

1 December 10, 2013. (ECF Nos. 158, 159.) Plaintiff replied on January 15, 2014. (ECF Nos. 163,
2 164.) The motion is deemed submitted. Local Rule 230(l).

3 **II. Request for Judicial Notice**

4 Plaintiff requests that the Court take judicial notice of a letter dated October 17, 2011, from the
5 Office of the Inspector General of California to State Senator Darrell Steinberg, Chair of the Senate
6 Rules Committee, regarding the California Department of Corrections and Rehabilitation's response to
7 an inmate hunger strike occurring between July 1 and July 20, 2011. Defendants contend that the
8 letter is not the type of matter that can be judicially noticed under Federal Rule of Evidence 201 and
9 does not relate to the hunger strike in this case, which occurred in 2004.

10 As discussed more fully below, Plaintiff's reference to the October 17, 2011 letter does not
11 relate to the instant action and is not relevant to the hunger strike in this case. Accordingly, Plaintiff's
12 request for judicial notice is denied.

13 **III. Motion to Compel Responses to Requests for Production of Documents¹**

14 A party may serve on any other party a request within the scope of Rule 26(b) to produce and
15 permit the requesting party or its representative to inspect, copy, test, or sample the following items in
16 the responding party's possession, custody or control: any designated documents or tangible things.
17 Fed. R. Civ. P. 34(a)(1). "Property is deemed within a party's 'possession, custody, or control' if the
18 party has actual possession, custody, or control thereof or the legal right to obtain the property on
19 demand." Allen v. Woodford, 2007 WL 309945, at *2 (E.D. Cal. Jan. 30, 2007) (citing In re Bankers
20 Trust Co., 61 F.3d 465, 469 (6th Cir. 1995)); accord Bovarie v. Schwarzenegger, 2011 WL 719206, at
21 *4 (S.D. Cal. Feb. 22, 2011); Evans v. Tilton, 2010 WL 1136216, at *1 (E.D. Cal. Mar. 19, 2010).

22 In responding to discovery requests, a reasonable inquiry must be made, and if no responsive
23 documents or tangible things exist, Fed. R. Civ. P. 26(g)(1), the responding party should so state with
24 sufficient specificity to allow the Court to determine whether the party made a reasonable inquiry and
25 exercised due diligence, Uribe v. McKesson, 2010 WL 892093, at *2 (E.D. Cal. Mar. 9, 2010). If
26 responsive documents do exist but the responsive party claims lack of possession, control, or custody,

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28 ¹ The parties are familiar with the procedural background of this action; therefore, the Court finds it unnecessary to recount that background in the instant order.

1 the party must so state with sufficient specificity to allow the Court (1) to conclude that the responses
2 were made after a case-specific evaluation and (2) to evaluate the merit of that response. Ochotorena
3 v. Adams, 2010 WL 1035774, at *3-4 (E.D. Cal. Mar. 19, 2010). As with other forms of discovery,
4 boilerplate objections do not suffice. Fed. R. Civ. P. 34(b)(2)(B), (C).

5 **A. Request for Production of Documents (POD) No. 5 – Set One**

6 **POD 5:** Any and all documents including those issued by the CDCR Director’s Office that
7 pertain to the placement, retention and release of inmates from administrative segregation in 2004-
8 2005.

9 **Original Response:** Defendants do not have any responsive documents in their possession,
10 custody, or control.

11 **Supplemental Response:** Defendants object to this request on the grounds that it is
12 overbroad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible
13 evidence. It also seeks confidential information the disclosure of which could violate the privacy
14 rights of individuals who are not parties to this lawsuit and could compromise the safety and security
15 of the institution, its staff members, the inmates and the community. Finally, it seeks information that
16 is protected from disclosure by the official information privilege. Cal. Code Regs. Tit. 15, §§ 3321,
17 3450(d); Cal Penal Code § 832; Cal. Evid. Code § 1043; 5 U.S.C. § 552; *Sanchez v. City of Santa Ana*,
18 936 F.2d 1027, 1033 (9th Cir. 1991); *Kerr v. U.S. Dist. Court*, 511 F.2d 192, 198-99 (9th Cir. 1975);
19 *Hampton v. City of San Diego*, 147 F.R.D. 227, 229-30 (S.D. Cal. 1993); *Jackson v. County of*
20 *Sacramento*, 175 F.R.D. 653 (E.D. Cal. 1997).

21 Without waiving these objections, Defendants respond as follows: Defendants will produce
22 Operation Procedure No. 100 (Revised 2005); Memorandum with attachments from the Acting
23 Deputy Director dated July 28, 2005; Memorandum with attachments from the Acting Deputy
24 Director dated May 9, 2005; and Memorandum with attachments from the Deputy Director dated May
25 12, 2004. *See* attached. More general information is also available in the Department Operations
26 Manual and the California Code of Regulations, both of which are available to Plaintiff.

27 **Ruling:** Plaintiff’s motion to compel is denied.
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1 Plaintiff argues that Defendants have maintained manuals and memoranda that specifically
2 address the circumstances under which he was confined by Defendants. Namely, a SHU Term
3 Assessment Handbook and a Senior Hearing Officer’s Manual existing in 1999. (ECF No. 154, pp. 9-
4 10.) Plaintiff also claims that Defendants have only produced an insignificant portion of available
5 documents. He seeks to review the memoranda maintained by the CDCR Classification Services as
6 well as the SHU Term Assessment Handbook.

7 Defendants counter that Plaintiff’s request was overbroad, making it difficult to ascertain the
8 documents that Plaintiff sought to receive. Defendants now indicate that the non-confidential
9 memoranda maintained by the CDCR Classification Committee are already available to Plaintiff in the
10 law library or through the Litigation Coordinator’s Office at his institution. Defendants also represent
11 that CDCR does not create or maintain any official “SHU Term Assessment Handbook” and that a
12 search of the records did not locate any such handbook created by any individual officer during the
13 time period that is relevant to this case.

14 Based on Plaintiff’s moving papers, Defendants have now informed Plaintiff of the location of
15 any non-confidential memoranda maintained by the CDCR Classification Committee and have
16 indicated that these documents are readily available to Plaintiff. With regard to the “SHU Term
17 Assessment Handbook,” Defendants have represented that CDCR does not create or maintain such a
18 handbook. The Court has reviewed Plaintiff’s moving papers and exhibits, but does not find evidence
19 that CDCR created or maintained such a handbook during the relevant time period. With regard to the
20 Senior Hearing Officer’s Manual, the Court has addressed this document in its order regarding
21 Defendants’ responses to interrogatories issued on September 9, 2014. (ECF No. 176.)

22 For the reasons stated, the Court will not compel Defendants to produce documents equally
23 available to Plaintiff or documents not created or maintained by the CDCR or individual defendants.

24 **B. Request for Production No. 6**

25 **POD 6:** Any and all documents that pertain to the issuance, review and classification of Rule
26 Violation Reports, including changing or amending of the alleged Rule Violation.

27 **Original Response:** Defendants do not have any responsive documents in their possession,
28 custody or control.

1 **Supplemental Response:** Defendants object to this request on the grounds that it is vague,
2 overbroad, and unduly burdensome. It also requests documents that are equally available to Plaintiff.
3 The documents that could be responsive to this request (depending on its specific meaning) could be
4 voluminous and could contain information that is not disclosable, such as private information about
5 other inmates. Without waiving this objection, Defendants respond as follows: Defendants refer
6 Plaintiff to:

- 7 • California Code of Regulations, title 15, §§ 3310 through 3320.1
- 8 • California Code of Regulations, title 15, §§ 3084 through 3085.

9 These code sections are available to Plaintiff.

10 **Revised POD 6:** Any pages and/or sections of the Senior Hearing Officers' Manual that
11 discusses changing or amending the Rule Violation Report (RVR) charge after the RVR was issued.
12 (ECF No. 154, Ex. G.)

13 **Revised Response:** A thorough search of the records indicates that there is no official CDCR-
14 created Senior Hearing Officers' Manual. Although individual hearing officers may have compiled
15 their own collections of selected Title 15 regulations and forms for their own convenience. CDCR
16 does not create separate manuals, handbooks, criteria, instructions, or guidelines for changing or
17 amending rules violation reports. The guidelines for changing or amending a rules violation report are
18 set forth in California Code of Regulations, title 15, §§ 3310 through 3320.1 and California Code of
19 Regulations, title 15, §§ 3084 through 3085.

20 **Ruling:** Plaintiff's motion to compel is denied.

21 In his moving papers, Plaintiff indicates that he seeks documents that refer to the "changing or
22 amending the disciplinary charge." Plaintiff contends that such documents exist by reference to the
23 aforementioned Senior Hearing Officer's Manual. (ECF No. 154, pp. 5, 10.) Defendants counter that
24 they have cited to all documents that pertain to changing or amending the disciplinary charge and that
25 provide the guidelines for changing or amending a disciplinary charge.

26 Based on Defendants' response, the Court cannot compel the production of documents that do
27 not exist. The Court previously addressed the issue of the Senior Hearing Officer's Manual in its
28 order of September 9, 2014. (ECF No. 176.)

1 **C. Request for Production No. 7**

2 **POD 7:** Any and all documents, including disciplinary manuals and handbook that defines the
3 following disciplinary terms “leading or participating in a disturbance;” “inciting;” “riot;” “strike;”
4 “hunger strike;” “work stoppage;” “disorder;” “endangers the facility;” and “conspiracy to assault
5 staff.”

6 **Original Response:** Defendants do not have any responsive documents in their possession,
7 custody, or control.

8 **Supplemental Response:** Defendants object to this request on the grounds that it is
9 overbroad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible
10 evidence. It also seeks documents that are equally available to Plaintiff. The terms referred to in the
11 request may appear in numerous provisions of California law. Defendants are prepared to respond to a
12 more narrowly-focused request.

13 **Revised POD 7:** Any pages and/or sections of the Senior Hearing Officers’ Manual that
14 discusses and/or defines the following disciplinary terms ‘leading or participating in a disturbance’,
15 ‘inciting’, ‘riot’, ‘strike’, ‘hunger-strike’, ‘disorder’, ‘serious disruption to facility’, ‘endangers the
16 facility’. (ECF No. 154, Ex. G.)

17 **Revised Response:** A thorough search of the records indicates that there is no official CDCR-
18 created Senior Hearing Officers’ Manual. Although individual hearing officers may have compiled
19 their own collections of selected Title 15 regulations and forms for their own convenience, CDCR
20 does not create separate manuals, handbooks, criteria, instructions, or guidelines defining or discussing
21 the listed terms. The source for the definitions and discussions of the listed terms is Title 15 and
22 related provisions of law.

23 **Ruling:** Plaintiff’s motion to compel is denied.

24 The Court previously addressed the issue of the Senior Hearing Officer’s Manual in its
25 September 9, 2014 order. (ECF No. 176.) For the reasons stated in that order, the Court will not
26 compel a further response to Revised POD 7.

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D. Request for Production No. 8

POD 8: Any and all documents that pertain to imposing a SHU term for leading or participating in a disturbance, riot or strike including any documents from the Director’s Office.

Original Response: Defendants do not have any responsive documents in their possession, custody, or control.

Supplemental Response: Defendants object to this request on the grounds that it is vague, overbroad, and unduly burdensome. It also request documents that are equally available to Plaintiff. The documents that could be responsive to this request (depending on its specific meaning) could be voluminous and could contain information that is not disclosable, such as private information about other inmates. Without waiving this objection, Defendants respond as follows: Defendants refer Plaintiff to California Code of Regulations, title 15, §§ 3310 through 3326; 3330 through 3335. These code sections are available to Plaintiff.

Revised POD 8: Any memorandums or bulletins generated by the Secretary’s or Director’s Office of CDCR including designees such as Deputy Director which are directed to Wardens and/or other staff that discuss or refer to imposing a SHU term for leading or participating in a disturbance, riot or strike. The date of such memorandums to be produced is between 1998 and July 2013. (ECF No. 154, Ex. G.)

Revised Response: A thorough search of the records indicates that there are no memorandums or bulletins dated between 1998 and July 2013 discussing the imposition of a SHU term for leading or participating in a disturbance, riot, or strike. The source of guidance on such matters is California Code of Regulations, title 15, §§ 3310 through 3326; 3330 through 3335.

Ruling: Plaintiff’s motion to compel is denied.

Plaintiff contends that Defendants are deliberately withholding documentation on this subject, including the original change to the Director’s Rules. Defendants indicate that they have cited all documents responsive to this request and the Notice of Change to Director’s Rules is already available to Plaintiff in the law library.

The Court finds no basis to compel a further response.

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1 **E. Request for Production No. 9**

2 **POD 9:** Any and all documents that refer to the hunger-strike that began on or about February
3 27, 2004 that plaintiff was found guilty of leading including but not limited to incident reports, reports
4 of unusual occurrences, program modification orders, program and unit logs, investigative
5 memorandums, and any other records.

6 **Original Response:** Attachment 3 includes all responsive documents in Defendants'
7 possession, custody, or control.

8 **Modified POD 9:** Confidential memorandums dated March 30, 2004 (authored by S. Martin),
9 March 18, 2004 (authored by Defendant Tripp), and March 25, 2004 (authored by Officer Boos-
10 Emma).

11 **Response to Modified POD 9:** Defendants object to this request on the following grounds:

- 12 • The request seeks information that constitutes “confidential information” within the
13 meaning of California Code of Regulations, Title 15, § 3321. Such information is
14 prohibited from being provided to inmates under California Code of Regulations, Title
15 15, § 3450(d).
- 16 • The request seeks information that is protected from disclosure under the “official
17 information privilege.” *See Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033 (9th
18 Cir. 1991).
- 19 • The request seeks information the disclosure of which would violate the privacy rights
20 of inmates and other individuals who are not parties to this lawsuit.

21 *See* attached Declaration and Privilege Log.

22 **Ruling:** Plaintiff’s motion to compel is denied.

23 Plaintiff claims that he only seeks portions of the memoranda that pertain to his interviews, the
24 investigating officers’ findings and any other information that does not identify an informant.
25 Defendants respond that even limited disclosure could severely threaten the safety and security of the
26 institution. Defendants have produced a privilege log along with the declaration of J. Cordova, a
27 Correctional Counselor II/Litigation Coordinator at California State Prison, Substance Abuse
28 Treatment Facility (SATF). (ECF No. 158, Ex. A.)

1 The Court has reviewed the privilege log and supporting declaration, which provides that the
2 requested memoranda are prohibited from being provided to inmates under the California Code of
3 Regulations and that even a carefully crafted protective order would create a substantial risk of harm
4 to significant governmental interests and that the harm from disclosure could potentially affect the
5 safety and security of all institutions, staff and inmates. (ECF No. 158, Ex. A; Cordova Dec. ¶¶ 4-5.)
6 Plaintiff has not suggested that protective order or other mechanism would protect the confidentiality
7 of the information, nor has he suggested that disclosure would not affect the safety and security of the
8 institutions, staff and inmates. Accordingly, the Court will not compel a further response POD 9.
9 Defendants are cautioned that they will not be able to introduce these memoranda at trial absent
10 disclosure to Plaintiff.

11 **F. Request for Production 4 – Set Two**

12 **POD 4, Set Two:** All documents that summarize, compile information, or collect data about
13 administrative or punitive actions taken against leaders of or participants in a hunger strike.

14 **Response:** Defendants object to this request on the grounds that it is vague, overbroad, and
15 unduly burdensome. It also request documents that are irrelevant to this lawsuit, and is not reasonably
16 calculated to lead to the discovery of admissible evidence. The documents that could be responsive to
17 this request (depending on its meaning) could be voluminous and could contain information that is not
18 disclosable, such as private information about other inmates and about individuals who are not parties
19 to this lawsuit. Defendants are prepared to respond to a more narrowly focused request that is relevant
20 to the issues in this case.

21 **Ruling:** Plaintiff's motion to compel is denied.

22 Plaintiff's request is overbroad and will lead to the production of documents that are irrelevant
23 to a claim or defense in this action and are not reasonably calculated to lead to the discovery of
24 admissible evidence. Although Defendants offered to respond to a more narrowly focused request,
25 Plaintiff did not revise his request. Plaintiff claims that CDCR provided such data to the OIG
26 investigators. Plaintiff supports his claim by reference to the October 17, 2011 letter from the Office
27 of the Inspector General identified in his request for judicial notice. (ECF No. 155.) However, the
28 letter pertains to a hunger strike occurring in 2011, and provides no relevant information regarding the

1 hunger strike in this action, nor does it suggest that CDCR regularly compiles statistical information
2 regarding hunger strike participants.

3 **IV. Conclusion and Order**

4 For the reasons stated, IT IS HEREBY ORDERED that:

- 5 1. Plaintiff's request for judicial notice, filed on November 11, 2013, is DENIED; and
6 2. Plaintiff's motion to compel the production of documents, filed on November 22, 2013, is
7 DENIED.

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9 IT IS SO ORDERED.

10 Dated: September 30, 2014

11 /s/ Barbara A. McAuliffe
12 UNITED STATES MAGISTRATE JUDGE