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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ADAM RAY LOPEZ,)	Civil No. 09cv00108 W(RBB)
)	
Plaintiff,)	ORDER (1) DENYING PLAINTIFF'S
)	MOTION REQUESTING PERMISSION
v.)	TO SUBMIT ADDITIONAL
)	INTERROGATORY QUESTIONS [ECF
)	NO. 115]; AND (2) GRANTING
P. SANTOYO, D.D.S, C.)	PLAINTIFF'S MOTION FOR AN
ROBERTSON, C.D.O.,)	ORDER COMPELLING DISCOVERY
)	[ECF NO. 120]
Defendants.)	
_____)	

Plaintiff Adam Ray Lopez, a state prisoner proceeding pro se and in forma pauperis, filed a Complaint on January 16, 2009, pursuant to 42 U.S.C. § 1983 [ECF Nos. 1, 4]. He subsequently filed a First Amended Complaint on July 15, 2009 [ECF No. 7], and a Second Amended Complaint on December 13, 2010 [ECF No. 62].¹ Lopez contends that Defendants Santoyo and Robertson violated his Eighth Amendment right to be free from cruel and unusual punishment by acting with deliberate indifference to Plaintiff's serious medical

¹ Because the Second Amended Complaint is not consecutively paginated, the Court will cite to it using the page numbers assigned by the electronic case filing system.

1 needs. (Second Am. Compl. 5, ECF No. 62.) The Defendants filed an
2 Answer on December 1, 2011 [ECF No. 98].

3 Plaintiff's Motion Requesting Permission to Submit Additional
4 Interrogatory Questions was filed nunc pro tunc to May 1, 2012 [ECF
5 No. 115]. On May 10, 2012, the Court issued a minute order
6 construing Plaintiff's request as a motion for leave to serve
7 additional and untimely interrogatories because the May 7, 2012
8 deadline for propounding discovery had lapsed [ECF No. 117].
9 Defendants Santoyo and Robertson filed their Opposition to
10 Plaintiff's Motion for Leave to Serve Additional and Untimely
11 Interrogatories on May 24, 2012 [ECF No. 118]. On June 8, 2012,
12 Plaintiff filed an "Opposition to Defendants Motion [sic] and
13 Opposition to Plaintiffs Motion for Leave to Serve Additional
14 Interrogatories," which the Court construes as his Reply [ECF No.
15 124].

16 Lopez also filed a Motion for an Order Compelling Discovery on
17 May 31, 2012 [ECF No. 120]. Defendants filed a document titled
18 "Discovery Matter: Defendants' Notice of Opposition and Opposition
19 to Plaintiff's Motion to Compel" on June 25, 2012 [ECF No. 126].
20 One month later, on July 25, 2012, Lopez similarly filed a document
21 titled "Discovery Matter: Plaintiff's Opposition to Defendants'
22 Opposition to Plaintiff's Motion to Compel," which the Court
23 construes as his Reply [ECF No. 130].

24 The Court finds the motions suitable for resolution on the
25 papers, pursuant to Civil Local Rule 7.1. See S.D. Cal. Civ. R.
26 7.1(d)(1). For the reasons stated below, Lopez' Motion Requesting
27 Permission to Submit Additional Interrogatory Questions is **DENIED**.
28 Plaintiff's Motion for an Order Compelling Discovery is **GRANTED**.

1 I. FACTUAL BACKGROUND

2 On December 13, 2010, when Lopez filed his Second Amended
3 Complaint, he was incarcerated at the California Substance Abuse
4 Treatment Facility and State Prison in Corcoran, California.
5 (Second Am. Compl. 1, ECF No. 62.) The events giving rise to this
6 action occurred between July 26, 2006, and July 10, 2007, while
7 Plaintiff was housed at Calipatria State Prison ("Calipatria").
8 (Id. at 2, 5-10.)

9 Plaintiff argues that on July 26, 2006, he submitted a Health
10 Care Services Request Form complaining of pain and discomfort in
11 his teeth and requesting that his wisdom teeth be extracted. (Id.
12 at 5 (citing id. Ex. A, at 14).) Defendant Santoyo, D.D.S.,
13 examined Lopez on November 1, 2006, in response to his request.
14 (Id.) The Plaintiff maintains that Dr. Santoyo's notes from that
15 examination indicate that Lopez had a serious dental need. (Id.;
16 see id. Ex. B, at 16.) According to Plaintiff, Santoyo then
17 completed a physician request for services form stating that Lopez
18 was in "urgent" need of oral surgery for two impacted molars, and
19 he was experiencing swelling, pain, and infection in his mouth.
20 (Second Am. Compl. 5, ECF No. 62.) Santoyo classified Plaintiff's
21 condition as "Priority 1C," a classification that required any oral
22 surgery to be performed within sixty days of diagnosis. (Id.)
23 Additionally, Plaintiff asserts that he told Defendant he was
24 experiencing extreme pain and discomfort, but the dentist refused
25 to prescribe any pain medication. (Id. at 5, 7).

26 Lopez submits that Dr. Santoyo told him that because Santoyo
27 did not perform wisdom teeth extractions, Lopez must be transported
28 to an outside medical service provider, and Dr. Torchia, D.D.S.,

1 would perform the surgery. (Id. at 6.)² But another inmate at the
2 prison, Christopher Soto, told Lopez in late 2007 that Dr. Santoyo
3 had extracted Soto's wisdom teeth. (See id. at 9-10.) Plaintiff
4 complains that "defendant Santoyo maliciously told [him] that he
5 did not perform tooth extractions." (Id. at 10.)

6 Lopez alleges that on November 2, 2006, Defendant Robertson,
7 chief dental officer at Calipatria, approved the "urgent Priority
8 1C" surgery. (Id. at 6.) The Plaintiff maintains that prison
9 regulations provide that the chief dental officer must review all
10 documents relating to a prisoner's medical condition before
11 approving oral surgery. (Id.) Lopez argues that in approving the
12 wisdom teeth extraction, Robertson was made aware of Plaintiff's
13 serious dental need. (Id. at 7.)

14 Lopez submitted an inmate grievance on January 1, 2007. Id.
15 His grievance was partially granted at the informal level on
16 February 20, 2007. (Id. Ex. E, at 27.) Plaintiff was informed
17 that he was "on the oral surgery list to be seen by an outside
18 provider." (Id.) Dissatisfied, Lopez appealed the 602 response to
19 the formal level, stating that his surgery should be done
20 "forthwith." (Id.)

21 On April 20, 2007, Plaintiff submitted another health care
22 request seeking priority status over other prisoners' medical
23 procedures in light of his severe pain. (Second Am. Compl. 7, ECF
24 No. 62.) Santoyo responded to the appeal on April 23, 2007. (Id.
25 Ex. E, at 27-28.) Plaintiff was advised that he was scheduled to
26 see the oral surgeon on April 30, 2007. (Id. Ex. E, at 28.)

27
28 ² Claims against Dr. Torchia were dismissed with prejudice on
September 17, 2010. (Order Adopting Report & Recommendation 12,
ECF No. 55.)

1 On that date, "after a 10 month delay without any pain
2 medication," Plaintiff contends he was transported to the outside
3 medical provider in San Diego, California, and received his
4 surgery. (Second Am. Compl. 8, ECF No. 62.) According to Lopez,
5 Dr. Torchia chipped one of Plaintiff's teeth while performing the
6 procedure and subsequently issued a physician's order directing
7 Calipatria dentists to repair the tooth. (Id. (citing id. Ex. G,
8 at 32).) Lopez asserts Torchia only prescribed him a five-day
9 supply of Motrin for the pain. (Id.)

10 On May 2, 2007, the Plaintiff submitted a health care request
11 complaining of pain and swelling to his jaw and stating that the
12 Motrin had no effect on his pain. (Id.) Lopez maintains that he
13 was put on a liquid diet but was not prescribed "any medication at
14 all." (Id.) Plaintiff claims that approximately one week after
15 his surgery, he spoke with Dr. Santoyo, who stated he would repair
16 Lopez's chipped tooth himself. (Id. at 9 (citing id. Ex. I, at
17 36).) On May 15, 2007, Santoyo examined Lopez, who told Dr.
18 Santoyo that he was in pain and needed his tooth repaired, yet
19 Defendant did "absolutely nothing for the plaintiff." (Id. at
20 8-9.)

21 On May 31, 2007, Lopez submitted another health care request
22 indicating that he needed his chipped tooth filled and his teeth
23 cleaned. (Id. at 9.) Plaintiff was seen by Dr. Santoyo on June
24 12, 2007; Lopez told him that he was in pain, could not eat, and
25 needed his tooth repaired, but the Defendant "took no action."
26 (Id.) Santoyo ultimately repaired Lopez's chipped tooth on July
27 10, 2007. (Id.)

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1 Plaintiff alleges Defendants' conduct constituted deliberate
2 indifference to his serious medical needs in violation of the
3 Eighth Amendment to the United States Constitution. (Id. at 5, 10-
4 11.) Lopez also complains that "the prison's medical care system
5 and policy Title 15 3354" are ineffective because he did not
6 receive his surgery within sixty days of being approved for
7 surgery, as required. (Id. at 11.)

8 II. DISCUSSION

9 A. Additional Interrogatories

10 Federal Rule of Civil Procedure 33(a)(1) provides: "Unless
11 otherwise stipulated or ordered by the court, a party may serve on
12 any other party no more than 25 written interrogatories, including
13 all discrete subparts. Leave to serve additional interrogatories
14 may be granted to the extent consistent with Rule 26(b)(2)." Civil
15 Local Rule 33.1 requires a party seeking to serve additional
16 interrogatories to "submit to the court a written motion setting
17 forth the proposed additional interrogatories and the reasons
18 establishing good cause for their use." S.D. Cal. Civ. R. 33.1(a).

19 On January 21, 2012, Lopez served his interrogatories on
20 Defendant Santoyo. (Defs.' Mem. P. & A. Opp'n Pl.'s Mot. Leave
21 Serve Addt'l & Untimely Interrogs. 3, ECF No. 118.) He served
22 interrogatories on Defendant Robertson on January 23, 2012. (Id.)
23 Although Plaintiff was allowed twenty-five interrogatories, he
24 served only twenty-two interrogatories on each Defendant.
25 Plaintiff's deadline to serve interrogatories was May 7, 2012.
26 (Case Mgmt. Conference Order 2, ECF No. 104.) Defendants served
27 their responses to Plaintiff's interrogatories on February 23,
28 2012. Defs.' Mem. P. & A. Opp'n Pl.'s Mot. Leave Serve Addt'l &

1 Untimely Interrogs. 3, ECF No. 118.) Assuming that Plaintiff's
2 twenty-two interrogatories did not include discrete subparts, Lopez
3 was free to serve three additional interrogatories on each of the
4 Defendants by May 7, 2012, without seeking leave of Court.
5 Instead, Plaintiff submitted this Motion Requesting Permission to
6 Submit Additional Interrogatory Questions [ECF No. 115], which was
7 filed nunc pro tunc to May 1, 2012. In his Motion, Plaintiff does
8 not explain why he served fewer interrogatories than allowed by the
9 federal and local rules. Neither does he provide a reason for his
10 delay in attempting to serve additional interrogatories.
11 Furthermore, neither Lopez's Motion nor his Reply offer any
12 information on how many proposed additional interrogatories he
13 seeks to serve on Defendants, as required by the Civil Local Rule
14 33.1.

15 In his Motion Requesting Permission to Submit Additional
16 Interrogatory Questions, Lopez argues that Defendants objected to
17 all of the questions. (Pl.'s Mot. Requesting Permission Submit
18 Addt'l Interrog. Questions 1, ECF No. 115). Lopez states that he
19 is "not sure what he did wrong" and requests that the Court permit
20 him to "correct" his interrogatories and resubmit them to
21 Defendants. (Id.) In their Opposition, Defendants argue that
22 Plaintiff has not established grounds for serving additional,
23 untimely interrogatories because Defendants provided responses to
24 the interrogatories Plaintiff served in January. (Defs.' Mem. P. &
25 A. Opp'n Pl.'s Mot. Leave Serve Addt'l & Untimely Interrogs. 3, ECF
26 No. 118.) Defendants attach their interrogatory responses, which
27 indicate that Defendant Santoyo answered twenty-one of the twenty-

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1 two interrogatories,³ and Defendant Robertson answered all twenty-
2 two. (See id. Attach. #1, Decl. Kral, Exs. B, D.) Defendants
3 contend that Plaintiff's Motion violates Civil Local Rule 33.1(a)
4 because Lopez failed to identify the deficiencies in Defendants'
5 responses and set forth his proposed interrogatories. (Defs.' Mem.
6 P. & A. Opp'n Pl.'s Mot. Leave Serve Addt'l & Untimely Interrogs.
7 4, ECF No. 118.) They also allege that Lopez has not established
8 good cause for serving additional interrogatories and that he
9 failed to meet and confer with Defendants prior to filing the
10 Motion. (Id.)

11 In his Reply, Lopez argues that he is unable to meet and
12 confer with Defendants because he is incarcerated. (Reply 2, ECF
13 No. 124.) He contends that it is "necessary and essential" that he
14 propound additional interrogatories because he is otherwise unable
15 to depose Defendants. (Id.) Finally, Lopez alleges that he has no
16 access to the law library or to legal assistance; he lacks
17 "knowledge in the law and court procedures[;]" and he has
18 "difficulty understanding the discovery process." (Id.)

19 "In general, pro se representation does not excuse a party
20 from complying with a court's orders and with the Federal Rules of
21 Civil Procedure." Ackra Direct Mktg. Corp. v. Fingerhut Corp., 86
22 F.3d 852, 856-57 (8th Cir. 1996) (citing Jones v. Phipps, 39 F.3d

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24 ³ Defendant Santoyo objected and did not answer interrogatory
25 number thirteen, which asked Santoyo to describe the circumstances
26 where Defendant would "refuse to prescribe pain medication or take
27 any action to relieve a patient's pain and suffering when
28 [Defendant had] personal knowledge that the patient is in extreme
29 pain and the patient requests pain medication." (Defs.' Mem. P. &
30 A. Opp'n Pl.'s Mot. Leave Serve Addt'l & Untimely Interrogs.
31 Attach. #1, Decl. Kral, Ex. B, ECF No. 118.) Defendant objected to
32 this question as overbroad, argumentative, burdensome, oppressive,
33 vague and ambiguous, and irrelevant. (Id.)

1 158, 163 (7th Cir. 1994); Anderson v. Home Ins. Co., 724 F.2d 82,
2 84 (8th Cir. 1983)). Plaintiffs who represent themselves must
3 abide by the rules of the court in which they litigate. Carter v.
4 Comm'r, 784 F.2d 1006, 1008-09 (9th Cir. 1986); see also Bias v.
5 Moynihan, 508 F.3d 1212, 1223 (9th Cir. 2007) (discussing the pro
6 se litigant's violation of local rules). "[W]hile pro se litigants
7 may be entitled to some latitude when dealing with sophisticated
8 legal issues, acknowledging their lack of formal training, there is
9 no cause for extending this margin to straightforward procedural
10 requirements that a layperson can comprehend as easily as a
11 lawyer." Jourdan v. Jabe, 951 F.2d 108, 109 (6th Cir. 1991); Cone
12 v. Rainbow Play Sys., No. CIV 06-4128, 2008 U.S. Dist. LEXIS 17489,
13 at *4 (D.S.D. Mar. 5, 2008) (explaining that pro se litigants must
14 follow procedural rules).

15 In this case, Lopez had sufficient time to send out additional
16 interrogatories after he received Defendants' responses on February
17 23, 2012. Even accepting Lopez's argument that he did not
18 understand "what he did wrong regarding the interrogatory
19 questions[,] " Plaintiff does not describe any action he took to
20 correct his perceived mistakes after Defendants served their
21 responses. If Plaintiff needed more time to serve his
22 interrogatories, he could have requested an extension of the May 7,
23 2012 deadline for propounding discovery. (See Case Management
24 Conference Order 2, ECF No. 104.) Instead, Lopez chose to wait
25 until April 22, 2012, to file the current motion. "The decision
26 whether to penalize a party for dilatory conduct during discovery
27 proceedings is committed to the sound discretion of the trial
28 court." Bollow v. Fed. Reserve Bank, 650 F.2d 1093, 1102 (9th Cir.

1 1981) (citing Fed. R. Civ. P. 37(a)(4); Marquis v. Chrysler Corp.,
2 577 F.2d 624, 640 (9th Cir. 1978)). "A scheduling order is not a
3 frivolous piece of paper, idly entered, which can be cavalierly
4 disregarded by counsel without peril." Johnson, 975 F.2d at 610
5 (quotation omitted). "The use of orders establishing a firm
6 discovery cutoff date is commonplace, and has impacts generally
7 helpful to the orderly progress of litigation, so that the
8 enforcement of such an order should come as a surprise to no one."
9 Cornwell, 439 F.3d at 1027.

10 Even if the Court excuses Lopez's failure to timely seek
11 permission to exceed the allowed number of interrogatories, he has
12 not established good cause for serving more than twenty-five
13 interrogatories. Lopez has not provided the Court with his
14 proposed interrogatories. See S.D. Civil Rule 33.1(a). Plaintiff
15 argues that he should be allowed to propound additional
16 interrogatories because he is unable to depose defendants, and he
17 lacks knowledge of the law. Yet, there is no indication that Lopez
18 is subjected to burdens beyond those ordinarily imposed on
19 incarcerated pro se litigants. Further, as discussed above, there
20 is no evidence that Lopez was diligently working to meet his May 7
21 discovery deadline.

22 Despite his pro se status, Lopez is not entitled to any
23 latitude for the untimeliness. See Ackra Direct Mktg. Corp., 86
24 F.3d at 856-57 (stating that pro se representation does not excuse
25 a litigant from complying with court orders); Jourdan, 951 F.2d at
26 109 (explaining that although courts should liberally construe pro
27 se plaintiffs' legal arguments, courts should strictly construe
28 their compliance with procedural requirements); see also Carter,

1 784 F.2d at 1008-09 (noting that pro se plaintiffs must follow the
2 rules of the court). Accordingly, Plaintiff's Motion Requesting
3 Permission to Submit Additional Interrogatory Questions is **DENIED**.

4 **B. MOTION TO COMPEL**

5 Federal Rule of Civil Procedure 34 governs production of
6 documents and provides, in pertinent part:

7 A party may serve on any other party a request
8 within the scope of Rule 26(b):

9 (1) to produce and permit the requesting party or
10 its representative to inspect, copy, test, or sample the
11 following items in the responding party's possession,
12 custody, or control:

13 (A) any designated documents or electronically
14 stored information—including writings, drawings, graphs,
15 charts, photographs, sound recordings, images, and other
16 data or data compilations—stored in any medium from which
17 information can be obtained either directly or, if
18 necessary, after translation by the responding party into
19 a reasonably usable form

20 Fed. R. Civ. P. 34(a)(1)(A). Federal Rule of Civil Procedure
21 37(a)(1) allows a party to move for an order compelling disclosure
22 or discovery. The rule provides that such a motion "must include a
23 certification that the movant has in good faith conferred or
24 attempted to confer with the person or party failing to make
25 disclosure or discovery in an effort to obtain it without court
26 action." Fed. R. Civ. P. 37(a)(1).

27 Lopez moves the Court for an order pursuant to Rule 37(a)
28 compelling Defendants Santoyo and Robertson to produce the
29 following documents: (1) "Request for Dental Treatment Log (RDTL)
30 CDCR 7433" for July 1, 2006, through July 30, 2007; (2) "Daily
31 Dental Treatment/Appointment Log (DDTAL) CDCR 7434" for July 1,
32 2006, through July 30, 2007; (3) "CDCR Dental Pharmaceutical Record
33 Log" for July 1, 2006, through July 30, 2007; and (4) "Written
34 Minutes recorded by the OT of all Committee (D.A.R., M.A.R.,

1 H.C.R.C.) Meetings" from November 1, 2006, through March 1, 2007.
2 (Pl.'s Mot. Order Compelling Disc. 1-2, ECF No. 120.) Plaintiff
3 contends that he submitted a written request for these documents on
4 February 1, 2012, and allowed Defendants six additional weeks to
5 produce them. (Id. at 2.) Lopez alleges that on April 21, 2012,
6 he sent a letter to Defendants' counsel informing him that
7 Plaintiff had not received the documents. (Id.; id. Ex. A.) He
8 received no response. Subsequently, Lopez sent another letter to
9 Defendants regarding the requested documents. (Id. Ex. B.) He did
10 not receive a response to his second letter. (Pl.'s Mot. Order
11 Compelling Disc. 3, ECF No. 120.) Lopez contends that he has in
12 good faith attempted to confer with Defendants prior to filing this
13 Motion. (Id.)

14 In their Opposition to Plaintiff's Motion, Defendants contend
15 that the requested documents were not specifically mentioned in
16 Lopez's original request for production served on Defendants on
17 January 30, 2012. (Defs' Opp'n Pl.'s Mot. Compel 5, ECF No. 126.)
18 Defendants argue that although they produced over 430 pages of
19 documents in response to Lopez's original request, Plaintiff
20 subsequently sought four additional documents. (Id.) Defendants
21 argue that because Lopez's initial request was vague and overbroad,
22 any further production would be unduly burdensome. (Id. at 2.)
23 Defendants also oppose the Motion on the following grounds: (1)
24 The requested documents are no longer maintained by the CDCR; (2)
25 production would violate the Health Information Portability and
26 Accountability Act; (3) requested documents are not relevant to
27 Lopez's case; and (4) the request for production violates

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1 California Evidence Code section 1157 and the federal privilege of
2 critical self-analysis. (Id.)

3 **1. Availability of Documents**

4 Defendants argue that the Court should deny the motion to
5 compel production of documents requested by Lopez because the
6 requested items no longer exist. Defendants allege that their
7 investigation revealed that documents responsive to requests
8 numbers 1 through 4 were purged by CDCR prior to 2010. (Id. at 6.)
9 Defendants submitted a declaration from Christina Castro, a CDCR
10 office technician responsible for scheduling inmate-patients dental
11 treatment. (Id. Ex. H, Decl. Castro.) Ms. Castro states that in
12 August 2010, the CDCR implemented new procedures for maintenance of
13 inmate dental records that required most records to be kept for
14 only three years. (Id. at 1.) Castro alleges that the written
15 minutes, the request for dental treatment log, the dental
16 treatment/appointment log, and the pharmaceutical record log
17 requested by Lopez are no longer available because they had been
18 purged pursuant to the new policy. (Id. at 2.) Castro also states
19 that the relevant information about Plaintiff's treatment is
20 available in Lopez's medical records. (Id.)

21 In his Reply, Plaintiff challenges Ms. Castro's declaration
22 and argues that the records he seeks may still exist. (Pl.'s
23 [Reply] to Defs.' Opp'n 6, ECF No. 130.) Lopez points out that
24 Defendants failed to produce the updated 2010 manual which
25 allegedly shortens the time for record keeping to three years.
26 (Id.) Instead, they turned over copies of the 2006 and 2007 CDCR
27 Dental Policies and Procedures Manual, both of which mandate that
28 certain dental records be kept for a period of five years. (Id.)

1 Exs. D, E.) Lopez argues that this indicates bad faith on
2 Defendants' part. (Pl.'s [Reply] to Defs.' Opp'n 6, ECF No. 130.)
3 Additionally, Lopez contends that the information sought is not
4 contained in his medical file. (Id. at 10-11.)

5 " 'Document retention policies,' which are created in part to
6 keep certain information from getting into the hands of others,
7 . . . are common in business," and are lawful "under ordinary
8 circumstances." Arthur Andersen LLP v. United States, 544 U.S.
9 696, 704 (2005). Litigants, however, are under a duty to preserve
10 "what [they know], or should know, is relevant in the action, is
11 reasonably calculated to lead to the discovery of admissible
12 evidence, is reasonably likely to be requested during discovery
13 and/or is the subject of a pending discovery request." Zubulake v.
14 UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003). The duty
15 extends to "any documents or tangible things . . . made by
16 individuals 'likely to have discoverable information that the
17 disclosing party may use to support its claims or defenses.'" Id.
18 at 217-18 (quoting Fed. R. Civ. P. 26(a)(1)(A)).

19 The duty to preserve begins when a party reasonably should
20 have known that the evidence is relevant to anticipated litigation.
21 See In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060,
22 1067 (N.D. Cal. 2006). As soon as a potential claim is identified,
23 a litigant is under a duty to preserve evidence which it knows or
24 reasonably should know is relevant to the action, is reasonably
25 calculated to lead to the discovery of admissible evidence, is
26 reasonably likely to be requested during discovery, or is the
27 subject of a pending discovery request. Id.; Wm. T. Thompson Co.
28 v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1445 (C.D. Cal. 1984).

1 Spoliation of evidence is defined as "the destruction or
2 significant alteration of evidence, or the failure to preserve
3 property for another's use as evidence in pending or reasonably
4 foreseeable litigation." United States v. Kitsap Physicians Serv.,
5 314 F.3d 995, 1001 (9th Cir. 2002). A party's destruction of
6 evidence is considered "willful" if the party "has some notice that
7 the [evidence was] potentially relevant to the litigation before
8 [it was] destroyed." Leon v. IDX Sys. Corp., 464 F.3d 951, 959
9 (9th Cir. 2006) (internal citation omitted). "Once the duty to
10 preserve attaches, a party must 'suspend any existing policies
11 related to deleting or destroying files and preserve all relevant
12 documents related to the litigation.'" Brooks v. Felker, No.
13 2:08-cv-2512 KJM KJN P, 2011 U.S. Dist. LEXIS 61825, at *1-2 (E.D.
14 Cal. June 9, 2011) (citation omitted).

15 Plaintiff initiated this litigation in 2009, and Defendants
16 were on notice of Lopez's claims as early as October of 2009. (See
17 Defs.' Ex Parte Appl. Extension Time File Initial Responsive
18 Pleading, ECF No. 13 (filed Oct. 30, 2009).) Defendants allege
19 that the new policy and procedures for inmate dental services were
20 implemented in August of 2010; subsequently, the records Lopez
21 seeks were "purged pursuant to the policy." (Defs' Opp'n Pl.'s
22 Mot. Compel Attach. #2, Ex. H, Decl. Castro 1-2, ECF No. 126.)

23 The 2010 change in the record keeping policy does not excuse
24 Defendants' failure to retain records relevant to this case. As
25 noted above, parties are under an obligation to preserve all
26 documents and evidence that may be relevant to pending litigation.
27 Defendants had a duty not to purge records even after implementing
28 the 2010 policy. Because they were on notice of Lopez's claims as

1 early as 2009, whether evidence was intentionally destroyed, the
2 likely contents of that evidence, and the appropriate trial
3 sanction are questions for another day. See Fujitsu Ltd. v.
4 Federal Exp. Corp., 247 F.3d 423, 436 (2d Cir. 2001).

5 **2. Relevance of the Requested Documents**

6 Defendants Santoyo and Robertson argue that the Court should
7 deny Lopez's request because the documents he seeks do not contain
8 any information relevant to any claim or defense in this case.

9 (Defs.' Opp'n Pl.'s Mot. Compel Attach. #1 Mem. P. & A. 11, ECF No.
10 126.) They state that the information sought by Plaintiff, such as
11 when Lopez requested dental treatment, when his appointments were
12 made, what medicine he may have received, and what recommendations
13 were made by dental staff, is available to Plaintiff by examining
14 his own medical records. (Id.)

15 Lopez replies that the information he seeks is relevant to
16 proving his claim for deliberate indifference to his medical needs
17 because it would demonstrate when Defendants learned about
18 Plaintiff's condition, what medication was prescribed, and when his
19 surgery was approved. (Pl.'s [Reply] to Defs.' Opp'n 8, ECF No.
20 130.) Further, Plaintiff contends the information he seeks is not
21 available in his medical file. (Id. at 10-11.)

22 With respect to document request number one, Plaintiff
23 explains that he needs the CDCR Form 7433, Request for Dental
24 Treatment Log, to show when Defendants received his CDCR Form 7362,
25 Health Care Services Request Form. (Id. at 8.) Although Lopez
26 alleges that he submitted a request on July 26, 2006, Defendant
27 Santoyo claims in his response to an interrogatory that the request
28 did not reach him until November 1, 2006. (Id.) Plaintiff argues

1 that the log will show when his request was received, and is
2 therefore essential to show that Defendant Santoyo was aware of
3 Plaintiff's condition earlier than November 1, 2006. (Id.)

4 As to the document request number two, the CDCR Form 7434,
5 Daily Dental Treatment/Appointment Log, Lopez argues that the
6 document will show when his request reached Defendant Santoyo, and
7 when Santoyo scheduled Lopez's dental appointment. (Id. at 8-9.)
8 He contends that obtaining the appointment log is necessary,
9 because Plaintiff disputes that Santoyo scheduled Lopez's
10 appointment according to the priority designation. (Id. at 9.)
11 The information in the logs relates to the parties' dispute
12 regarding when Defendant Santoyo became aware of Lopez's request
13 for dental care. Because when Santoyo learned about Lopez's need
14 is at issue with regard to the deliberate indifference claim, the
15 information in the logs is relevant.

16 Lopez also seeks production of the CDCR dental pharmaceutical
17 log that lists medications prescribed and given to Plaintiff along
18 with the dates and Defendants' signatures. The information in this
19 log is relevant because Lopez claims he was denied pain medication
20 and disputes what medication he actually received. (Id. at 9.)

21 Finally, Lopez seeks the written minutes recorded by OT of all
22 Committee (DAR, MAR, HCRC) Meetings from November 1, 2006, to March
23 1, 2007. Plaintiff argues during the monthly meetings, committee
24 members approve all inmate surgeries and discuss any unresolved
25 issues, such as delays in approved treatment. (Id. at 10.)
26 Plaintiff alleges these records will show that Defendant Robertson,
27 as a committee member, participated in approving Lopez's surgery on
28 November 1, 2006. Defendants claim that Robertson was not aware of

1 any grievances regarding Plaintiff's wisdom teeth until April 23,
2 2007. (See Defs.' Mot. Summ. J. &/or Summ. Adjudication Attach.
3 #1, Mem. P. & A. 9, ECF No. 131.) Lopez argues that the delay in
4 his surgery was discussed in subsequent committee meetings, and
5 therefore the records will prove that Robertson was put on notice
6 of the delay prior to April of 2007. (Pl.'s [Reply] to Defs.'
7 Opp'n 10, ECF No. 130.) The information in the minutes is relevant
8 to Lopez's claim of deliberate indifference to his serious medical
9 needs against Defendants.

10 **3. Privileges**

11 Defendants argue that the Court should deny Plaintiff's Motion
12 to Compel production of the written minutes from prison medical and
13 dental committee meetings because the records are protected by
14 California law. (Defs.' Opp'n Pl.'s Mot. Compel Attach. #1 Mem. P.
15 & A. 9, ECF No. 126.) Specifically, Santoyo and Robertson assert
16 that the peer review privilege found in California Evidence Code
17 section 1157 applies. (Id.) Lopez replies that Defendants may not
18 assert a state law privilege in this federal lawsuit and that, in
19 any event, section 1157 contains an exception for statements made
20 by parties to an action. (Pl.'s [Reply] to Defs.' Opp'n 11-12, ECF
21 No. 130.)

22 In civil rights cases brought under federal statutes,
23 questions of privilege are resolved by federal law. Kerr v. United
24 States District Court, 511 F.2d 192, 197 (9th Cir. 1975). "State
25 privilege doctrine, whether derived from statutes or court
26 decisions, is not binding on federal courts in these kinds of
27 cases." Kelly v. City of San Jose, 114 F.R.D. 653, 655-56 (N.D.
28 Cal. 1987). Plaintiff brought this case under a federal statute,

1 42 U.S.C. § 1983, and it is well settled that "questions of
2 evidentiary privilege arising in the course of the adjudication of
3 federal rights are governed by the principles of federal common
4 law." Miller v. Pancucci, 141 F.R.D. 292, 297 (C.D. Cal. 1992)
5 (citing United States v. Zolin, 491 U.S. 554 (1989)); see also Fed.
6 R. Evid. 501.

7 Defendants also argue that the written minutes should not be
8 produced because the federal privilege of critical self-analysis
9 prevents the disclosure of self-evaluative material where the
10 public need for confidentiality outweighs the need for discovery.
11 (Defs.' Opp'n Pl.'s Mot. Compel Attach. #1 Mem. P. & A. 9-10, ECF
12 No. 126.)

13 The "self-critical" analysis privilege invoked by defendants
14 has not been recognized by the Ninth Circuit. Union Pac. R.R. Co.
15 v. Mower, 219 F.3d 1069, 1076 n.7 (9th Cir. 2000); Dowling v. Am.
16 Hawaii Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992). In
17 addition, it does not appear that California has recognized that
18 privilege. Cloud v. Superior Court, 50 Cal. App. 4th 1552, 1559,
19 58 Cal. Rptr. 2d 365, 369 (1996) (naming thirteen privileges
20 recognized in the California Evidence Code, the self-critical
21 analysis privilege not among them). Kenney v. Superior Court, 255
22 Cal. App.2d 106, 63 Cal. Rptr. 84 (1967), is cited by Defendants
23 for the proposition that a critical self-analysis privilege is
24 similar to the privilege created by Evidence Code section 1157 for
25 health care professional review committees. There is no similar
26 provision that would apply to Defendants' records. Furthermore,
27 Kenney was decided on the basis of attorney work product, not
28 critical self-analysis. Id. at 112.

1 The self-critical analysis privilege would be inapplicable to
2 this case because the four elements of the "self-critical" analysis
3 privilege are not met. First, the information must result from a
4 critical self-analysis undertaken by the party seeking protection.
5 Dowling, 971 F.2d at 426. Second, the public must have a strong
6 interest in preserving the free flow of the type of information
7 sought. Id. Third, the information must be of the type whose flow
8 would be curtailed if discovery were allowed. Id. Finally, in
9 order for the privilege to apply, the document must be prepared
10 with the expectation that it would be kept confidential, and has in
11 fact been kept confidential. Id.

12 Defendants also cite In re Air Crash Near Cali, Colombia on
13 Dec. 20, 1995, 959 F. Supp. 1529, 1533 (S.D. Fla. 1997), and
14 suggest that a critical analysis privilege is "often asserted when
15 disclosure would have a chilling effect." (Defs.' Opp'n Pl.'s Mot.
16 Compel Attach. #1 Mem. P. & A. 10, ECF No. 126.) The case,
17 however, does not support Defendants' position. There, the court
18 stated, "[W]e decline to recognize any self-critical analysis
19 privilege under the facts and circumstances of this case." Id.

20 For these reasons, the Court will not apply the self-critical
21 analysis privilege to the written committee minutes requested by
22 Lopez. Accordingly, Defendants may not withhold the requested
23 information on this basis.

24 **4. Defendants' Other Objections**

25 Defendants argue that the Court should deny Lopez's Motion to
26 Compel because his requests in the April 21, 2012 letter are vague
27 and overbroad. (Defs.' Opp'n Pl.'s Mot. Compel Attach. #1 Mem. P.
28 & A. 5-6, ECF No. 126.) Plaintiff replies that Defendants'

1 response to his letter, dated May 16, 2012, does not raise these
2 objections. (Pl.'s [Reply] to Defs.' Opp'n 7, ECF No. 130.)

3 Plaintiff's April 21, 2012 letter does not contain a time
4 period for three out of four requests. (See Mot. Order Compelling
5 Disc. Ex. A, ECF No. 120.) The fourth item identified in the
6 letter, minutes of specified committees, is for the period from
7 November 1, 2006, through March 1, 2007. (Id.) In his Motion,
8 however, Lopez specifies that he is seeking the logs for the time
9 period beginning on July 1, 2006, and ending on July 30, 2007.
10 (Mot. Order Compelling Disc. 1-2, ECF No. 120.)

11 Defendants Santoyo and Robertson also oppose Plaintiff's
12 Motion to Compel on the ground that Lopez's requests violate laws
13 regulating the privacy of medical records. (Defs.' Opp'n Pl.'s
14 Mot. Compel Attach. #1 Mem. P. & A. 7, ECF No. 126.) They allege
15 that because Lopez seeks logs which contain dental and medical
16 records of other inmates, disclosure of their confidential medical
17 information violates the Health Information Portability And
18 Accountability Act, 42 U.S.C. § 1320d et. seq. ("HIPAA"). (Id. at
19 10.)

20 Defendants do not dispute Plaintiff's right to access his own
21 medical records. Lopez contends he is only seeking information
22 regarding his treatment and medication during the complaint period.
23 (Pl.'s [Reply] to Defs.' Opp'n 11, ECF No. 130.) Plaintiff also
24 points out that the Court may order the documents to be redacted to
25 the extent they refer to individuals other than Plaintiff. (Id. at
26 8.) Accordingly, the Court will grant Plaintiff's request with
27 regard to the entries in the logs that refer to Lopez only.

28

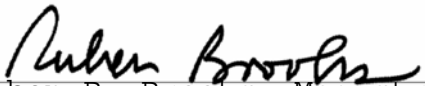
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III. CONCLUSION

For the reasons discussed above, Lopez has not established good cause for permitting him to file additional and untimely interrogatories. Consequently, Lopez's Motion Requesting Permission to Submit Additional Interrogatory Questions is **DENIED**. Plaintiff's Motion for an Order Compelling Discovery is **GRANTED**. Defendants may redact identifying information of other inmates, such as inmate name or number, from the documents. Defendants are ordered to comply with the Court's Order by **November 26, 2012**.

IT IS SO ORDERED.

DATE: November 6, 2012


Ruben B. Brooks, Magistrate Judge
United States District Court

cc:
Judge Whelan
All Parties of Record