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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KENNETH M. MARSH,)	Civil No. 05cv1568 JLS (AJB)
)	
Plaintiff,)	
v.)	Order Granting Motion to Compel
)	[Doc. No. 96]
COUNTY OF SAN DIEGO, M.L. MURPHY,)	
M.D., DAVID L. CHADWICK, M.D.,)	
ROGER WILLIAMS, M.D., CHILDREN'S)	
HOSPITAL MEDICAL CENTER and DOES)	
1 to 100, inclusive,)	
)	
Defendants.)	
_____)	

Plaintiff brings this motion to compel seeking all records in the possession of Children's Hospital and Health Center ("CHHC") and its Center for Child Protection, which pertain to Punanai Polanco, Douglas Allen Yates, Jr. and Harvey Thomas. Defendants' contend that Plaintiff is not entitled to the requested discovery because the requested records run afoul of privacy interests and the Health Insurance Portability and Accountability Act (HIPAA). The parties submitted letter briefs as this motion is appropriate for submission on the papers and without oral argument pursuant to Local Rule 7.1(d)(1). Based upon the moving papers and for the reasons set forth herein, Plaintiff's Motion to Compel is hereby GRANTED.

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2 **Background**

3 The instant action was brought by Plaintiff under 42 U.S.C. § 1983 alleging violations of
4 Plaintiff's Fourth Amendment rights, malicious prosecution under both § 1983 and state law, intentional
5 infliction of emotional distress and violation of state civil rights statutes. Plaintiff was convicted of the
6 murder of Phillip Buell. The complaint in the instant action alleges a conspiracy between Defendants to
7 mislead and distort the medical history of Phillip Buell and to perform his autopsy in a false and
8 deliberate manner to convict Plaintiff. Plaintiff's complaint also alleges that the Defendants improperly
9 influenced the County of San Diego to allow them to perform autopsies and autopsy related services in
10 cases where children's deaths were suspected of having been caused by abuse.

11 Plaintiff brings this motion to compel seeking all records in the possession of Children's
12 Hospital and Health Center ("CHHC") and its Center for Child Protection, which pertain to Punanai
13 Polanco, Douglas Allen Yates, Jr. and Harvey Thomas, who were admitted to the hospital and died there
14 in November 1983, October 1983 and January 1986, respectively. Punanai Polanco was autopsied at
15 CHHC, which subsequently reported force feeding by her caretaker as the cause of her death. When a
16 second autopsy was performed, it revealed that Punanai had died accidentally and all charges against her
17 parents were dropped. Douglas Allen Yates, Jr. (son of John and Michelle Ferraro) was autopsied at
18 CHHC, which resulted in charges of child abuse and murder being brought against his parents. During
19 the criminal prosecution of John and Michelle Ferraro, the cause of death was determined to be the
20 result of an accidental fall and all charges against the parents were dismissed. Harvey Thomas was
21 transferred to CHHC because he was suffering from symptoms attributable to a congenital defect, but
22 was diagnosed with non-accidental injuries as a result of violent shaking or a fall. The CHHC finding
23 resulted in the removal of the Thomas's other child from the home, and the Thomas's were charged with
24 murder. Subsequent expert testimony showed that the cause of death was the congenital defect and the
25 Thomas's were cleared of all charges. Both the Ferraros and Thomas's brought suit, but each case was
26 dismissed based on the Mandated Reporter Immunity found in Penal Code section 11172(a).

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2 **Legal Standard**

3 ***I. Rule 37 - Motion to Compel***

4 Federal Rule of Civil Procedure 26(b)(1)¹ states, “Parties may obtain discovery regarding any
5 matter, not privileged, that is relevant to the claim or defense of any party, including the existence,
6 description, nature, custody, condition of any books, documents, or other tangible things and the identity
7 and location of persons having knowledge of any discoverable matter . . . Relevant information need
8 not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of
9 admissible evidence.” Fed. R. Civ. Pro. 26(b)(1). “Generally, the purpose of discovery is to remove
10 surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their
11 dispute. Toward this end, Rule 26(b) is liberally interpreted to permit wide-ranging discovery of
12 information even though the information may not be admissible at the trial.” *U.S. ex rel. Schwartz v.*
13 *TRW, Inc.*, 211 F.R.D. 388, 392 (C.D. Cal 2002)(internal citations omitted).

14 Federal Rule 37(a)(2)(B), allows the discovering party to move for an order compelling an
15 answer, a designation, or an inspection in accordance with a specific discovery request. Fed. R. Civ.
16 Pro. 37(a)(2)(B). This rule establishes “a flexible means by which a court may enforce compliance with
17 the Federal discovery procedures through a broad choice of remedies and penalties.” *B.F. Goodrich Tire*
18 *Co. v. Lyster*, 328 F. 2d 411, 415 (5th Cir. 1954). Answers that are evasive or incomplete are treated as
19 a failure to disclose. Fed. R. Civ. Pro. 37(a)(3).

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21 **Discussion**

22 At issue in this motion is the balance of the families’ privacy against the public interest in
23 disclosure. Defendants’ contend that Plaintiff’s motion to compel should be denied because the
24 requested documents are protected by: 1) the right to privacy in the confidentiality of one’s own medical
25 records, which extends to the family of the decedent; 2) HIPAA regulations which prohibit health care
26 providers from divulging patients’ medical records without their consent or a qualified protective order
27 and; 3) The California Confidentiality of Medical Information Act which provides that “[n]o provider of
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¹All future references will be to the Federal Rules of Civil Procedure unless otherwise stated.

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2 health care . . . shall disclose medical information regarding a patient . . . without first obtaining an
3 authorization except . . . by a court pursuant to an order of that court.” Cal. Civ. Code §56.10 (2007).

4 ***I. Balancing of the Family’s Privacy and the Public Interest in Disclosure***

5 The United States Supreme Court has recognized a right of privacy in the confidentiality of
6 medical records and this right has been extended to include privacy rights of the deceased.² The right of
7 privacy is balanced against the public interest in disclosure.³ The party seeking disclosure must show
8 that the public interest is significant and that the information is likely to advance that interest. The
9 relevant factors to be considered in determining the scope of protection to be afforded individual privacy
10 rights includes: 1) the encroachment of the individual’s privacy right; 2) whether the encroachment
11 would impact an area that has traditionally been off limits for most regulation; 3) whether the informa-
12 tion is available from other sources; 4) the extent to which the privacy rights impinge on the rights of
13 others; and 5) whether the interests of society at large encourage a need for the encroachment. *Pagano*
14 *v. Oroville Hospital*, 145 F.R.D. at 699.

15 Alternatively, the public interest requirement may be satisfied when the information sought is
16 necessary to show that responsible officials acted negligently or otherwise improperly in the perfor-
17 mance of their duties. *National Archives and Records Administration v. Favish*, 541 U.S. at 173. In the
18 instant case, the Plaintiff is requesting the information to establish a *modus operandi* of falsely claiming
19 child abuse murder when the manner of death was accidental. “The requester must also produce
20 evidence that would warrant a belief by a reasonable person that the alleged Government impropriety
21 might have occurred.” *Id.* at 174. Here, the Plaintiff has produced sufficient evidence to warrant a
22 belief that the impropriety may have occurred. As such, the Plaintiff has demonstrated that a significant
23 public interest exists that outweighs the individual privacy rights of the three deceased children and their
24 families in keeping such records confidential. Furthermore, an individual’s privacy rights with regard to

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26 ²*Powell v. United States*, 584 F. Supp. 1508, 1526 (N.D. Cal. 1984). A deceased patient retains a
27 privacy right. Although not raised in the Defendant’s brief, the privacy interests of the deceased
diminishes with the passage of time.

28 ³*Fritsch v. City of Chula Vista*, 187 F.R.D. 614 (S.D. Cal. 1999); *Pagano v. Oroville Hospital*,
145 F.R.D. 683 (E.D. Cal. 1993); *Powell v. United States*, 584 F. Supp. at 1526; *National Archives and*
Records Administration v. Favish, 541 U.S. 157 (2004); *Division of Medical Quality, Board of Medical*
Quality Assurance v. Gherardini, 93 Cal. App. 3d 669 (1979).

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2 medical records is diminished after death. *Powell*, 584 F.Supp. 1508 at 1526. The parent’s privacy
3 rights may be impinged by the disclosure, this is outweighed by the fact that the information can only be
4 obtained through these confidential medical records. *Cox Broadcasting Corp. V. Cohn*, 420 U.S. 469,
5 474 (1975). While the Defendants contend that the information requested approaches or exceeds the
6 outer boundaries of relevance, the Court does not agree. The Plaintiff has demonstrated that the
7 information sought is reasonably calculated to lead to the discovery of admissible evidence regarding a
8 *modus operandi* of the Defendants and as such, Plaintiff is entitled to the requested discovery.

9 ***II. HIPAA & California Confidentiality of Medical Information Act***

10 HIPAA provides that a person may not be denied eligibility for health insurance based on their
11 medical records. It also imposes requirements on the Department of Health and Human Services
12 (“DHHS”), health plans and healthcare providers to protect information. The argument that HIPAA
13 provides for a private right of action has consistently been rejected because the law specifically states
14 that DHHS must pursue enforcement actions, because HIPAA does not provide an individual with a
15 private cause of action.⁴ The Plaintiff states, and the court agrees, that HIPAA and the California
16 Confidentiality of Medical Information Act do not present a bar to the release of these records, since
17 such records can be disclosed if compelled by a court order and the use of such records is limited by the
18 protective order in this case.

19 20 21 22 **Conclusion**


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⁴*Acara v. Banks*, 480 F.3d 569 (5th Cir. 2006); *Alexander v. Sandoval*, 532 U.S.275 (2001); *Agee v. United States*, 72 Fed.Cl. 284 (2006); *Walker v. Gerald*, 2006 WL 1997635 (E.D.La. 2006); *Poli v. Monuntain Valley’s Health Ctrs., Inc.*, 2006 WL 83378 (E.D.Cal. 2006); *Cassidy v. Nicolo*, 2005 WL 3334523 (W.D.N.Y. 2005); *Johnson v. Quander*, 307 F.Supp.2d 79(D.D.C. 2005); *Univ. Of Colo. Hosp. v. Denver Publishing Company*, 340 F.Supp.2d 1142 (D.Colo.2004); *O’Donnell v. Blue Cross Blue Shield of Wyo.*, 173 F.Supp.2d 1176 (D.Wyo.2001); *Means v. Ind. Life & Accident Ins. Co.*, 963 F.Supp. 1131 (M.D.Ala.1997); *Wright v. Combined Ins. Co. of Am.*, 959 F.Supp. 356 (N.D.Miss.1997).

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2 For the reasons set forth above, Plaintiff's Motion to Compel is hereby GRANTED. Defendants
3 shall produce all non-privileged⁵ documents responsive to Plaintiff's requests on or before November 9,
4 2007.

5 IT IS SO ORDERED.

6 DATED: October 15, 2007

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9 Hon. Anthony J. Battaglia
10 U.S. Magistrate Judge
11 United States District Court
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⁵Any privilege Defendant's wish to assert that was not covered by this order must be done in compliance with the Federal Rules.