

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MARY HEWETT,)
)
 Plaintiff)
)
 v.) Civil No. 98-206-B
)
 INLAND HOSPITAL,)
)
 Defendant)

Memorandum of Decision and Order

Plaintiff brings this action pursuant to the Emergency Medical Treatment and Active Labor Act, 42 U.S.C.A. § 1395dd (West Supp. 1998) (“EMTALA”). During discovery, Plaintiff propounded a set of interrogatories on Defendant. Defendant raised several objections and this Court held telephone conferences on April 21, 1999, and again on May 7, 1999, in an attempt to resolve them. In the Court’s Report of Telephone Conference and Order dated May 7, 1999, the Court ordered the parties to file briefs discussing whether a medical peer review privilege protects from disclosure the information requested by Plaintiff’s interrogatories Nos. 4 and 5. Those briefs are now before the Court. For the reasons stated below, the Court ORDERS Defendant to provide the information requested by Plaintiff subject to the limitations indicated below.

Background

Plaintiff's interrogatories Nos. 4 and 5 read:

4. Have you taken any action in regard to the rights and privileges of Dr. Brian Gretta within the last five (5) years?
5. If the preceding question was in the affirmative, please indicate what actions were taken, the dates they were taken, who was present when said actions were taken, where they were taken and the results of said actions.

Defendant objects to the interrogatories on several grounds. First, Defendant asserts that Congress protected the information requested from disclosure when it enacted the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. §§ 11101-11145. Second, Defendant argues that state law and federal common law protect the requested information from disclosure. Third, Defendant argues that because EMTALA is not a medical malpractice statute, whether any action was taken against Dr. Gretta is irrelevant. The Court will address each of Defendant's arguments below.

Discussion

A. Federal Statutory Law

Defendant points to the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. §§ 11101-11145, as providing for the confidentiality of professional peer review committees. Defendant cites §11137(b)(1) which reads:

(b) Confidentiality of information

(1) In general

Information reported under this subchapter is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity, as necessary to carry out subsections (b) and (c) of section 11135 of this title (as specified in regulations by the Secretary), or in accordance with regulations of the Secretary promulgated pursuant to subsection (a) of this section. Nothing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure. Information reported under this subchapter that is in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential. The Secretary (or the agency designated under section 11134(b) of this title), on application by any person, shall prepare such information in such form and shall disclose such information in such form.

Defendant directs the Court's attention to the provision in the statute that reads, "[i]nformation reported under this subchapter is considered confidential and shall not be disclosed . . ." as support for its position that Congress intended to create a peer review privilege.

While HCQIA finds "an overriding need to provide incentive and protection for physicians engaging in effective professional peer review," 42 U.S.C.

§ 11101(5), HCQIA extends that protection to only two areas. First, the HCQIA provides qualified immunity to those who participate in the peer review process.⁴² U.S.C. §11111(a)(1). Second, the HCQIA requires that various groups including

insurance companies, medical examiners and health care facilities report actions taken against physicians to a national clearinghouse or repository. 42 U.S.C. §§11131-11133. The information reported to the national clearinghouse or repository, *not the information gathered during the peer review process*, is confidential and privileged. *See Syposs v. United States*, 179 F.R.D.406, 410 (W.D. N.Y. 1998) (finding that 11137(b)(1) only protects from discovery that information reported to the national clearinghouse or repository.); *Bennett v. Fieser*, No. 93-1004-MLB, 1993 WL 566202, at *3 (D. Kan. Oct. 26, 1993) (“Section 11137(b) is not a general peer review privilege, but provides for the confidentiality of only that information provided to the national repository pursuant to the Act.”); *Teasdale v. Marin General Hospital*, 138 F.R.D. 691, 693 (N.D. Cal. 1991) (“Congress spoke loudly with its silence in not including a privilege against discovery of peer review materials in the HCQIA.”); Susan O. Scheutzow, *State Medical Peer Review: High Cost But No Benefit: Is it Time for a Change?*, 25 Am J. L. & Med. 7, 9-10 (1999) (“HCQIA provides immunity for peer review participants, but does not gant a federal evidentiary privilege to the records and deliberations of the peer review process.”). Based upon the plain words in the statute and the authority cited above, the Court is satisfied that 42 U.S.C. § 11137(b)(1) protects only that information reported to the national

clearinghouse. Accordingly, under HCQIA, Plaintiff is entitled to all records gathered during the peer review process but not to the information reported to the national clearinghouse or repository.

B. State law and Federal Common Law

Defendant next invites the Court to conclude that state law and federal common law recognize a peer review privilege that protects the requested information from disclosure. Because this case involves a federal question, the Court determines whether a peer review privilege exists by looking to the federal rules of evidence. Fed. R. Evid. 501 reads, in part:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Therefore this Court must determine whether federal common law supports the conclusion that the information requested by Plaintiff is protected from disclosure.

This Circuit uses a two-part test to determine whether to recognize a privilege. First, this Court must determine whether Maine would recognize the privilege asserted by Defendant. *In re Joyce Hampers*, 651 F.2d 19, 22 (1st Cir. 1981); *Green v. Fulton*, 157 F.R.D. 136, 139 (D. Me. 1994). If the Court

determines that Maine does recognize the privilege, it must then determine whether the privilege is “intrinsicly meritorious”. *Id.*

Defendant points to Me. Stat. Rev. Ann. tit. 32, § 3296 (West 1999) for the proposition that Maine protects the materials requested by Plaintiff from disclosure. The statute reads:

All proceedings and records of proceedings concerning medical staff reviews, hospital reviews and other reviews of medical care conducted by committees of physicians and other health care personnel on behalf of hospitals located within the State or on behalf of individual physicians, when the reviews are required by state or federal law, rule or as a condition of accreditation by the Joint Commission on Accreditation of Hospitals or the American Osteopathic Association Committee on Hospital Accreditation or are conducted under the auspices of the state or county professional society to which the physician belongs, are confidential and are exempt from discovery.

Id.

The parties have not cited any case by the Law Court discussing this statute. Therefore, the Court will look to the plain language of the statute. *Foster v. State Tax Assessor*, 716 A.2d 1012, 1014 (Me. 1998). (“In the interpretation of a statute, we seek to effectuate the intent of the Legislature, which is ordinarily gleaned from the plain language of the statute.”) Applying this rule of construction, the Court is satisfied that the statute clearly exempts from discovery “all proceedings and records of proceedings” produced during the peer review process. Me. Stat.

Rev. Ann. tit. 32, § 3296. However, as stated above, this is not the end of the matter. This Court must next determine whether the privilege is “intrinsically meritorious”.

When deciding whether the privilege is intrinsically meritorious this Court must consider:

(i) whether the communications originate in a confidence that they will not be disclosed;

(ii) whether this element of confidentiality is essential to the ‘full and satisfactory maintenance of the relations between the parties’;

(iii) whether the relationship is a vital one that needs to be fostered;

(iv) whether ‘the inquiry that would inure to the relation by the disclosure of the communications (would be) greater than the benefit thereby gained for the correct disposal of litigation.’”

Hampers, 651 F.2d at 22 (quoting *American Civil Liberties Union of Miss. v.*

Finch, 638 F.2d 1336 (5th Cir. 1981)).

These factors need not be applied in order. *Smith v. Alice Day Peck Mem’l Hosp.*, 148 F.R.D. 51, 56 (D. N.H. 1993). Further, if the Court answers in Plaintiff’s favor in any one of these factors, then the privilege does not apply. *Id.* Applying the fourth element above to this matter, the Court concludes that the information requested is not privileged from disclosure.

When applying this fourth element, courts have basically balanced the interest served by the state privilege against the federal interest in favor of disclosure. *Hampers*, 651 F.2d at 22; *Smith*, 148 F.R.D. at 56. Federal courts are evenly split over whether a medical peer review privilege exists under federal common law. Several found that the federal interest in disclosure is too strong to recognize such a privilege, while others see the need for such a privilege to exist. *See Burrows v. Redbud Community Hosp. Dist.*, No. C-9604345 SI, 1998 WL 1083876, at *12 (N.D. Cal. Jan 13, 1998) (finding that no federal peer review privilege applies in EMTALA action); *Syposs*, 179 F.R.D. at 411-12 (“Medical peer reviews do not enjoy the historical or statutory support upon which other privileges have been recognized in federal law, and the Hospitals have failed to provide any reason to believe some physicians would not provide candid appraisals of their peers absent the asserted privilege.”); *Johnson*, 169 F.R.D. at 560-61 (finding no federal peer review privilege exists.); *But See Weekotty v. United States*, 30 F. Supp. 2d 1343, 1346-47 (D. N.M. 1998) (finding that federal law recognizes medical peer review privilege); *Whitman v. United States*, 108 F.R.D. 5, 7 (D. N.H. 1985) (finding that “federal law now recognizes a privilege protecting hospital peer review records from disclosure.”).

The only case which discusses medical peer review privilege in the context of EMTALA is *Burrows v. Redbud Comm. Hosp.*, No. C-9604345 SI, 1998 WL 1083876, at *12 (N.D. Cal. Jan 13, 1998). In that case the Court determined that while California law protected the medical peer review materials from disclosure, recognizing the privilege “would be inconsistent with the [federal] policy in favor of broad disclosure”. *Burrows*, 1998 WL 1083876, at *12. On this the Court agrees. Further, this Court is, “. . . especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.” *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). As stated above, Congress enacted the HCQIA to protect from disclosure only that information reported to the national clearinghouse or repository and chose not to extend that protection to the information gathered during the peer review process. Additionally, the fact that Congress provided for medical peer review privileges in other federal statutes evidences its intent not to protect medical peer review materials in a matter such as this from disclosure. *See Syposs*, 179 F.R.D. at 411 (stating that in 38 U.S.C. § 5705 Congress provided that certain medical quality assurance records be privileged from disclosure operated by the Department of Veteran Affairs and also

provided similar protection for Defense Department health facilities in 10 U.S.C. § 1102.)

This Court does not feel at liberty to recognize the state privilege in this federal action where Congress “considered the competing concerns and [did] not establish a privilege.” *Syposs*, 179 F.R.D. at 411 (citing *Robertson* at 83). Especially in light of the Supreme Court’s directive to “strictly construe” privileges because they “contravene the fundamental principle that ‘the public . . . has a right to every man’s evidence’” *University of Pennsylvania*, 493 U.S. at 189, quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980). *Id.* Accordingly, the Court concludes that federal common law does not recognize medical peer review privilege in this EMTALA action.

C. Relevancy

Defendant next invites the Court to conclude that the information requested by Plaintiff is not relevant to her EMTALA claim. As the parties are well aware federal law allows for broad discovery. The applicable rule provides that the information need not be admissible at trial. All that is needed is that the information requested be “reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1).

An EMTALA action is not a medical malpractice claim. Therefore, standard of care issues are irrelevant in this action. What is at issue is whether Defendant provided an “appropriate medical screening examination” and whether Defendant stabilized Plaintiff before her transfer to the other hospital. 42 U.S.C. § 1395dd. With this in mind, the Court agrees with Defendant that its request for information on “any action” taken against the treating doctor is too broad and is not calculated to lead to relevant evidence. Whether actions were taken against the doctor outside the emergency room context is irrelevant to an EMTALA claim. However, the Court is also satisfied that whether such actions were taken against the treating doctor because of his failure to properly screen patients *in the emergency room* may lead to relevant evidence. For example, it would be relevant if the treating doctor had continually failed to provide an “appropriate medical screening procedure” in the past to other patients and the hospital failed to take any action. Therefore, the Court ORDERS that Plaintiff’s interrogatory no. 4 be modified to read:

4. Have you taken any action in regard to the rights and privileges of Dr. Brian Gretta within the last five years **with respect to his ability to properly screen and stabilize patients in the emergency room?**

Interrogatory No. 5 remains unchanged.

Conclusion

To reiterate, Defendant must disclose the information requested by Plaintiff subject to two limitations. First, the information reported to the national clearinghouse as contemplated by HCQIA is privileged from disclosure. Second, Defendant need only disclose information regarding actions taken against Dr. Greta as they relate to his ability to properly screen and stabilize patients in the emergency room.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated on July, 1999