreed
5 to search again for responsive documents related to an entry in the patient’s medical chart.

6 Therefore, Defendant is **ORDERED** to conduct a comprehensive search for responsive
7 documents. If documents are found, Defendant is **ORDERED** to produce the documents or a privilege
8 log no later than November 18, 2010. If the latter occurs, Dr. Boporai is permitted to review the
9 privilege log and, if she believes it is insufficient, she will meet and confer with Defendant’s counsel.
10 If the parties cannot resolve the matter, Defendant is **ORDERED** to submit the privilege log and copies
11 of the documents to the Court for an in camera review. If there are few documents, Defendant will
12 provide the privilege log and the documents to the Court via e-mail to JLTorders@caed.uscourts.gov.
13 Otherwise, Defendant will submit the documents to this Magistrate Judge Thurston’s chambers via
14 USPS other document service. If Defendant wishes return of the documents produced, he must provide
15 a postage-paid, self addressed envelope. Otherwise, the Court will destroy the documents after review.

16 Request Nos. 4, 5 and 9

17 Plaintiff requested copies of the medical records of the patient at issue, photos of the patient’s
18 skin condition and all documents demonstrating that the patient had cancer on June 13, 2006 and any
19 documents that demonstrate that the cancer diagnosis should have occurred while Dr. Boparai was the
20 treating physician. As noted above, Defendant objected to the production request based upon patient
21 privacy grounds. For the reasons set forth above, the motion to produce redacted documents (as
22 described above) responsive to Request Nos. 4 and 5 is **GRANTED**.

23 Request No. 6

24 Plaintiff requested “non-privileged” peer review documents. In the joint statement, Plaintiff
25 explained that she is seeking aggregated, statistical information relating to other peer reviews.
26 Defendant responded to the request by stating that he has discovered and will produce responsive
27 documents. Therefore, the motion to produce documents responsive to Request No. 6 is **GRANTED**.

1 Request No. 7

2 Plaintiff sought records related to “open disclosures” as to other patients that she did not treat
3 and whose care is not at issue here. At argument, Plaintiff explained that she sought these records to
4 determine whether other doctors had suffered Title VII violations as evidenced by discrimination-minded
5 “open disclosures.” Defendant explained that all documentation related to open disclosures are
6 maintained in patient records.

7 The Court finds that Plaintiff has not demonstrated a legal basis for invading the medical records
8 of patients whose care is not at issue here. Though it is possible that the records may demonstrate a
9 discriminatory animus held by Defendant, Plaintiff has not alleged here that her peer review or the open
10 disclosure event related to her patient occurred due to unlawful discrimination. Likewise, her complaint
11 does not raise a hostile work environment claim.⁵ (Doc 49 at 3-4) Plaintiff’s complaint is limited to
12 unlawful retaliation for filing the earlier EEOC complaint. Id. Moreover, even if she had alleged a
13 hostile work environment, she would not be permitted to cite to other instances of discrimination to
14 bolster her claim because she has made no claim that she knew of any. Brooks v. City of San Mateo,
15 229 F.3d 917, 924 (9th Cir. 2000)(acts of which the plaintiff was not aware cannot have caused her to
16 believe that the work environment was hostile). Therefore, the motion to produce documents responsive
17 to Request No. 7 is **DENIED**.

18 Request No. 8

19 Plaintiff seeks aggregated information about the demographic characteristics of the employees
20 of the VA’s GLA office. Also, she seeks the demographic information about those who participated in
21 the open disclosure, peer review and risk management efforts related to the patient at issue. Defendant
22 has responded that he has no responsive documents. However, Plaintiff has clarified that she was
23 required to complete demographic questionnaire forms in 2009, so she knows that the documents exist,
24 at least in 2009.

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27 ⁵ Plaintiff’s complaint alleges, as to the Court’s jurisdiction that, “I am filing this case under Title VII (Discrimination
28 due to race, color, religion, sex, national origin or reprisal.” (Doc. 1) However, the complaint and the join statement clarify
that the cause of action, however, is for retaliation “for my prior EEOC complaint in 2006 . . .” Id.

1 Defendant's counsel countered that simply because the documents were required in 2009 does
2 not mean that similar documents existed in 2006 and 2007. Therefore, the Court **ORDERS** Defendant
3 to conduct a comprehensive search for documents reflecting aggregated demographic information for
4 all employees of the GLA for the time period June 2006 through December 2007 and documents
5 reflecting the demographic information, if they exist, of those who participated in the open disclosure,
6 peer review and risk management⁶ efforts at issue in this case, related to the patient at issue. If
7 documents are found, Defendant is **ORDERED** to produce them no later than November 18, 2010.

8 D. Requests - Set Two

9 Because the Request for Production Set Two was not served until September 15, 2010, one day
10 before the discovery deadline, it was not timely. The Scheduling Order issued on February 17, 2010
11 reads, "The parties are ordered to *complete* all discovery pertaining to non-experts on or before
12 September 16, 2010 . . ." (Doc. 14, emphasis added) Because propounding discovery one day before
13 the deadline left insufficient time for Defendant to respond before the deadline, the Request for
14 Production of Documents Set Two was not timely. Therefore, the motion to produce further documents
15 responsive to the Request for Production of Documents Set Two, is **DENIED**.

16 **ORDER**

17 Based on the foregoing, the Motion to Compel Production of Documents (Doc. 48) is
18 **GRANTED IN PART** and **DENIED IN PART** as follows:

- 19 1. The Motion to Compel Production for Requests 1, 4, 5, 6 and 9 is **GRANTED**.
- 20 2. If any responsive documents exist, the Motion to Compel Production for Request 8 is
21 **GRANTED**.
- 22 3. As to Request No. 3, Defendant is **ORDERED** to conduct a comprehensive search for
23 responsive documents. If documents are found, Defendant is **ORDERED** to produce the
24 documents or a privilege log no later than November 18, 2010. If the latter occurs, Dr.
25 Boporai is permitted to review the privilege log and if she believes it is insufficient, she
26 will meet and confer with Defendant's counsel. If the parties cannot resolve the matter,

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28 ⁶ "Risk management" documents are limited to those outlined in the Court's order as to Request No. 3.

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Defendant is **ORDERED** to submit the privilege log and copies of the documents to the Court for an in camera review.

4. As to all remaining requests, the motion is **DENIED**.

5. The Defendant is **ORDERED** to produce the documents required herein no later than November 18, 2010.

IT IS SO ORDERED.

Dated: November 12, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE