

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

G.K., by their next friend,
Katherine Cooper, et al.

v.

Case No. 21-cv-4-PB

Christopher Sununu, Governor
of New Hampshire, et al.

ORDER ON PLAINTIFF'S MOTION TO COMPEL

The plaintiffs in this putative class action are four minors with disabilities who have been placed in the legal custody of the New Hampshire Division of Children, Youth and Families ("DCYF") due to parental abuse or neglect. They have sued New Hampshire Governor Christopher Sununu and other State officials arising out of the operation of the State's foster care system.

Plaintiffs seek declaratory and injunctive relief on behalf of themselves and a putative class on the ground that defendants are violating their rights under the Adoption Assistance and Child Welfare Act of 1990, [42 U.S.C. §§ 671 et seq.](#), Title II of the Americans with Disabilities Act, [42 U.S.C. §§ 12131 et seq.](#), and Section 504 of the Rehabilitation Act, [29 U.S.C. §§ 794 et seq.](#), by unnecessarily placing them in institutional and group care facilities without adequate case planning.¹

¹The court previously dismissed plaintiffs' claim that they categorically possess a constitutional right to counsel in certain proceedings. See [Memorandum and Order \(Doc. No. 49\)](#).

Before the court is plaintiffs' motion to compel production of the named plaintiffs' DCYF files in unredacted form, pursuant to an agreement between the parties. (Doc. No. 44). The defendants have objected, (Doc. No. 59) the plaintiffs have replied, (Doc. No. 58), and the court has conducted oral argument. For the reasons that follow, plaintiff's motion is granted.

Background

In March 2021, the parties filed a joint protective order ("JPO") governing production of all documents. (Doc. No 33). The JPO permits any party to designate documents as "Confidential - Subject to Protective Order" when that party has determined that the document either contains information protected from disclosure by statute or confidential personal information. Id. ¶ 3. Confidential personal information includes names and information related to the named plaintiffs' relatives, including their siblings. Id. This category of information also includes, but is not limited to, foster parent and caregiver information. Id. In addition to protecting against the public disclosure of certain confidential information, the JPO does not allow the individual plaintiffs to review confidential documents unless counsel determines their clients' "assistance is reasonably necessary to the conduct of the litigation." JPO (Doc. No. 33) ¶ 5(b)(ii). It also bars parties from withholding information on the ground that such

information requires protection greater than that afforded by the JPO unless the withholding party moves for an order providing for special protection. [Id.](#) ¶ 7.²

In May 2021, as part of an agreement to stay discovery while their motion to dismiss was pending ([Doc. No. 40](#)), the defendants agreed to produce the named plaintiffs' case files. In the course of producing the plaintiffs' files, the defendants have withheld certain information, by either redacting documents or withholding them entirely. This withheld information falls into several categories. Before the court delves into the documents at issue, it makes several observations that underpin the resolution of the instant motion in plaintiffs' favor.

First, "[i]t is difficult to imagine subject matter more relevant to Plaintiffs' claims of improper administration of [a state's] Child Protective System than the very records of that system." [Dwayne B. v. Granholm, Civ. No. 06-13548, 2007 WL 2372363, at *4 \(E.D. Mich. Aug. 17, 2007\)](#).

Next, the defendants, as noted above, have already agreed to produce the plaintiffs' files prior to the commencement of formal discovery and after the court approved the JPO. Although the agreement may have been executed before the defendants fully

²Although the defendants did not technically comply with the provision in the JPO requiring them to file a motion seeking additional protection, the plaintiffs agreed at oral argument to consider the defendants' responses to their motion to compel, in combination with the hearing itself, as a satisfactory substitute.

appreciated the nuances of the files' contents or their clients' concerns about the possibility it could be shared with the named plaintiffs, the defendants' indisputably valid concerns are addressed by the strong confidentiality protections built into the JPO. Id. at *5 (conditioning disclosure of juvenile plaintiffs' files on filing of protective order); see also Henry A. v. Willden, 271 F.R.D. 184, 190 (D. Nev. 2010) (same).

Relatedly, the defendants' objection is based, in part, on their concern that the proposed class action might "entail a detailed review of every file for every child in DCYF's custody." Def. Obj. (Doc. No. 59) at 2. This concern is, at best, premature. The scope of the parties' agreement, the plaintiffs' motion, and this Order are limited to the files of the four named plaintiffs.

Finally, the court rejects the defendants' proposal that would require plaintiffs' counsel to notify defense counsel prior to sharing any of the currently-withheld information with the plaintiffs, in order that the defense can address the intended disclosure with the court. As defense counsel suggested at the hearing, such a proposal is not only unduly cumbersome, but would likely have the unintended effect of revealing plaintiff's litigation strategy. Moreover, the JPO adequately limits the basis for disclosing confidential information to the plaintiffs. To the extent that the defendants are concerned that the JPO allows disclosures for

litigation-related purposes, without reference to the best interests of the individual plaintiff, the court is satisfied that the appointment of experienced next friends, as agreed to by the defense, sufficiently protects the individual plaintiffs. With these considerations in mind, the court next addresses specific categories of information in dispute.³

1. Attorney-Client and Work Product Privileges

To the extent the defendants have redacted or withheld documents pursuant to the attorney-client or work product privileges, they shall provide a privilege log to the plaintiffs within 30 days of this order.

2. Non-Responsive, Completely Unrelated, Probably Misfiled

The defendants assert that they have withheld or redacted certain documents because they are “[l]ikely misfiled records pertaining to wholly unrelated parties or cases.” Def. Obj. (Doc. No. 59) at 5. Nevertheless, the defendants do not dispute that the documents at issue were located in plaintiffs’ files, and are thus within the universe of documents they agreed to produce. While this dispute is taking place in the context of the parties’ agreement, the court finds applicable Judge DiClerico’s reasoning in rejecting a party’s attempt to redact information from documents the court had previously ordered

³During oral argument, plaintiffs’ counsel represented to the court that it would take defendants’ concerns over sharing particular information with their clients into consideration.

produced: “the defendants cannot ask for an order protecting from discovery the very documents that the court has already ordered the defendants to produce.” [Bourne v. Town of Madison, No. 05-cv-365-JD, 2007 WL 951552, at *2 \(D.N.H. Mar. 27, 2007\)](#). The same rationale applies here, to the documents the defendants have already agreed to produce. Moreover, [Fed. R. Civ. P. 34](#), which governs document production, does not permit “a party to scrub responsive documents of non-responsive information.” [Orion Power Midwest, L.P. v. Am. Coal Sales Co., No. 2:05-CV-555, 2008 WL 4462301, at *2 \(W.D. Pa. Sept. 30, 2008\)](#); [see also Aronstein v. Mass. Mut. Life Ins. Co., Civ. No. 15-12864-MGM, 2017 WL 2818993, at *5 \(D. Mass. June 29, 2017\)](#) (“[r]edactions of documents that are responsive and contain some relevant information should be limited to redactions of privileged information when, as in this case, there is a protective order restricting the use and dissemination of . . . sensitive information.” (quoting [Sexual Minorities of Uganda v. Lively, Civ. No. 3:12-30051-MAP, 2015 WL 4750931, at *4 \(D. Mass. Aug. 10, 2015\)](#))).

Here, given the parties’ agreement and the protections offered by the JPO, the court grants plaintiffs’ motion to compel production of the unredacted documents defendants have included within “Category 1” of their objection. [Doc. No. 59 at 5](#).

3. Sibling, Family and Third-Party Information

Records of three of the four plaintiffs - those with siblings - are included in what defendants describe as a "family file." This information, the defendants assert, would not be in the plaintiffs' files, but for the fact that family files were created. Def. Obj. (Doc. No. 59) at 4. The defendants have, therefore, withheld information solely pertaining to the plaintiffs' siblings, rather than information that merely includes the sibling. Defendants maintain that providing this "sibling only" information could violate state statutes, invade the siblings' privacy and create potential danger for siblings' foster families. At oral argument, the defendants suggested that a sibling's parent be given a chance to weigh in on any disclosures. The court is not persuaded by any of the defendants' arguments.

Initially, to the extent the defense argues that sibling information is of diminished probative value, defense counsel indicated at oral argument that one of the purposes of creating a "family file" was to enable caseworkers to more effectively address the often-interrelated needs of plaintiffs and their siblings. Where, as here, the plaintiffs are claiming that their needs have not been met, a type of file that caseworkers rely on to assess and address minors' needs seems especially probative. The defendants cannot, on one hand, treat certain information as necessary to discharge its responsibility to a

plaintiff, and then, on the other, claim that such information lacks probative value.

Next, the defendants' reliance on state statutes⁴ restricting the disclosure of DCYF files is misplaced, as "State statutes, while binding on state courts determining privilege, do not bind federal courts deciding federal questions." [Moses v. Mele, No. 10-CV-253-PB, 2011 WL 2174029, at *5 \(D.N.H. June 1, 2011\)](#). See also [Hoyt v. Connare, 202 F.R.D. 71, 74 \(D.N.H. 1996\)](#) ("it is generally recognized that, with respect to federal claims, a court is not obligated to apply the privileges provided by state statute unless it chooses to do so."). As the court did in [Mele](#), this court finds that applying New Hampshire's confidentiality provisions "would work a substantial harm [to] the policy of providing citizens with a federal forum in which to litigate their . . . claims." [Id.](#) at *6. The presence of the strong confidentiality provisions in the JPO reinforces the court's conclusion. See id. at *9 - *10 (describing protective order); see also [Henry A., 271 F.R.D. at 189](#) (rejecting application of state confidentiality provisions

⁴ In their objection to plaintiffs' motion, the defendants cited [N.H. Rev. Stat. Ann. § 169-C:2](#) ("The best interests of the child shall be the primary consideration of the court in all proceedings under" state child protection laws.). More specifically, although not cited by the defendants, the court notes that [N.H. Rev. Stat. Ann. § 170-G:8-a](#) also deems certain information in DCYF's possession confidential.

in light of protective order limiting disclosures); [Dwayne B.](#), 2007 WL 2372363, at *5 (same).

As another basis for withholding or redacting documents, the defendants cite the privacy and confidentiality interests of various third parties, including siblings, family members, foster families and reporters of abuse and neglect. Specifically, they cite two discrete theories in support of their positions. First, the defendants point to the interests of those third parties in protecting their personal identifying and personal health information. Next, they cite the so-called "informer's privilege," to prevent disclosure of information about individuals reporting abuse or neglect in order to encourage such reporting. Neither theory provides a valid basis for ignoring the parties' agreement or the detailed protections for confidential information written into the JPO.

As for the third-party information, the defendants rely on [Soto v. City of Concord](#), 162 F.R.D. 603, 616 (N.D. Cal. 1995) for the proposition that the court must balance "individuals' interests in the privacy of their highly personal" information with the plaintiff's need for the information. That case, however, does not support the weight which defendants assign to it. The court in [Soto](#) did not prevent disclosure of the police files at issue in that case. The [Soto](#) court's reasoning is instructive. In reaching its decision, the court observed that "[p]laintiff's need for the requested personnel files is great.

. . . the information contained in police personnel files is unlikely to be available from any other source than Defendants' files." [Id.](#) at 617. So it is here. See [Dwayne B., 2007 WL 2372363, at *4](#) ("[i]t is difficult to imagine subject matter more relevant.") The [Soto](#) court also concluded that "it is clear that Plaintiff's need for the documents will outweigh any invasion of Defendants' privacy rights, particularly under the limitations of a carefully crafted protective order. [Soto](#), 162 F.R.D. at 617 (emphasis added); see also [Dwayne B., 2007 WL 2372363, at *5](#) (conditioning use of information on implementation of protective order). These cases suggest that the parties in this case, having crafted a thorough and detailed JPO, have already done what other courts have required in similar circumstances regarding disclosure of such "highly personal" information.

Defendants' reliance on the "informer's privilege" fares no better. In general, the government is privileged to withhold from disclosure the identities of persons furnishing information of law violations to law enforcement officers. [Roviaro v. United States, 353 U.S. 53, 59 \(1957\)](#). "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement." [Id.](#) At this early stage of the proceedings, the plaintiffs must show a substantial need for the information. [Martin v. Albany Bus. Jour., 780 F. Supp 927, 937 \(N.D.N.Y. 1992\)](#) (citing [Usery v. Loc. Union 720,](#)

Laborers' Int'l Union of N. Am., AFL-CIO, 547 F.2d 525, 528
(10th Cir. 1977)).

In this case, as the court has already addressed, the JPO helps ensure the confidentiality of those who have reported abuse and neglect. Moreover, the identity of the reporter could be meaningful to plaintiffs' cases. As plaintiffs' counsel hypothesized during oral argument, whether the reporter is a sympathetic relative who might be able to care for a plaintiff or relates to a foster care situation bears directly on plaintiffs' thesis that the defendants have failed to discharge their responsibilities towards the plaintiffs.

The same rationale supports rejection of the defendants' attempt to withhold contact information relating to the plaintiffs' siblings' foster families. The JPO protects against public disclosure of such information and binds defense counsel to limit disclosure to the named plaintiffs only to situations where such disclosure is reasonably necessary.

As the court in Dwayne B. observed, "[i]t would be both ironic and improper . . ., for this court to permit state confidentiality statutes to insulate [defendants] against judicial consideration of allegations that it failed to adequately serve the very children whom the statutes and the agency exist to protect." 2007 WL 2372363, at *4.

4. Best Interests of the Child

The defendants have withheld or redacted certain information - consisting of roughly twenty-four pages -- related to two of the named plaintiffs, which, defendants claim, require protection that goes beyond the JPO, such that any production should be limited to "attorneys' eyes only." The information includes reference to the plaintiffs' own evaluations, evaluations of other people in plaintiffs' sphere, such as parents or siblings, and certain sibling foster family information. The defendants base their position on the "best interests of the child" and rely on affidavits from Child Protective Service Workers familiar with the plaintiffs, which have been filed under seal. These affidavits generally posit that learning of the withheld information could be harmful to the minor plaintiffs. See also [N.H. Rev. Stat. Ann. § 169-C:2](#) ("The best interests of the child shall be the primary consideration of the court in all proceedings under" state child protection laws.).

As noted above, the protections incorporated into the JPO, in combination with the appointment of next friends for each plaintiff, are sufficient to safeguard the plaintiffs' best interests. In their assent to the appointment of "next friends" for each of the named plaintiffs, the defendants indicated that they requested the appointment "because [they] believe it is necessary . . . in order to permit the Next Friends to have

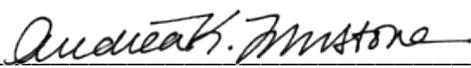
access to certain confidential information of the children, which Defendants have agreed to provide subject to the" JPO. Assented-to Motion for Appointment (Doc. No 43) at 5.

As with the other categories of documents at issue, the court finds that the confidentiality provisions and the plaintiffs' attorneys' obligations under the JPO, in combination with the presence of the appointed next friends, will serve the dual interests of appropriately safeguarding the information at issue, without impeding plaintiffs' rights to pursue their claims.

Conclusion

In light of the foregoing, the plaintiffs' motion to compel (Doc. No. 44) is granted. Unless otherwise agreed to by the parties, the defendants shall produce the documents responsive to this Order within 30 days.

SO ORDERED.



Andrea K. Johnstone
United States Magistrate Judge

December 30, 2021.

cc: counsel of record