THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
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NOTICE OF DECISION

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Case Name: **Exeter Hospital, Inc. v Dr. Sharon Alroy-Preis, et al**
Case Number: **217-2012-CV-00617**

Enclosed please find a copy of the court's order of October 31, 2012 relative to:

Order

~~November 01, 2012~~

William S. McGraw
Clerk of Court

(629)

C: Anthony J. Galdieri; Jeanne P. Herrick

The State of New Hampshire

MERRIMACK, SS SUPERIOR COURT

Exeter Hospital, Inc.

v.

Dr. Sharon Alroy-Preis,
Dr. Jose Montero, and
New Hampshire Department of Health and Human Services

NO. 2012-CV-617

ORDER

This case involves a New Hampshire Department of Health and Human Services ("DHHS") investigation into the Hepatitis C outbreak at Exeter Hospital. The Petitioner, Exeter Hospital, Inc., ("Exeter"), seeks a Declaratory Judgment that the Respondents, Dr. Sharon Alroy-Preis, Dr. Jose Montero, and DHHS, (also collectively, "DHHS"): (1) do not have unfettered access to all paper and electronic records of Exeter's patients; (2) may only access portions of medical records that are not protected by State and Federal law; (3) may only acquire the minimum amount of information necessary to conduct their investigation pursuant to RSA 141-C; (4) must provide Exeter with some information necessary to determine which patient records they wish to review; and (5) must provide Exeter with an opportunity to review said medical records prior to the Respondents' review of the same records. The Petitioner also seeks a Protective Order that would require the DHHS Respondents to provide certain information before being allowed access to patients' medical records. The DHHS Respondents object. Because Petitioner has produced no evidence to suggest that DHHS is not complying with state and federal law in its investigation at Exeter Hospital, the Petitioner's Motion for a Protec-

tive Order is **DENIED**.

I

DHHS initiated an investigation on May 15, 2012 after the Petitioner reported a cluster of recently diagnosed cases of Hepatitis C at its hospital. DHHS proceeded pursuant to the provisions of RSA 141-C:1, entitled "communicable diseases." RSA 141-C:1, entitled "Policy," states in relevant part that:

> The outbreak and spread of communicable disease cause unnecessary risks to health and life, interfere with the orderly workings of business, industry, government and the process of education, and disrupt the day-to-day affairs of communities and citizens... [I]t is hereby declared to be the policy of this state that communicable diseases be prevented, and that such occurrences be identified, controlled, and, when possible, eradicated at the earliest possible time by application of appropriate public health measures and medical practices.

In order to effectuate the purposes of the chapter, the Commissioner of DHHS has been given broad authority by statute to investigate incidents of communicable disease. RSA 141-C:7 required Petitioner to report the cluster of diagnoses and, as part of the report, to disclose certain protected health information of its patients.

After receiving Petitioner's report, pursuant to RSA 141-C:9, DHHS conducted an initial investigation to determine whether the cluster of diagnoses was truly an outbreak. Since the time that DHHS acquired enough information to determine that the cases are related, "the goals of the investigation have been: (1) to stop transmission of the infection by establishing, and disrupting, the mode of transmission; and (2) to determine the scope of the outbreak by identifying all those impacted and to allow linkage to appropriate care." Respondents' Memorandum of Law in Support of Objection to Motion for Protective Order ("Respondents' Memo in Support of Objection"), 2.

Early on in the investigation, DHHS personnel visited Exeter Hospital on nine occasions and accessed medical records through use of the hospital's electronic medical

records database ("EMR"). Members of the investigation team were provided access to computer terminals within the hospital to conduct their review of records. During this time, the Petitioner did not request information regarding which medical records were being reviewed, but rather, provided DHHS with "open access" after being informed that the review was related to the investigation for the Hepatitis C outbreak.

To help facilitate the investigation, DHHS used software "that creates an electronic database for storage of the relevant information extracted by [DHHS's] investigators] and allows analysis of the data." Respondents' Supplemental Memorandum of Law in Further Support of Objection to Motion for Protective Order ("Respondents' Supplement"), 3. The Centers for Disease Control and Prevention (CDC) designed the software and it is used by trained Public Health Professionals to collect information provided in the EMR. Further, the DHHS used additional software to collect information related to exposed patients that had died and other patients that died from a Hepatitis C related cause.

In early August, members of the investigation team signed an "End User Security Agreement – Outside Individual Access," ("Security Agreement") so that each investigator could obtain a username and password that would provide access to the EMR. The Security Agreement ensured that each user would only access those records as allowed by privacy/security policies and as allowed by law. Further, the Security Agreement ensured that each user would be accountable for his/her work conducted under their username and ensure that users would not intentionally access any information not authorized by their password. Because each investigator now had their own username and password, the Petitioner could audit each investigator's use of the EMR after their review.

According to the Respondents, the investigation led to information that indicated the healthcare worker suspected of causing the outbreak, in addition to being located in the cardiac catheterization laboratory, may have also been located in the main inpatient operating room and the intensive care unit at the hospital. Because of this information, "outstanding questions remain regarding the mode of transmission and the scope of the outbreak." Respondents' Memo in Support of Objection, 7.

Sometime beginning in July and extending to August, the Petitioner began requesting that DHHS provide information related to what facts it had learned in the investigation. DHHS, however, maintained that it could not share information obtained throughout the course of the investigation pursuant to RSA 141-C:10. After this, on August 24, 2012, the Petitioner refused DHHS access to medical records, stating that DHHS must provide additional information about the review, including information about the connection of the patient to the Hepatitis C investigation. The instant Petition for Declaratory Judgment and Motion for Protective Order followed.

II

The Petitioner advances two main arguments in support of its Motion: (1) the Petitioner contends that the Respondents have not ensured that they are only obtaining the minimum amount of information necessary in their investigation, as required by law to protect patient privacy (RSA 141-C:10, IV); and (2) the Petitioner contends that the Respondents' access to entire medical records is in violation of federal and state laws that provide privileges for certain medical information. Petitioner submits that before any review of records, the Respondents shall be required to provide the Petitioner with the following information: the patient's name; the approximate dates of the medical records sought; the portion of the medical record for which review is sought; and an ex-

planation regarding why the information sought is the minimum necessary.

The Respondents object and make three points: (1) Respondents assert that they are only obtaining the minimum information necessary to conduct the investigation, evidenced by the fact that they are using a scientific approach to define collection requirements and using tools to develop forms and databases to determine relevant information; (2) Respondents contend that the state laws cited by the Petitioner do not prohibit DHHS's access to records for the purpose of a communicable disease investigation; and (3) Respondents maintain that they are prohibited from providing the Petitioner information relative to the investigation pursuant to RSA 141-C:10. The Court agrees with Respondents.

A

New Hampshire RSA 141-C:10, IV provides in pertinent part that when the DHHS is conducting an investigation for an outbreak of a communicable disease, it "shall acquire and retain only the minimum amount of information . . . necessary to carry out its obligations under this chapter." The Petitioner contends that "it is inconceivable that an entire patient's file is 'the minimum amount of information necessary' for [DHHS] to conduct its investigation into the Hepatitis C outbreak." Petitioner's Memorandum of Law in Support of Verified Motion for a Protective Order, 5. However, Petitioner, the moving party, has provided no expert medical testimony to support its position. In fact, at oral argument, Petitioner argued that records prior to the incident in question could not be relevant. Respondent pointed out, though, that Hepatitis C could be obtained from blood transfusions and that blood transfusions have only been screened for Hepatitis C relatively recently. The record before the Court suggests, a blood transfusion that occurred in the past could well be relevant because it could ex-

plain the presence of Hepatitis C in a hospital patient and, therefore, could rule that patient out as part of the current incident.

Respondents, on the other hand, have provided an offer of proof that demonstrates that DHHS is only acquiring the minimum amount of information necessary. The Respondents explain what evidence indicates that they are obtaining the minimum information necessary in the following ways:

> For the Exeter Hospital Hepatitis C outbreak, medical information on patients possibly associated with the outbreak that was necessary to collect to carry out the public health response included the following: documentation of Hepatitis C risk factors or prior Hepatitis C diagnosis, relevant underlying medical conditions and medications, and information on encounters at Exeter Hospital that might have exposed the patient to Hepatitis C. Forms and databases were developed to collect this information in a systematic and standardized way. Trained public health professionals (physicians, nurses, and epidemiologists) collected medical information by reviewing medical records at Exeter Hospital to extract the relevant data originally decided on into the database that was uniquely developed for this outbreak investigation. During medical record review only the information in the unique tool developed for this outbreak was collected and nothing more. Initially, these professionals were oriented to the EMR system by Exeter Hospital staff and were shown how to navigate the EMR to identify relevant patient information . . . Standardized collection of data by public health professionals analyzing and extracting information from the EMR has: (1) allowed for a consistent, complete, and efficient public health investigation; (2) prevented the collection of volumes of non-relevant medical records being provided in hard copy to public health; and (3) ensured that public health received all relevant information related to the patient given the complexity of an EMR and the difficulty with identifying certain pieces of information.

Respondents' Supplement, 8. The Respondents have provided a detailed explanation of how they ensure that only the minimum information necessary is acquired during this investigation and demonstrate that they are not abusing their access to sensitive medical records. The Respondents have demonstrated that this is a professional, regulated, and lawful investigation into a potentially serious health threat. Petitioner's *ipse dixit* is not persuasive.

The Petitioner attempts to analogize this case to cases in which the New Hamp-

shire Supreme Court has developed specific procedures to protect patient medical records in instances where the records are the subject of a search warrant in a criminal investigation. See In Re Search Warrant (Medical Records of C.T.), 160 N.H. 214, 226 (2010). However, this analogy is unpersuasive for several reasons. The medical records for a criminal investigation differ in several ways from the reasons for obtaining medical records regarding communicable diseases investigations. First, the search warrant for an individual's medical records presents a circumstance in which the interest of the State is in ensuring that criminal conduct of a target criminal defendant is detected and punished, and that interest is, in most circumstances adverse to the holder of the privilege. This is not ordinarily the case in an investigation into a communicable disease by DHHS. An investigation into an outbreak of a communicable disease uncovers direct and specific harm occurring to individuals who contract a communicable disease.

Second, and perhaps more important, once information is obtained pursuant to the criminal procedures, there is a high likelihood it will eventually become public. Information obtained pursuant to RSA 141-C is not turned over to police and prosecutors and reviewed by criminal juries. Unlike law enforcement officials that do not have medical training and may not be aware of the sensitive nature of information contained within medical records, DHHS investigators have significant medical training and its statutes and rules provide for limited use of the information obtained. RSA 141-C:10, I.

Further, there are other areas of the law where the "minimum information necessary" standard is implicated. 18 U.S.C. §2518(5), the Federal wiretap statute, requires that when a governmental agency conducts a wiretap in a criminal investigation, the listen-in "shall be conducted in such a way as to minimize the interception of communica-

tions not otherwise subject to interception."[1] As the First Circuit has noted, "[t]his minimization requirement spotlights the interest in confining intrusions as narrowly as possible so as not to trench impermissibly upon the personal lives and privacy of wiretap targets and those who, often innocently, come into contact with such suspects." United States v. Hoffman, 832 F.2d 1299, 1307 (1st Cir. 1987). Although the intrusion must be confined, "[t]he statute does not forbid the interception of all non-relevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversation." Scott v. United States, 434 U.S. 128, 140 (1978). Under this framework, "[d]uring the early stages of surveillance[,] the agents may be forced to intercept all calls to establish categories of non-pertinent calls .... Interception of those same calls might be unreasonable later on, however, once the non-pertinent categories have been established and it is clear that this particular conversation is of that type." Id. at 141. Courts recognize that police officers listening to intercepted communications often deal with individuals who use code language, "the terms of which ma[k]e it difficult to identify immediately those calls that [are] inquiries into [the defendant's] legitimate business interests...." State v. Andrews, 125 N.H. 158, 167 (1984).

While the analogy to review of medical records is not entirely congruent, there are certainly similarities. An electronic intercept intrudes into calls, not only of the target of the investigation, but of those innocent persons who call the target. Some of those communications, for example, physicians and other health care providers, might well be privileged. RSA 141-C:10, IV does not prohibit DHHS investigators from ever *seeing*

[1] The same minimization requirement is set forth in RSA 570-A:9, V, the State's cognate statute, which provides in relevant part "every order and intercept shall contain a provision that the authorization to intercept shall be... conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter..." See State v. Moccia, 119 N.H. 169, 172 (1979).

non-relevant information, but rather requires that they only acquire and retain the minimum necessary information. This process may involve determining what information is not necessary to the investigation and may involve observations of information not relevant to the investigation. However, as in the case of a wiretap, once the non-relevant information is identified, the DHHS may not retain it. Further, as apparent from DHHS's explanation, it has already taken steps to ensure that instances of observing non-relevant information are few and far between through the use of its software and tools. Similar to wiretap investigations, the investigators from DHHS are professionals trained to identify relevant and non-relevant information to the investigation. See Andrews, 125 N.H. at 167.

Since DHHS has demonstrated that it is only obtaining the minimum amount of information necessary for its investigation, the Court cannot find Petitioner has established a violation of the minimization requirement.

B

In a related argument, Petitioner also contends that if it allows Respondents access to entire medical records, then the Petitioner will necessarily be in violation of certain federal and state laws. Specifically, the Petitioner cites the following New Hampshire statutes requiring patient consent before records are released: RSA 151:21, X (Patient's Bill of Rights); RSA 141-H:2 (Genetic Testing); RSA 141-F:8 (Testing for HIV); RSA 135-C:19-a (Mental Health Treatment); RSA 173-C:2 (Rape Crisis and Domestic Violence Counseling); and RSA 172:8-a (Alcohol or Drug Abuse Treatment). The Petitioner also cites federal regulations interpreting the Heath Insurance Portability and Accountability Act of 1996 ("HIPAA"). Because HIPAA provides a floor for privacy in medical records, the Court need only address the more stringent state law requirements.

See 42 C.F.R. §160.203.

Significantly, Petitioner has cited no authority for the proposition that state evidentiary privileges can thwart the efforts of a public health investigation into communicable diseases. Examination of the privileges themselves illustrates why.

First, the Patient's Bill of Rights, while it requires consent to release information, also explicitly provides an exception for records released to persons authorized by law to receive them, *i.e.* the DHHS in a communicable disease outbreak investigation. RSA 151:21, X. As to the remaining statutes the Petitioner cites, the Respondents provide a comprehensive summary of why the purpose behind each of these statutes is not frustrated when medical records are released in conjunction with a DHHS investigation of a communicable disease outbreak. Respondents' Supplement, 4–7. The Court need not repeat that summary here. It suffices to say that it is well settled that all statutes relating to a particular subject must be read together, to effectuate all of their terms.[2] Opinion of the Justices, 135 N.H. 543, 545 (1992).

Finally, even if the privileges recognized in the statutes the Petitioner cites were absolute and were meant to apply in all contexts, the privileges still would need to give way in the face of other compelling justifications for release of the privileged information. Analogously, "New Hampshire law makes clear that even so-called absolute [evidentiary] privileges are subject to overriding concerns when the competing claim is suf-

[2] Additionally, the Respondents point out that the Petitioner has not provided any evidence that the statutes even apply to its facility: it has not shown that it conducts genetic testing; operates New Hampshire Hospital or one of its designated receiving facilities; operates a rape crisis center or a domestic violence center; or operates a federally-funded drug or alcohol rehabilitation facility. Id. at 6. If any patients at Exeter Hospital did divulge information pertaining to any of these categories to a physician at the hospital so that the information is now contained in the medical records, the release of those records to DHHS would still be permitted under RSA 141-C:10, III ("The physician-patient privilege shall not apply to information required to be reported or provided to the commissioner under this chapter.").

ficiently compelling," *e.g.* the constitutional right of confrontation or compulsory process or the constitutional right to a fair trial. A PRACTICAL GUIDE TO DISCOVERY AND DEPOSITIONS IN NEW HAMPSHIRE, Vol. 1 §11.26 (2011). For example, both the physician-patient privilege and the attorney-client privilege must give way in circumstances where constitutional rights must be upheld or where "there is a compelling need for the information and no alternate source is available." State v. Farrow, 116 N.H. 731, 733 (1976); McGranahan v. Dahar, 119 N.H. 758, 764 (1979). As the Court recently noted, any statutory privilege may yield when disclosure of the information "is considered essential." In re Search Warrant, 160 N.H. at 225.

Similarly, statutory privileges must give way to the DHHS's compelling interest in investigating communicable disease outbreaks. As the Policy of RSA chapter 141-C states:

> The outbreak and spread of communicable disease cause unnecessary risks to health and life, interfere with the orderly workings of business, industry, government, and the process of education, and disrupt the day-to-day affairs of communities and citizens.

The DHHS is the entity charged with the responsibility of determining the scope of outbreaks and determining how an outbreak started. The entity is comprised of trained professionals equipped to design the best way to carry out these investigations. Certain privileges contained in medical records may need to give way to the DHHS's compelling interest in discovering information related to the investigation. This will permit the DHHS to fulfill the policy of RSA 141:C and to protect public health. Notably, the DHHS is not on a hunt for privileged information, but rather, as discussed *supra*, is trained to avoid acquiring unnecessary medical records and to only acquire the minimum necessary to complete the investigation. Information it obtains will not be disclosed to the

public, as in the criminal context, but will be kept confidential. RSA 141-C:10, I.

C

Finally, the Petitioner's proposed compromise, suggesting that the DHHS investigators shall provide the patient's name, approximate dates of the medical records sought, the portion of the medical record for which review is sought, and an explanation regarding why information sought is the minimum necessary before the Petitioner releases any medical records, is not necessary nor required by law. The Court agrees with the Respondents that RSA 141-C:10, I should be construed to prohibit the DHHS from re-disclosing information obtained during its investigation to the Petitioner. RSA 141-C:10, I provides, in relevant part, the following:

> Any protected health information provided to or acquired by the department under this chapter shall be released only with the informed, written consent of the individual or to those authorized persons having a legitimate need to acquire or use the information and then only so much of the information as is necessary for such persons to provide care and treatment to the individual who is the subject of the protected health information, investigate the causes of disease transmission in the particular case, or control the spread of the disease among the public.

The Petitioner has not alleged that it requires the information requested in order to provide treatment, investigate the cause of the disease transmission, or to control the spread of the disease among the public. Instead, the Petitioner has only suggested it requires this information to protect the privacy of the patients involved. RSA 141-C does not permit other use of re-disclosed information. Even if the Respondents provided the names of the patients, this would communicate to the Petitioner that these patients are connected to the outbreak or have Hepatitis C related symptoms and spent time in a questioned portion of the hospital.

III

In sum, the Petitioner's duty to protect its patients' privacy must give way to the

DHHS's interest in investigating communicable disease outbreaks. RSA 141-C explicitly bestows the responsibility of conducting outbreak investigations while simultaneously protecting certain health information to the trained professionals of the DHHS. See RSA 141-C:6 (providing that the commissioner of the DHHS shall adopt rules to carry out the policies and purposes of the chapter). Petitioner has made no showing that DHHS is not carrying out its duties appropriately or within the limits of the law as it conducts its investigation. For these reasons, the Petitioner's Motion for a Protective Order must be **DENIED.**

SO ORDERED.

10/31/12
Date

Richard B. McNamara
Richard B. McNamara
Presiding Justice