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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA (Fresno)

Tracy Arthur Stone,

Plaintiff,

vs.

Vasquez and Rodriguez,

Defendants.

) No. 1:05-CV-1377-JAT

) **ORDER**

\_\_\_\_\_ )  
Pending before the Court is Plaintiff’s motion to compel. In the motion to compel, Plaintiff seeks to compel responses to his first request for production and second request for production. In their response to the motion, Defendants attempt to decipher exactly which of their responses to which Plaintiff seeks to compel and answer. However, unfortunately, in his motion, Plaintiff did not take the time to specify exactly which of Defendants’ responses he claimed were deficient, and why he claimed those specific responses were deficient.<sup>1</sup> Further, Plaintiff did not reply to Defendants’ response to confirm or deny that Defendants’ interpretation of Plaintiff’s motion was accurate.

However, Defendants also make this process far more cumbersome than necessary by asserting lack of “possession or control” of virtually every document or item Plaintiff is

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<sup>1</sup> For example, Plaintiff makes global complaints like, “I assert that each of my requests are plain, easy to comprehend, and descriptive enough to enable defendants ... to discern the specific information and documents I am seeking.”

1 seeking. Defendants argue, for example, that they do not have possession or control of  
2 copies of grievances filed against the Defendants themselves or a copy of the video of the  
3 incident in question. *See* Doc. #54. Specifically, Defendants argue that even if they could  
4 obtain the documents, the documents are not in their “possession and control” if they would  
5 have to make any efforts to obtain a copy of the documents, citing *Clark v. Vega Wholesale,*  
6 *Inc.* 181 F.R.D. 470, 472 (D. Nev. 1998) (holding that a plaintiff was not in “possession or  
7 control” of her own medical records because she would have had to sign a release with her  
8 doctor to obtain such records).

9 Defendants’ arguments are certainly not within the spirit of discovery and disclosure  
10 envisioned by the Federal Rules of Civil Procedure. Moreover, Defendants have waived the  
11 right to use any of these documents at the summary judgment phase of this case or at trial by  
12 their failure to provide them as part of their disclosures. *See* Fed. R. Civ. Pro. 26(a).<sup>2</sup>  
13 Plaintiff is encouraged to move to strike any and all evidence that Defendants seek to offer  
14 in this case that Plaintiff has requested that Defendants have claimed is not in their  
15 possession or control.

16 On the issue of control:

17 The governing standards are established. Rule 34 requests may be used to  
18 inspect documents, tangible things, or land in the possession, custody, or  
19 control of another party. The party seeking production of documents bears the  
20 burden of proving that the opposing party has such control. *United States v.*  
*International Union of Petroleum and Indus. Workers, AFL-CIO*, 870 F.2d  
21 1450, 1452 (9th Cir.1989). Property is deemed within a party’s possession,  
custody, or control if the party has actual possession, custody, or control

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22 <sup>2</sup> Generally, Rule 26(a) requires a party, “without awaiting a discovery request,”  
23 to provide other parties with: names, addresses, and telephone numbers of  
24 individuals likely to have discoverable information that the disclosing party  
25 may use to support her claim; copies or descriptions of documents, electronic  
26 information, or tangible objects that are in the disclosing party's possession or  
27 control which that party may use to support her claims; and a computation of  
28 damages while making available for inspection the documents upon which  
such computation is based. Fed.R.Civ.P. 26(a)(1)(A)-(D).  
*Doctor v. Nicholson*, 2008 WL 700169, \*4 n.3 (D. Ariz. 2008).

1           thereof, or the legal right to obtain the property on demand. *In re Bankers*  
2           *Trust Co.*, 61 F.3d 465, 469 (6th Cir.1995) (documents prepared by Federal  
3           Reserve and bank during bank examination were subject to discovery despite  
4           Federal Reserve's ownership of documents, in light of apparent relevance of  
5           documents and fact that bank had possession of documents). A party having  
6           actual possession of documents must allow discovery even if the documents  
7           belong to someone else; legal ownership of the documents is not  
8           determinative. *In re Bankers Trust Co.*, 61 F.3d at 470 (Federal Reserve  
9           regulations prohibiting disclosure of confidential documents in party's  
10           possession held invalid when conflicting with discovery order).

11           "Control" need not be actual control; courts construe it broadly as "the legal  
12           right to obtain documents upon demand." *United States v. Int'l Union of*  
13           *Petroleum & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir.1989) (Ninth  
14           Circuit refused to compel an international union to produce documents  
15           belonging to local union affiliates in response to a subpoena where the  
16           international union did not have physical possession of the documents); *Scott*  
17           *v. Arex, Inc.*, 124 F.R.D. 39, 41 (D.Conn.1989) (party controls document if it  
18           has right, authority, or ability to obtain documents on demand).

19           "Legal right" is evaluated in the context of the facts of each case. *In re Folding*  
20           *Carton Antitrust Litig.*, 76 F.R.D. 420, 423 (D.Ill.1977). The determination of  
21           control is often fact-specific. Central to each case is the relationship between  
22           the party and the person or entity having actual possession of the document.  
23           *Estate of Young v. Holmes*, 134 F.R.D. 291, 294 (D.Nev.1991). The requisite  
24           relationship is one where a party can order the person or entity in actual  
25           possession of the documents to release them. *Id.* This position of control is  
26           usually the result of statute, affiliation or employment. *Id.*; *In re Citric Acid*  
27           *Litig.* (9th Cir.1999) 191 F.3d 1090, 1107 (court cannot order production of  
28           documents held by a separate legal entity, where requested party is not in  
29           actual possession or custody of the documents).

30           "Control" may be established by the existence of a principal-agent  
31           relationship. *In Rosie D. v. Romney*, 256 F.Supp .2d 115, 119  
32           (D.C.Mass.2003), defendant state officials were required to produce  
33           documents that were in the possession of non-party agencies. The state's  
34           Division of Medical Assistance (MDA) delegated the delivery of health  
35           services to several entities that in turn were authorized to engage subcontracted  
36           service providers. MDA's contracts required these entities to maintain books  
37           and records and gave MDA the right to examine and copy these records. There  
38           was little doubt, in light of these contractual provisions, that the state officials  
39           had the right to control and obtain the documents that were in the possession  
40           of the non-parties.

41           *Thomas v. Hickman*, 2007 WL 4302974, 13-14 (E.D. Cal. 2007).

42           Defendants are both correctional officers at the facility where Plaintiff is incarcerated.  
43           Considering all of Plaintiff's requests, it would seem obvious that the documents and videos  
44           he seeks are in the possession of Defendants' employer. Thus, the question is whether  
45           something in the possession of one's employer qualifies as within the possession and control  
46           of the employee. Against this background, the Court will turn to each of Plaintiff's

1 individual requests (a copy of the requests and Defendants' response are at Docs. ## 54 and  
2 63).

3 I. Plaintiff's first request for production of documents (Doc. #54)

4 1. Defendants' objection is sustained because disclosing other inmates' appeals  
5 could cause a safety risk.

6 2. Defendants' objection that this request is overlybroad and not reasonably  
7 calculated to lead to the discovery of admissible evidence is overruled.

8 Defendants' objection that this request is vague, ambiguous and calls for  
9 speculation is overruled. Defendants' object to this request on the grounds that

10 the documents are privileged under state law. *See* California Penal Code §§  
11 832.7 & 6126.3; *Kelly v. City of San Jose*, 114 F.R.D. 653, 656, 660, 663

12 (N.D. Cal. 1987) (holding that while federal courts are not bound to follow the  
13 state law privileges, the federal courts should give weight to the privacy rights

14 protected by state constitutions and state statutes; and ultimately applying the  
15 non-exhaustive-10-prong test of the "official information privilege"); *but see*

16 *Agster v. Maricopa County*, 422 F.3d 836, 839 (9<sup>th</sup> Cir. 2005) (holding that  
17 federal courts do not apply state law privileges in federal cases unless the court

18 creates a new privilege as a matter of federal common law). The test is:

19 Federal common law recognizes a qualified privilege for official  
20 information.... Government personnel files are considered  
21 official information.... In order to determine whether personnel  
22 files sought are privileged, courts must weigh potential benefits  
23 of disclosure against potential disadvantages; if the latter is  
24 greater, the official information privilege may bar  
25 discovery....Such balancing should be conducted on a case by  
26 case basis, determining what weight each relevant consideration  
27 deserves in the fact-specific situation that is before the Court.

24 *Miller v. Pancucci*, 141 F.R.D. 292, 299-300 (C.D. Cal. 1992) (citing *Kelly's*  
25 10-factor test).

26 Thus, to avail themselves of the official information privilege, Defendants  
27 must apply the factors to each piece of information sought. Therefore,  
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1 Defendants must file a supplement memorandum showing why the official  
2 information privilege should bar discovery as to this request. See Kelly, 114  
3 F.R.D. at 657 (party asserting the privilege must satisfy the “test” showing  
4 they are entitled to the privilege).

5 3. Defendants’ objection that this request is overlybroad, unintelligible and not  
6 reasonably calculated to lead to the discovery of admissible evidence is  
7 overruled. Defendants must file a supplement memorandum showing why the  
8 official information privilege should bar discovery as to this request. Id.

9 4. Defendants’ objection that this request is overlybroad and not reasonably  
10 calculated to lead to the discovery of admissible evidence is overruled.  
11 Defendants’ objection that this request is vague, ambiguous and calls for  
12 speculation is overruled. Defendants must file a supplement memorandum  
13 showing why the official information privilege should bar discovery as to this  
14 request. Id.

15 5. The Court interprets this request as seeking only public records of any criminal  
16 complaints (or indictments) or civil domestic violence complaints filed against  
17 either Defendant in court (specifically any municipal or state court in  
18 California). Defendants’ objections are overruled. Defendants shall produce  
19 copies of any documents meeting this description.

20 6. Defendants’ objection that this request is overlybroad and not reasonably  
21 calculated to lead to the discovery of admissible evidence is overruled.  
22 Defendants argue that they have no documents that were created or produced  
23 in connection with the investigation of Plaintiff’s CDC 602 Log. No. SATF-C  
24 04-04545.<sup>3</sup> Defendants shall file a supplemental memorandum avowing who  
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26 <sup>3</sup> The Court has presumed 04-04545 is Plaintiff’s grievance of his alleged beating on October  
27 4, 2004, which gives rise to this lawsuit.  
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1 within the facility would have custody and control of these documents and  
2 what procedures Defendants would have to go through to obtain a copies of  
3 the documents.

4 7. Defendants' objection that this request is overlybroad and not reasonably  
5 calculated to lead to the discovery of admissible evidence is overruled.  
6 Defendants' objection that this request is vague, ambiguous and calls for  
7 speculation is overruled. Defendants shall produce all responsive documents  
8 that they claim are available in Plaintiff's central file. Defendants' shall file  
9 a supplemental memorandum explaining the evidentiary basis for why the  
10 documents responsive to this request that are not in the central file would be  
11 "confidential."

12 8. Defendants' objection that the request is vague and compound is sustained.

13 9. Defendants' objection that the request is vague is sustained.

14 10. Defendants have avowed that no such policies exist.

15 11. Defendants have avowed that no such policies exist.

16 12. Defendants' objection that this request is overlybroad and not reasonably  
17 calculated to lead to the discovery of admissible evidence is overruled.  
18 Defendants' objection that this request is vague, ambiguous and calls for  
19 speculation is overruled. Defendants claim they do not have "custody and  
20 control" of the videos showing Plaintiff's alleged beating on October 4, 2004.  
21 Defendants shall file a supplemental memorandum avowing who within the  
22 facility would have "custody and control" of the videos and what procedures  
23 Defendants would have to go through to obtain a copy of the videos.<sup>4</sup>

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25 <sup>4</sup> Defendants also raise a safety and security objection arguing that they cannot disclose the  
26 camera locations to an inmate. In Plaintiff's second request for production of documents at  
27 request #7, Plaintiff specifies particular camera locations, of which Plaintiff is obviously  
28 already aware. Defendants' objection on a safety and security basis is overruled with respect

1 13. Defendants’ objection that this request is overlybroad, unintelligible and not  
2 reasonably calculated to lead to the discovery of admissible evidence is  
3 overruled. Defendants’ objection that this request is vague, ambiguous and  
4 calls for speculation is overruled. Defendants’ claim they do not have “custody  
5 and control” of the videos showing Plaintiff’s alleged beating on October 4,  
6 2004. Defendants shall file a supplemental memorandum avowing who within  
7 the facility would have “custody and control” of the videos and what  
8 procedures Defendants would have to go through to obtain a copy of the  
9 videos.

10 13.1 Defendants’ objection that this is not a document request is sustained.

11 14. Defendants’ objection that this is not a document request is sustained.

12 15. Defendants’ objection that Plaintiff can obtain this information himself at the  
13 prison law library is sustained.

14 16. There is no remaining issue.

15 17. Defendants’ objection that the physical dimensions of the prison cannot be  
16 given to a inmate, such as Plaintiff, for safety and security reasons, is  
17 sustained.

18 18. Defendants’ objection that Plaintiff can obtain this information himself at the  
19 prison law library is sustained.

20 19. Defendants’ objection that this is not a document request is sustained.

21 20. Defendants’ objection that this is not a document request is sustained.

22 II. Plaintiff’s second request for production of documents (Doc. #63).

23 1. Defendants’ objection that this request is duplicative is overruled. Defendants’  
24 objection that this request is vague, ambiguous and calls for speculation is

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27 to all cameras Plaintiff specified in #7 of his second request for production, and sustained as  
28 to any other cameras that may exist.

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overruled — Plaintiff is asking for a list of the log numbers of all category 7 et seq incidents about which an inmate file a CDC 602 form. Defendants also object that the list of log numbers of such filings in not in their “possession and control.” Defendants shall file a supplemental memorandum avowing who within the facility would have “possession and control” of the list and what procedures Defendants would have to go through to obtain list.

- 2. Defendants’ objection that this request is overbroad is sustained.
- 3. Defendants’ objection that this request is overbroad is sustained.
- 4. Defendants’ objection that this request is overlybroad and not reasonably calculated to lead to the discovery of admissible evidence is overruled. Defendants’ objection that this request is vague, ambiguous and calls for speculation is overruled. Defendants must file a supplement memorandum showing why the official information privilege should bar discovery as to this request. See Court’s discussion of Plaintiff’s #2 request of his first request for production of documents above.
- 5. Defendants’ objection that this request is duplicative of request #7 of Plaintiff’s first request for production of documents is sustained.
- 6. Defendants’ objection that this request is compound is sustained.
- 7. Defendants’ objection that this request is duplicative of #12 from Plaintiff’s first request for production is sustained.
- 8. Defendants’ objection that the request is overbroad is overruled. Defendants’ objection that the request is vague, ambiguous, and calls for speculation is overruled. Defendants shall produce the records of who checked out and/or viewed the videos referenced in request 7 of Plaintiff’s second request for production of documents.
- 9. All of Defendants’ objections are overruled except their objection that they do not have custody and control of the “use of force interview.” With respect to



1 that objection, Defendants shall file a supplemental memorandum avowing  
2 who within the facility would have “custody and control” of the video and  
3 what procedures Defendants would have to go through to obtain a copy of the  
4 video.

5 10. Defendants’ objection that this request is vague and ambiguous is sustained.

6 11. Defendants’ objection that this request is duplicative of #17 from Plaintiff’s  
7 first request for production of documents is sustained. Additionally,  
8 Defendants’ objection that the physical dimensions of the prison cannot be  
9 given to an inmate, such as Plaintiff, for safety and security reasons, is  
10 sustained.

11 12. Defendants’ objection that this is not a document request is sustained.

12 Based on the foregoing,

13 IT IS ORDERED that Plaintiff’s motion to compel (Doc. #70) is granted in part and  
14 denied in part as indicated above.

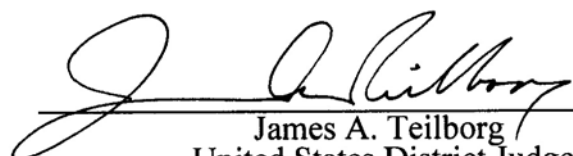
15 IT IS FURTHER ORDERED that all supplemental memoranda ordered herein are due  
16 within 14 days of the date of this order.

17 IT IS FURTHER ORDERED that all production ordered herein is due to Plaintiff  
18 within 20 days of the date of this order.

19 IT IS FURTHER ORDERED that the dispositive motion deadline of August 28, 2009  
20 is confirmed.

21 IT IS FINALLY ORDERED confirming that Defendants have *waived the ability* to  
22 rely on *anything* they claim is not in their custody and control for purposes of moving for  
23 summary judgment or at trial.

24 DATED this 19<sup>th</sup> day of August, 2009.

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28 James A. Teilborg  
United States District Judge