UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JOHN GILL SMITH,	)	
	)	
Plaintiff,	)	
	)	No. 03-6494
and	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Intervenor,	)	
	)	
v.	)	
	)	
THE CITY OF PHILADELPHIA,	)	
	)	
Defendant.	)	
	)	

UNITED STATES' REPLY TO DEFENDANT'S OPPOSITION TO UNITED STATES' MOTION TO COMPEL DISCOVERY, AND UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER

I. Preliminary Statement

After attempting to resolve this discovery dispute without Court intervention, the United States filed a motion to compel the production of certain patient care reports generated by Philadelphia Fire Department ("PFD") paramedics Joni Kuonen and/or Katherine Ceschan for the period 2000 through 2002. Defendant filed a brief in opposition in the form of a motion for protective order. Defendant did not dispute that the patient care reports are relevant to the litigation.[1] Rather, Defendant argued that because of the way the reports were electronically stored, production of responsive documents was impossible and a manual search for paper

[1] The United States' document request, limited to the three year period from January 1, 2000 through 2002, is narrowly tailored to reflect and discover relevant information regarding the particular paramedics involved in this action during the period reasonably preceding and following the incident at issue, which occurred on February 20, 2001.

documents would be unduly burdensome. Because Defendant's argument was premised on unsupported factual assertions that had not previously been raised with the United States, the United States sought, and the Court granted, a stay to conduct a Rule 30(b)(6) deposition, previously noticed, regarding the storage and retrieval of patient care reports.[2]

Pursuant to the Court's Order, Defendant produced Captain Richard Marshall Bossert, head of Continuous Quality Improvement for the PFD Emergency Medical Services division ("EMS"). Captain Bossert's testimony flatly contradicted the factual assertions underlying Defendant's undue burden argument, and demonstrated that responsive computer records generated during the period at issue were identifiable and retrievable through a database search. Given the absence of any evidentiary basis for Defendant's argument that production of the requested records would be unduly burdensome, the United States respectfully requests that the Court deny Defendant's motion for protective order and direct Defendant to produce the electronically generated patient care reports responsive to the United States' request.[3]

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[2] Initially, the United States requested a designated agent who could testify about "the means by which the City of Philadelphia collects and maintains data relating to dispatches by paramedics and EMT's, and the means by which such data can be retrieved." For the purposes of this motion to compel, the request was narrowed to reflect the maintenance and retrieval of reports generated from 2000 through 2002. In addition, we informed counsel for Defendant that "the deposition will cover the unsupported representations regarding the burden and cost of production raised in your opposition to the United States' Motion to Compel."

[3] In view of Captain Bossert's testimony that additional reports responsive to the United States' request can be generated through an electronic search, the United States will not seek reports that are available only in paper form, thus rendering moot Defendant's argument that the cost of a manual search would be unduly burdensome.

II. Argument

A party wishing to obtain an order of protection over discovery material must demonstrate that "good cause" exists for the order of protection. Fed. R. Civ. P. 26(c); see also Fort Washington Resources, Inc. v. Tannen, 153 F.R.D. 78, 79 (E.D. Pa. 1994) ("[T]he party seeking the protective order bears the burden of showing good cause.") (citing Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir.1986); Trans Pacific Ins. Co. v. Trans-Pacific Ins. Co., 136 F.R.D. 385, 391 (E.D.Pa.1991)).

Discovery in the form of document production will always impose some burden on the party from whom the discovery is sought, thus "good cause" requires a showing of, and Rule 26(c) protects only against, *undue burden*. See, e.g., Roesburg v. Johns-Manville Corp., 85 F.R.D. 292, 297 (D.C. Pa. 1980) (the fact that discovery will require the objecting party to expend considerable time, effort and expense is not alone sufficient to disallow the discovery unless the requests are "egregiously burdensome or oppressive"). Whether discovery imposes an undue burden depends on such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by the request, the particularity with which documents are described, and the burden imposed.[4] Wyoming v. U.S. Dep't of Agriculture, 208 F.R.D. 449, 453 (D.D.C. 2002). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing." Pansy, 23 F.3d at 786 (citing Cipollone, 785 F.2d at 1121).

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[4] Defendant cited only time and expense concerns in its undue burden argument, and cannot at this late stage argue that other factors justify protection of the documents. See also Footnote 1, supra (discussing limited scope of document request) and United States' Mem. in Support of Motion to Compel, at pp. 4-5 (discussing relevance of requested documents).

In this case, Defendant's broad allegations of harm, unsubstantiated, and largely refuted, by Defendant's designated agent, will not support the good cause showing required under Rule 26(c), and, accordingly, Defendant's opposition and motion for protective order must fail.

A. Additional responsive reports were electronically generated and are identifiable

Defendant alleges, generally, that computer-related issues render an electronic search, and subsequent production, of additional responsive records impossible. Defendant asserts that patient care reports from 2000 were not stored on a computer file; that reports prior to late 2001, while possibly electronically generated, could only be searched by date or dispatch number; and that no reports between 2000 and 2002 could be searched by the "prior history" field. Defendant's Opp. at ¶¶ 12-15.

These factual assertions were flatly refuted by Defendant's designated agent. As set out below, Captain Bossert's testimony clearly establishes: (1) that Ms. Kuonen's and Ms. Ceschan's EMS unit, Medic 2, was electronically reporting EMS runs prior to late 2001, and (2) that in any electronically generated patient care report, *all* database fields are "queryable," or searchable, for terms included on the pre-programmed drop-down boxes for each database field.

The United States first sought information regarding when and how the PFD paramedics – and Ms. Ceschan and Kuonen, particularly – generated patient care reports during the relevant time period. Captain Bossert explained that the United States' document request covered a period of transition for the PFD, in that during the years 2000 through 2002, the PFD EMS was converting to a computerized system. See Bossert Depo. at p. 36.[5] Medic units were converted to electronic reporting at different times during this period, and, while some began electronic

[5] Copies of all referenced pages from Captain Bossert's 30(b)(6) deposition are attached.

reporting as early as 2000, others continued to generate paper reports which were then scanned into the computer. Id.

Captain Bossert could not testify as to the exact date when Medic 2 converted to electronic reporting although he admitted that this information is available in his office. Bossert Depo. at pp. 96-97. However, based on a review of Plaintiff John Gill Smith's patient care report, dated February 20, 2001, and marked as Exhibit 2, Captain Bossert testified that Medic 2 was electronic as of, *at least*, February 20, 2001:

Page 82:

Q. Now, can you tell from looking at this [Exhibit 2], was Medic 2 electronic at this point?
A. This would be, yes, on this report.
Q. And the date of this incident was February 20th, 2001.

Therefore, patient care reports were electronically generated by Ms. Kuonen and/or Ms. Ceschan from at least that point forward, and may date back to 2000:

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MS. EINSTEIN: And it's your assumption that if they were electronic in February of 2001, they were electronic from February 2001 forward?
THE WITNESS: Minus the exceptions when the computer system is down.
MS. EINSTEIN: Correct.
THE WITNESS: Okay.[6]

[6] See also Bossert Depo., at p. 95-96 (reiterating that electronically generated reports from early 2001 on should be retrievable and confirming that ACS, a computer consulting firm

See also Bossert Depo. at p. 97, lines 9 - 14 ("Q. And everything that you just discussed with Miss Einstein, those assertions hold true if they were electronic in 2000 as well, correct? A. Correct.").

Captain Bossert also testified, contrary to Defendant's assertions, that where a patient care report was electronically generated, it could be queried for, and records identified by, *any* field in the report:

Page 102

11 Q. Your understanding is that
12 any field in a database should be
13 queryable --
14 A. Right.
15 Q. -- if the information is in
16 that field?
17 A. Correct.

Captain Bossert explained that any terms available from the drop-down boxes, or "pick-list" within a database field would be searchable and records including that term would be identifiable. See Bossert Depo., at pp. 103, 115-16. Although the PFD used a number of different database software programs during this period, Captain Bossert testified that he would be able to determine, "with some reliability," which software database program or programs were in use by Medic 2 throughout the period at issue, and, then, determine which terms were available from the pick-list. See id. at 116-17. Significantly, Captain Bossert testified that records wherein the "probable cause" field included "chest pain" would be identifiable since the search term specified in the United States' request – "chest pain" – would be phrased consistently regardless of the software.

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retained by the City and the PFD, could generate and produce a list of the responsive records).

Page 28 (Witness)

9 But that's not a problem,
10 because we have a complaint that says
11 "Chief complaint is chest pains," and
12 I can query that, for a particular
13 medic unit, for a particular time.

And, with respect to the HIV-related reports, when presented with Exhibit 2, Plaintiff Smith's report from February 2001, and an additional report from 2002, Captain Bossert confirmed that although the two reports were generated using different software, both included AIDS/HIV among the pick-lists for the prior history field and thus reports during that time frame and generated with those programs would be searchable by that field and that term. See Bossert Depo. at pp. 100-102, 118-19.[7]

In sum, contrary to Defendant's allegations, the evidence demonstrates that additional reports responsive to the United States' document production requests are electronically searchable, identifiable and producible.

B. The HIV/AIDS-related patient care reports

As demonstrated above, some or all of the requested HIV-related records are electronically identifiable and retrievable. See also Bossert Depo. at p. 109, lines 9-12 ("[Q.] Logistically, you could have performed that search, however? [A.] Logistically, yes. . . .").

[7] In Exhibit 2, the paramedics had documented HIV in the prior history field, thereby establishing that HIV/AIDS was in the pick-list, and reports using that software could have been queried for "prior history" of HIV/AIDS. See Bossert Depo. at pp. 103-104. Captain Bossert further confirmed that the software used by Medic 2 at some point in 2002 also could be queried for a prior history of HIV/AIDS. Bossert Depo. at pp. 118-19. Since it is unlikely that the PFD *removed* HIV/AIDS from the pick-list after February, 2001, and re-inserted it in 2002, it is reasonable to assume that a "prior history" of HIV/AIDS is searchable for the entire period from February 20, 2001 forward, and possibly earlier.

Captain Bossert admitted, however, that, although contacted about the document request, he *never* searched the PFD electronic records for the HIV-related reports, and was unaware of whether anyone else did:

> Page 107
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> Q. Did you do a search for the requests involving Joni Kuonen and Katie Ceschan, plus HIV/AIDS, prior history?
> A. No.
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> * * *
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> Page 119
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> Q. So you don't know what ACS[8] did with respect to this document request?
> A. This particular one, no.

Captain Bossert offered two explanations for why he did not do the requested search, neither of which justifies, or is relevant to, the failure to *produce* the requested documents. Captain Bossert explained that he did not do the requested search because, in his opinion, the patient care records identified and obtained from such a search would not be "reliable," the "most probable" reason being that not all patients with the HIV virus identify themselves as such to paramedics. See Bossert Depo., at p. 110. He was also concerned that variances in the software programs from 2000 to 2002 might result in less than complete identification of records falling within the requested parameters because the pick-list might not have included HIV/AIDS

[8] ACS is a computer and record storage firm that the City contracts with for record maintenance. Defendant's Opp. at ¶ 11. Captain Bossert described ACS as "the caretaker[] of the databases" for the PFD. Bossert Depo. at p. 46, lines 19-22.

(a concern proven to be less important given his concession that HIV/AIDS was, indeed, on the pick-list in February, 2001, and in 2002, and likely during the intervening time period). See id. at 108. Captain Bossert shared his opinions with his superiors in the PFD and was then told not to do the search:

> Page 109
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> 5 Q. And so you were told not to
> 6 do the search?
> 7 A. From my recollection, yes.

Defendant's motion for a protective order, on undue burden grounds, must fail where Defendant has not presented evidence that it took even the minimal steps that would have demonstrated that the relevant documents were searchable and would have indicated the number of documents responsive to the request.[9] Cf. Fort Washington Resources, 153 F.R.D. at 79 ("The burden is not met by 'the recitation of expense and burdensomeness [which are] merely conclusory' statements.") (citing Panola Land Buyers Ass'n v. Shuman, 762 F.2d 1550, 1559 (11th Cir.1985)).

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[9] Some of the factual assertions in Defendant's brief concerned actions allegedly taken or statements made by representatives of ACS, a computer consulting company retained by the City and the PFD. Although Captain Bossert understood that he was being deposed as Defendant's Rule 30(b)(6) designated agent, he was unprepared to answer any questions regarding what actions, if any, ACS took in attempting to satisfy the United States' document request. He admitted he did not call or speak with ACS prior to the deposition and had no knowledge of the actions undertaken by ACS on the City's behalf with respect to the document requests. See Bossert depo. at 113-14; 119. See, e.g., Black Horse Lane Assoc., L.P. v. Dow Chem. Corp., 228 F.3d 275, 304 (3d Cir. 2000) ("[W]e believe that the purpose behind Rule 30(b)(6) undoubtedly is frustrated in the situation in which a corporate party produces a witness who is unable and/or unwilling to provide the necessary factual information on the entity's behalf."); Hooker v. Norfolk Southern Ry. Co., 204 F.R.D. 124, 126 (S.D.Ind. 2001) (explaining that Rule 30(b)(6) "imposes a duty upon the named business entity to prepare its selected deponent to adequately testify *not only on matters known by the deponent, but also on subjects that the entity should reasonably know*") (emphasis added).

C. The "chest pain" patient care reports

With respect to the United States' request for patient care reports involving Joni Kuonen or Katie Ceschan where the nature of the 911 call, as documented in the "probable cause" field, includes "chest pain," Defendant produced 126 responsive reports from the "latter part" of 2001 through 2002, covering approximately 13 to 15 months of the three-year period at issue. The United States seeks production of responsive reports for the period from January 1, 2000 up to the latter part of 2001.

In view of Captain Bossert's admission, discussed above, that responsive reports were identifiable at least by February 20, 2001, but had not been produced, the United States asked Captain Bossert whether he had searched for responsive reports for January, 2001 forward. Captain Bossert could not recall:

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MS. EINSTEIN: Well, let me ask you specifically.
Did you query for the time period January 2001 forward?
THE WITNESS: I queried for whatever I could query for. And whoever asked for it was told that. And outside that...
MS. EINSTEIN: Well, I asked if you queried for the period January 2001 forward. Do you recall?
THE WITNESS: I don't know. No, I don't recall exactly.
MS. EINSTEIN: Okay.
THE WITNESS: I couldn't tell you.

Nonetheless, Captain Bossert admitted that *if* a search had been done for the period 2000 forward, all electronically generated reports would be identified in the search. Since he had

already conceded that Ms. Kuonen and Ms. Ceschan were "electronic" as of February 20, 2001, this meant that as of at least February 20, 2001, and going forward, all of the reports generated by Ms. Kuonen and Ms. Ceschan were electronically generated and retrievable under the criteria specified by the United States:

> Page 92
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> MS. EINSTEIN: And if you had queried January 2001 forward, the report in Exhibit 2 would have shown up?[10]
> THE WITNESS: As far as I
> Page 93
> can tell, yes.
> MS. EINSTEIN: And any other report that was electronic would have shown up?
> THE WITNESS: That's correct.

Given the established existence of electronically generated reports prior to "latter 2001," Captain Bossert had no explanation for Defendant's failure to produce the electronically generated records from that period:

> Page 93
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> MS. EINSTEIN: And so do you have any explanation why in producing the reports the City did not produce reports for any time prior to what they have characterized as late 2001?
> THE WITNESS: The only explanation I could give you would

[10] Exhibit 2 refers to the patient care report for Plaintiff Smith, dated February 20, 2001.

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be, those reports aren't electronically done and they're on paperwork and they're archived. That would be the only -- I --

MS. EINSTEIN: No. But these particular reports, for Joni Kuonen and Katherine Ceschan for chest pains --

THE WITNESS: Okay.

MS. EINSTEIN: -- which we've already agreed were electronically generated.

THE WITNESS: Right.

MS. EINSTEIN: So do you have any explanation for why those reports were not produced for prior to late 2001?

THE WITNESS: Off the top of my head, I -- all I remember is give me the number of calls under these parameters, tell us what we have, blah, blah, blah. From that point on, it went back and forth multiple times through the --

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MS. EINSTEIN: I just asked you a yes or no question.

Maybe you should read it back.

THE WITNESS: Okay. No.

In sum, given that Captain Bossert's testimony demonstrates that responsive chest pain reports are electronically identifiable and retrievable as of at least February, 2001, thereby refuting the factual basis for Defendant's undue burden argument, Defendant's motion must fail.

D. Production of the reports is not unduly burdensome

Defendant alleged that the only reasonable means to locate the responsive reports would be to conduct a manual search of storage boxes, at an approximate cost of $164,160. Defendant's Opp. at ¶¶ 20-24. Now that Defendant's designated agent has testified that the documents can be identified and produced through a computer document search, Defendant's assertions of burdensomeness are moot. Given that it takes approximately five minutes to produce each report, Defendant's Opp. ¶ 17, and that the number of responsive documents is, likely, around 120,[11] Defendant cannot show that production would be burdensome.

First, it bears repeating that the United States' request is relevant and narrowly tailored to the facts in this case. Moreover, the reports at issue already reflect a compromise reached by the parties to limit the initial request, which covered the time period 2000 to the present, to a three year period from 2000 through 2002, precisely because Defendant's counsel expressed concerns about the time it would take to produce the reports. Indeed, at five to ten minutes per report (giving Defendant every benefit of the doubt) Defendant could produce 120 reports in ten to twenty hours. The United States was unable to find any reported cases in which a court held that the expenditure of ten to twenty hours to produce relevant documents was unduly burdensome.

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[11] The 126 chest pain reports already produced represent approximately 13 to 15 months – from the latter part of 2001 through 2002. Given Captain Bossert's testimony that the date that Medic 2 converted to electronic reporting could be readily determined from PFD records, as could the particular database(s) in use by Medic 2 during that period, it follows that accurate querying of the database(s) in use during the period from January 1, 2000 up and until the latter part of 2001 would generate approximately the same number, or less, of "chest pain" reports. And, although Captain Bossert never attempted the electronic query that would have indicated the precise number, it goes without question that there would be significantly fewer responsive reports documenting a prior history of HIV/AIDS.

See, e.g., Fort Washington Resources, 153 F.R.D. at 79 (Defendant failed to meet burden of showing good cause; assertion that producing documents would take too much time and expense was unsupported by the necessary particularized facts and details regarding the amount of time or expense and why such amounts are unduly burdensome); Klausen v. Sidney Printing & Pub. Co., 271 F. Supp. 783 (D.Kan.1967) (mere fact that interrogatories are lengthy or that defendant will be put to some trouble and expense in preparing requested answers is not alone sufficient to warrant protective order relieving defendant from burden of answering).[12]

III. Conclusion

For the foregoing reasons, and based upon the entire record herein, the United States' motion to compel should be granted and Defendant's motion for a protective order should be denied.

[12] Defendant relies on Lickteig v. Landauer, 1992 WL 333994 (E.D. Pa. 1992) as support for its assertion that production requiring 6000 man hours is unduly burdensome. Def. Mem. at 11-12. In Landauer, the court granted a protective order for a document request that required the review of 1,108 complaints requiring an estimated 554 hours. Landauer is inapposite to the actual facts in this case – retrieval of approximately 120 reports, requiring 10-20 hours. Moreover, even in Landauer, the Court ordered the City of Philadelphia to produce documents more closely tailored to the facts of that case for a five year period. Id.

Respectfully submitted this ____ day of July, 2005.

ALBERTO R. GONZALES
Attorney General of the United States

PATRICK L. MEEHAN
United States Attorney
Eastern District of Pennsylvania

NANCY GRIFFIN
Assistant United States Attorney
Eastern District of Pennsylvania
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106
Telephone: (215) 861-8200

BRADLEY J. SCHLOZMAN
Acting Assistant Attorney General
Civil Rights Division

JOHN L. WODATCH, Chief
PHILIP L. BREEN, Special Legal Counsel
ALLISON J. NICHOL, Deputy Chief
Disability Rights Section
Civil Rights Division

/s/ Kathleen P. Wolfe
LAURA F. EINSTEIN
KATHLEEN P. WOLFE
Trial Attorneys
Disability Rights Section
Civil Rights Division
U.S. Department of Justice - NYA
950 Pennsylvania Avenue NW
Washington, D.C. 20530
Telephone: (202) 307-0663

CERTIFICATE OF SERVICE

I hereby certify that on July ___, 2005, I electronically filed with the Clerk of the Court, using the Electronic Case Management System, the United States' . . . .

I further certify that copies of this filing were mailed via First-Class Mail on July __, 2005, to the following non-ECF participants:

Ronda Goldfein
AIDS Law Project of Pennsylvania
1211 Chestnut Street, Suite 600
Philadelphia, PA 19107

By:

Kathleen P. Wolfe
Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice - NYA
950 Pennsylvania Avenue NW
Washington, D.C. 20530
Telephone: (202) 307-0663