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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MELISSA SOTO,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 13-cv-2359-BAS (DHB)

**ORDER RESOLVING JOINT  
MOTION REGARDING  
PLAINTIFF'S REQUEST FOR  
PRODUCTION OF DOCUMENTS**

**[ECF No. 21]**

On August 28, 2014, the parties filed a joint motion regarding Defendant the United States of America's responses to Plaintiff Melissa Soto's requests for production of documents. (ECF No. 21.) As part of Defendant's responses to the document requests, Defendant produced a privilege log identifying eleven documents as being privileged under the quality assurance privilege found in 25 U.S.C. § 1675. Plaintiff contends that all, or at least some, of the documents fall outside the scope of the quality assurance privilege. The parties have met and conferred in an effort to resolve this dispute. However, they have been unable to reach agreement as to whether Defendant must produce the documents at issue. Thus, the parties seek the Court's assistance in resolving this dispute. For the reasons set forth below, the Court finds that all of the documents listed in Defendant's privilege log are indeed privileged pursuant to the quality assurance privilege set forth in 25 U.S.C. § 1675, and that Defendant is not required to produce them.

1 **I. BACKGROUND**

2 Plaintiff alleges in her First Amended Complaint (ECF No. 10) that Dr. Rocio D.  
3 Guzman, D.M.D., committed dental malpractice on February 1, 2012, when he  
4 negligently severed Plaintiff’s right lingual nerve while performing a surgical extraction  
5 of two of Plaintiff’s teeth. Plaintiff alleges Dr. Guzman, an employee of the Southern  
6 Indian Health Council, Inc. (“SIHC”), which is itself deemed part of the Public Health  
7 Service of the United States Department of Health and Human Services, failed to  
8 adequately explain to Plaintiff the risks associated with the surgery. Plaintiff further  
9 alleges that as a result of the severed lingual nerve, she has lost all sensation in the right  
10 side of her tongue, including her ability to taste.

11 **II. LEGAL STANDARD**

12 As noted, by withholding the disputed documents, Defendant relies on the quality  
13 assurance privilege contained in 25 U.S.C. § 1675. This statute defines “medical quality  
14 assurance program” as:

15 any activity carried out before, on, or after the date of enactment of the  
16 Indian Health Care Improvement Reauthorization and Extension Act of  
17 2009 [enacted March 23, 2010] by or for any Indian health program or  
18 urban Indian organization to assess the quality of medical care, including  
19 activities conducted by or on behalf of individuals, Indian health program  
20 or urban Indian organization medical or dental treatment review committees,  
or other review bodies responsible for quality assurance, credentials,  
infection control, patient safety, patient care assessment (including treatment  
procedures, blood, drugs, and therapeutics), medical records, health  
resources management review, and identification and prevention of medical  
or dental incidents and risks.

21 25 U.S.C. § 1675(a)(2).

22 The statute defines “medical quality assurance record” as “the proceedings,  
23 records, minutes, and reports that (A) emanate from quality assurance program activities  
24 described [above]; and (B) are produced or compiled by or for an Indian health program  
25 or urban Indian organization as part of a medical quality assurance program.” 25 U.S.C.  
26 § 1675(a)(3). Medical quality assurance records under the statute are “confidential and  
27 privileged” and, subject to certain exceptions which the Court finds inapplicable here,  
28 they “may not be disclosed to any person or entity.” 25 U.S.C. § 1675(b). Further,

1 subject to certain exceptions which, again, do not apply here, medical quality assurance  
2 records cannot “be subject to discovery or admitted into evidence in any judicial or  
3 administrative proceeding.” 25 U.S.C. § 1675(c)(1).

### 4 III. DISCUSSION

#### 5 A. Parties’ Arguments

6 As noted above, the parties dispute whether various documents identified in  
7 Defendant’s privilege log fall within the Quality Assurance privilege. The documents,  
8 which have been provided to the Court for an *in camera* review<sup>1</sup>, consist of emails,  
9 handwritten notes, information printed from an internet site, and reports.

10 Plaintiff first contends that the emails, handwritten reports, and the information  
11 obtained from the internet do not qualify as privileged under 25 U.S.C. § 1675 because,  
12 under the doctrine of *expression unius est exclusio alterius*, it is presumed that “when a  
13 statute designates certain persons, things, or manners of operation, all omissions should  
14 be understood as exclusions.” *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 885  
15 (9th Cir. 2005) (quoting *Boudette v. Barnette*, 923 F.2d 754, 756-57 (9th Cir. 1991)).  
16 The statute defines privileged medical quality assurance records as “proceedings, records,  
17 minutes, and reports.” 25 U.S.C. § 1675(a)(3). According to Plaintiff, this list is  
18 exclusive and does not identify communications, notes, or information found on an  
19 internet site as being privileged.

20 Plaintiff next contends that the remaining documents, which consist of three  
21 reports, should not qualify under the quality assurance privilege because it is not clear  
22 from the privilege log whether the reports “emanate” from medical quality assurance  
23 program activities as contemplated by the statute or whether one of the three reports even  
24 involves anyone related to SIHC’s quality assurance program.

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26 <sup>1</sup> Notwithstanding the statute’s prohibition of disclosure of privileged documents,  
27 *in camera* review by the Court is appropriate to determine whether the documents are  
28 privileged. *See Smith v. United States*, 193 F.R.D. 201, 207 (D. Del. 2000) (“[T]here is  
a long tradition of federal courts conducting an *in camera* review of potential evidence,  
even in the face of a[n] evidentiary privilege asserted by the government.”). In addition,  
the parties agreed that *in camera* review is appropriate in this case. (*See* ECF No. 21 at  
5:13-6:8, 11:2-5.)

1 Defendant contends that Plaintiff incorrectly argues that the definition of a medical  
2 quality assurance record necessarily excludes emails, handwritten documents, and  
3 information obtained from the internet. Rather, Defendant argues, any “record” that  
4 emanates from quality assurance program activities and is produced or compiled as part  
5 of a medical quality assurance program is privileged under the statute. Defendant also  
6 points out that the statute’s definition of a medical quality assurance program consists of  
7 “*any activity . . . to assess the quality of medical care.*” 25 U.S.C. § 1675(a)(2) (emphasis  
8 added). Further, Defendant contends that the declarations of Dr. Guzman and Meghan  
9 Lenaghan (ECF Nos. 25, 24), SIHC’s quality control coordinator, demonstrate that all of  
10 the documents listed in Defendant’s privilege log emanated from SIHC’s quality  
11 assurance program activities and were produced or compiled by SIHC as part of its  
12 medical quality assurance program.

13 **B. Analysis**

14 Upon review of the lodged documents, the parties’ arguments and the relevant case  
15 law, the Court concludes that all of the documents in question are privileged medical  
16 quality assurance records within the meaning of 25 U.S.C. § 1675 and should not be  
17 produced by Defendant.

18 As an initial matter, SIHC is an Indian health program within the meaning of the  
19 statute. Moreover, it is clearly evident based on the Court’s review of Ms. Lenaghan’s  
20 declaration and the lodged documents that SIHC carries out a medical quality assurance  
21 program and that, following Plaintiff’s February 1, 2012 procedure, SIHC’s medical  
22 quality assurance program assessed the quality of Plaintiff’s dental care for purposes of  
23 its quality assurance review and to identify and prevent future incidents and risks.  
24 Moreover, all of the disputed documents emanated from SIHC’s quality assurance  
25 program activities and were produced or compiled as part of the medical quality  
26 assurance program. The documents clearly are the types of documents that a medical  
27 institution would produce and compile to assess its quality of patient care. Moreover, the  
28 documents all relate to SIHC’s review and assessment of Plaintiff’s visit, the details of

1 her procedure, and correspondence involving Ms. Lenaghan, SIHC’s quality control  
2 coordinator.

3 Thus, the only question left unanswered is whether the documents fall within the  
4 statute’s definition of medical quality assurance records, meaning that they are  
5 “proceedings, records, minutes, [or] reports.” 28 U.S.C. § 1675(a)(3). The Court finds  
6 that all of the documents fall within the scope of this definition.

7 First, the Court recognizes there are no recorded judicial decisions citing 25 U.S.C.  
8 § 1675. Thus, the scope of the statute’s definition of medical quality assurance records  
9 is an issue of first impression.

10 Second, under the plain language of 25 U.S.C. § 1675(a)(3), the three documents  
11 identified as “reports” in Defendant’s privilege log are medical quality assurance records  
12 subject to the protection of the quality assurance privilege. The Court’s review of these  
13 three documents confirms that they are indeed reports entitled to protection.

14 Third, with respect to the email communications and the information obtained from  
15 the internet, the Court finds no basis to interpret “records” as narrowly as Plaintiff  
16 suggests. Rather, in light of the statute’s policy of encouraging medical institutions to  
17 improve their level of patient care and make appropriate corrective or preventative  
18 measures, the Court views the definition of “records” broadly in a manner that  
19 encompasses the correspondences between the quality assurance staff and the medical  
20 staff. The Court also interprets the definition to include information obtained to facilitate  
21 the quality assurance program’s review, whether that information be obtained from the  
22 internet, as occurred in this case, or some other source.

23 The Court’s conclusion is supported by judicial interpretation of a virtually  
24 identical statute, 10 U.S.C. § 1102<sup>2</sup>, which sets forth a quality assurance privilege related

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26 <sup>2</sup> The Fifth Circuit has recognized that in enacting 10 U.S.C. § 1102, “Congress  
27 recognized that ‘medical quality assurance programs are the primary mechanism by  
28 to Department of Defense beneficiaries,’” and that Congress enacted the statute in 1986  
“to bar the discovery or use of medical quality assurance records in litigation except in  
certain limited instances” due to Congress’ “then-current fear [that] ‘release of committee

1 to medical care provided to Department of Defense beneficiaries. The quality assurance  
2 privilege in 10 U.S.C. § 1102 is virtually identical to that contained in 25 U.S.C. § 1675,  
3 including the definitions of medical quality assurance program and medical quality  
4 assurance record. Thus, 10 U.S.C. § 1102 provides significantly persuasive authority as  
5 to the scope of 25 U.S.C. § 1675.

6 In *Maynard v. United States*, 133 F.R.D. 107, 108 (D. N.J. 1990), the court was  
7 tasked with determining whether certain documents were confidential and privileged  
8 under 10 U.S.C. § 1102. In that case, where a patient's parent alleged negligence against  
9 an army hospital, the court found that a memorandum from a quality assurance  
10 coordinator to the chief of the nursing department, a report of unusual occurrence, and  
11 a portion of the minutes of a risk management committee were all medical quality  
12 assurance reports protected from disclosure. *Id.* at 108. Similarly, in *Cole v.*  
13 *McNaughton*, 742 F. Supp. 587, 588, 591 (W.D. Okla. 1990), the court found that several  
14 letters generated as part of an army hospital's quality assurance review constituted  
15 confidential and privileged medical quality assurance records under 10 U.S.C. § 1102.  
16 Just as the *Maynard* and *Cole* decisions concluded that communications fall within the  
17 definition of medical quality assurance records under 10 U.S.C. § 1102, the Court  
18 concludes that the communications identified in Defendant's privilege log are medical  
19 quality assurance records protected under 25 U.S.C. § 1675.

20 The Court finally addresses a provision in 25 U.S.C. § 1675 that might be  
21 interpreted, albeit incorrectly, as permitting a medical quality assurance program to  
22 insulate from discovery documents originating outside the quality assurance program,  
23 such as a patient's medical records. That provision, found at 25 U.S.C. § 1675(I), states:

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25 Nothing in this section shall be construed as limiting access to the  
information in a record created and maintained outside a medical quality

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27 records . . . through discovery in litigation . . . [results in] beneficiaries . . . receiv[ing]  
less than the high quality care they deserve.” *In re United States*, 864 F.2d 1153, 1154  
28 (5th Cir. 1989) (quoting S. REP. NO. 331 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6413,  
6440). These same policies apply to recipients of health care services at Indian health  
programs, as contemplated by 25 U.S.C. § 1675.

1 assurance program, including a patient's medical records, on the grounds  
2 that the information was presented during meetings of a review body that  
are part of a medical quality assurance program.

3 An identical provision, found in 10 U.S.C. § 1102(h), was analyzed in a case  
4 involving a plaintiffs' request for information contained in military-wide databases:

5 After reviewing the language of this statute, the Court now finds that  
6 § 1102(h) does not limit the confidentiality and privilege afforded by  
7 § 1102(a) to information maintained solely within, or originating from, a  
8 quality assurance program. Rather, § 1102(h) provides that information  
9 existing or originating outside of a quality assurance program does not  
10 become confidential and privileged merely by incorporating it into a quality  
11 assurance record. In other words, nothing in § 1102 precludes the disclosure  
12 of a patient's medical files by a hospital, even if those files have been  
13 incorporated into a medical quality assurance record . . . . Section 1102(h)  
14 merely stands for the proposition that a hospital or other entity may not  
insulate a non-privileged, non-confidential document from disclosure by  
filtering it through a quality assurance program. This does not mean,  
however, that § 1102(h) authorizes the disclosure of a patient's medical files  
from a medical quality assurance record. To the contrary, § 1102(a) renders  
such quality assurance records exempt from disclosure. Section 1102(h), on  
the other hand, makes clear that an individual is not precluded from  
obtaining those files from an outside source (i.e., a source other than the  
quality assurance program) simply because they may have been  
incorporated into a quality assurance record.

15 *Dayton Newspapers, Inc. v. Dep't of the Air Force*, 107 F. Supp. 2d 912, 917-18 (S.D.  
16 Ohio 1999).

17 Similarly, the Court finds that Plaintiff is not prevented from obtaining from other  
18 sources certain documents that are found in SIHC's quality assurance file. For example,  
19 Plaintiff is not prevented from obtaining a copy of Dr. Lester Machado's operative report  
20 that was attached to Ms. Lenaghan's April 23, 2010 email to Dr. Guzman. (*See* ECF No.  
21 24 at ¶ 14.) While the body of the email is privileged, Plaintiff's medical records from  
22 Dr. Machado, an outside source who Plaintiff consulted for treatment following the  
23 allegedly negligent surgical procedure at SIHC, are not privileged. In addition, Plaintiff  
24 is not precluded from locating the online information from Drugs.com addressing  
25 Septocaine. The mere fact that these documents are found in SIHC's quality assurance  
26 file does not insulate them from discovery. However, Plaintiff must obtain these outside  
27 documents from sources other than Defendant because the entirety of SIHC's quality  
28 assurance file is privileged under 25 U.S.C. § 1675.

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**IV. CONCLUSION**

For the foregoing reasons, the Court concludes that each of the documents identified in Defendant’s privilege log are medical quality assurance records that are confidential and privileged pursuant to 25 U.S.C. § 1675. Plaintiff’s request to compel production of the documents is, therefore, **DENIED**.

**IT IS SO ORDERED.**

DATED: September 22, 2014

  
DAVID/H. BARTICK  
United States Magistrate Judge