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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FRED PRICE,

Plaintiff,

v.

S. R. CUNNINGHAM, et al.,

Defendants.

CASE NO. 1:08-cv-00425-AWI-BAM PC

ORDER DENYING PLAINTIFF’S MOTION TO COMPEL (ECF No. 65, 67, 69)

ORDER DENYING PLAINTIFF’S MOTION TO STAY SUMMARY JUDGMENT (ECF Nos. 79, 80)

I. Background

Plaintiff Fred Price (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on the complaint, filed March 24, 2008, against Defendants Cunningham and Mullins for violations of the First and Eighth Amendments. On November 21, 2011, an order issued opening discovery in this action. (ECF No. 53.) On July 19, 2012, Plaintiff filed a motion for a protective order. (ECF No. 64.) On July 23, 2012, Plaintiff filed a motion to compel discovery. (ECF No. 65.) Defendants filed an opposition to the motion for a protective order on August 6, 2012, and an opposition to the motion to compel on August 7, 2012. (ECF Nos. 66, 67.) On August 15, 2012, Plaintiff filed a reply to the opposition to the motion for a protective order, and on August 24, 2012, Plaintiff filed a reply to the opposition to the motion to compel. (ECF Nos. 68, 69.)

On October 8, 2012, Defendants filed a motion for summary judgment. (ECF No. 72.) On October 16, 2012, Defendants were ordered to file supplemental briefing on Plaintiff’s motion for

1 a protective order within fifteen days.¹ (ECF No. 75.) On October 19, 2012, Plaintiff’s motion for
2 an extension of time to file an opposition to the motion for summary judgment was granted. (ECF
3 No. 77.) On October 25, 2012, Plaintiff file a motion to stay the motion for summary judgment, and
4 on October 26, 2012, Defendants filed a statement of non-opposition to the motion to stay. (ECF
5 Nos. 79, 80.)

6 **II. Motion to Compel**

7 **A. Legal Standard**

8 “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any
9 party’s claim or defense. . . . Relevant information need not be admissible at the trial if the discovery
10 appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P.
11 26(b)(1). If Defendants object to one of Plaintiff’s discovery requests, it is Plaintiff’s burden on his
12 motion to compel to demonstrate why the objection is not justified. In general, Plaintiff must inform
13 the Court which discovery requests are the subject of his motion to compel, and, for each disputed
14 response, inform the Court why the information sought is relevant and why Defendants’ objections
15 are not meritorious.

16 For document production requests, responding parties must produce documents which are
17 in their “possession, custody or control.” Fed. R. Civ. P. 34(a)(1). “Property is deemed within a
18 party’s ‘possession, custody, or control’ if the party has actual possession, custody, or control thereof
19 or the legal right to obtain the property on demand.” Allen v. Woodford, No. CV-F-05-1104 OWW
20 LJO, 2007 WL 309945, *2 (E.D.Cal. Jan. 30, 2007) (citing In re Bankers Trust Co., 61 F.3d 465, 469
21 (6th Cir. 1995)); accord Bovarie v. Schwarzenegger, No. 08cv1661 LAB (NLS), 2011 WL 719206,
22 at *4 (S.D.Cal. Feb. 22, 2011); Evans v. Tilton, No. 1:07CV01814 DLB PC, 2010 WL 1136216, at
23 *1 (E.D.Cal. Mar. 19, 2010).

24 **B. Plaintiff’s Motion to Compel Discovery**

25 Plaintiff states that he is moving for a motion to compel Defendant Cunningham to produce
26 documents in response to his first and second set of his request for production of documents,
27

28 ¹Plaintiff’s motion for a protective order will be addressed by separate order after Defendants’ supplemental
briefing is filed.

1 however the Court notes that the requests were made in the first second, and third request for
2 production of documents.

3 **1. Requests for Production of Documents Defendants Contend Do Not**
4 **Exist**

5 Plaintiff's request for production of documents, set one, no. 1 states:

6 The Facility 4A-Building 3 Daily Housing Unit Log Book Pages for
7 November 9, 2006, and November 15, 2006, as well as November 16,
2006.

8 Plaintiff's request for production of documents, set two, no. 1 states:

9 In the defendants [sic] response to plaintiff's first set of Interrogatory No.
10 6. The [sic] defendant responded that he did not go to the plaintiff's cell on
11 November 12, 2006 [sic] with Sergeant Mack. The plaintiff did inform
12 the responding party on November 12, 2006, that he desired a cell move
13 because he was not getting along with his cellmate. However, the plaintiff
14 did not indicate that there were any safety concerns. The responding party
15 informed Sergeant mack [sic] of the plaintiff's desire to be moved to a
16 different cell and the move was approved. This move could not be
17 completed in the short time before the responding party came to the
18 plaintiff's cell in response to his violently kicking on the cell door for help.
19 Attach a copy of facility 4A Housing unit 3 Daily Log page describing
20 plaintiff's request for a cell move.

21 Plaintiff's request for production, set two, no 2 states:

22 Also attach a copy of Sergeant Mack's Daily Log page that he prepared
23 describing plaintiff's request for a cell move.

24 Defendant's response to all these request for production of documents states:

25 Objection. Housing unit log books are used by staff to record any number
26 of events occurring within the housing unit and contain a great deal of
27 information concerning the inmates in that housing unit. Their production
28 would violate the privacy rights of those inmates. Furthermore, they could
jeopardize the safety and security of the institution, staff, and inmates by,
for example, assisting an inmate to identify another inmate and determine
his cell assignment so as to carry out an attack. Without waiving these
objections, responding party states that it has nothing responsive to this
request. Housing unit log books are only retained for a limited amount of
time. The plaintiff is seeking log books from six years ago and they have
been purged pursuant to the institution's retention schedule.

29 Plaintiff's request for production, set three, no. 1 states:

30 In response to plaintiff's Request for Production of Documents No. 1, Set
31 Two, to attach a copy of Facility 4A housing unit 3 Daily Log page
32 describing plaintiff's request for a cell move. You in your response to
33 Production of Documents No. 3, state that housing unit log books are only

1 retained for a limited amount of time. The plaintiff is seeking log books
2 from six years ago and they have been purged pursuant to the institution's
retention schedule.

3 Plaintiff therefore request [sic] that you produce for inspection and
4 copying "The Institution's Retention Schedule Log for the period you
claim the facility 4A unit 3 Daily Log Book for November 9, 10, 11, 12,
5 2006 was purge." [sic]

6 Defendant's response to request for production, set three, no. 1 states:

7 Objection. Unlikely to lead to the discovery of admissible evidence.
8 Without waiving this objection, the responding party has nothing
responsive to this request. A "Institution's Retention Schedule Log" does
not exist.

9 **Plaintiff's argument:** Plaintiff argues that the Operational Manual for the Department of
10 Corrections and Rehabilitation requires that the prison maintain a records management program
11 and they must comply with CDCR's Records Retention Handbook. Plaintiff contends that
12 Defendants' claim there is no "Institutions Retention Schedule Log" is false. Plaintiff states that
13 under section 14060.6 the guidelines for the legal retention, disclosure, and destruction of records
14 are listed in each operational unit's Record Retention Schedule. It is Plaintiff's position that
15 records are not destroyed every five years. Plaintiff alleges that Defendants are lying about the
16 records being purged and refuse to provide proof that they have been purged. Plaintiff argues
17 that the Operations Manual requires CDCR to maintain a master inactive records list and allows
18 for retrieval of these records by contacting the local archives liaison for transfer and retrieval
19 instructions. Plaintiff contends that Defendants failed to retrieve inactive list and requests that
20 Defendants be required to produce responsive documents.

21 **Defendants' argument:** Defendants submit a declaration of the litigation coordinator at
22 the California Correctional Institution who states that she has made a search for the records that
23 were requested and they were unable to be located. Based upon the institutions records retention
24 schedule, the log books for November 2006 should have been purged prior to Plaintiff making
25 his requests. No record is kept of when log books are purged, however since they are unable to
26 be located the only conclusion that could be reached is that they have been purged. Defendants
27 argue that the Operations Manual for the CDCR does not state that CDCR must preserve for
28 eternity all documents that are created. The section Plaintiff references specifically refers to the

1 disposition of records, contemplating that they will be disposed of at some time. Plaintiff fails to
2 produce evidence that the records still exist.

3 Further Plaintiff is seeking an “Institution Retention Schedule Log.” The institution does
4 not maintain such a log and therefore it cannot be produced. While the regulations referenced by
5 Plaintiff refers to a “Record Retention Schedule,” it does not refer to or require that the
6 institution maintain a log of records that are destroyed, which is apparently what Plaintiff is
7 attempting to obtain.

8 **Ruling:** It is Plaintiff’s responsibility to adequately identify the documents to be
9 produced. Plaintiff did not request that Defendants request the master inactive list, nor does
10 Plaintiff demonstrate that this list applies to the documents that he is requesting. While section
11 14060.6.8 of the Operations Manual does provide a procedure for the transfer of inactive records
12 for off site storage, it also states that inactive records can be stored at the facility. Further,
13 section 14060.6.8 provides procedures for storage of records at the CDCR Archives, which
14 section 14060.3 defines as “[t]he storage location of discharged inmate/parolee records.”
15 Defendants have responded that there are no responsive documents and Plaintiff has failed to
16 show that documents responsive to this request do exist. **Plaintiff’s motion for additional
17 production is DENIED.**

18 **3. Plaintiff’s Requests for Affidavits**

19 Plaintiff’s request for production, set three, no. 2 states:

20 In Plaintiff’s interrogatory, SET TWO, Interrogatory No. 4, Plaintiff
21 requested an affidavit from the California Correctional Institution at
22 Tehachapi Departmental Head, declaring under penalty of perjury that the
23 requested documents were purge. [sic]

24 You stated this request was a request for production of documents, and not
25 an interrogatory.

26 Plaintiff therefore request [sic] that you produce an affidavit from the
27 California Correctional Institution at Tehachapi Department Head, under
28 penalty of perjury and stating that the Facility 4A Housing Unit 3 Daily
Log pages for November 9, 10, 11, 12, 2006 no longer exist because the
Log book was purge [sic] pursuant to the Institutions [sic] Retention
Policy.

Plaintiff’s request for production, set three, no. 3 states:

1 Please submit an Affidavit from the Departmental Head at California
2 Correctional Institution at Tehachapi, that the unit Program Sergeant's
3 Daily Log Book for November 12, 2006 no longer exist [sic], because it
4 was purge [sic] pursuant to the Institution's Retention policy.

5 Defendant's response to request for production, set three, nos. 2 and 3 states:

6 Objection. Under the Federal Rules of Civil Procedure, a response to a
7 request for production of documents does not need to be verified.
8 Furthermore, the responding party is not obligated to create documents in
9 response to a request for production of documents.

10 **Plaintiff's argument:** Plaintiff argues that Defendants are refusing to provide proof that
11 the records he is requesting have been destroyed.

12 **Defendants' argument:** Plaintiff is requesting that Defendant Cunningham have an
13 individual who is not a party to this lawsuit create a declaration. The Federal Rules do not
14 require a document to be created in response to a request for production of documents.

15 **Ruling:** Plaintiff is requesting that a non party create a document in response to his
16 requests for production. Federal Rule of Civil Procedure 34 requires a party to produce
17 documents that already exist and a party does not have to create a document in response to a
18 request for production. Alexander v. F.B.I., 194 F.R.D. 305, 310 (D.D.C. 2000). Plaintiff's
19 request for Defendants to create responsive documents is improper, thus Defendants' response is
20 sufficient. **Plaintiff's request for additional production is DENIED.**

21 **III. Motion for Stay**

22 Plaintiff moves to stay Defendants' motion for summary judgment until his motion to
23 compel has been decided. Since the motion to compel has been addressed by this order,
24 Plaintiff's motion to stay is denied as moot.

25 **IV. Conclusion and Order**

26 Based on the foregoing, IT IS HEREBY ORDERED that:

- 27 1. Plaintiff's motion to compel, filed July 23, 2012, is DENIED; and
- 28 2. Plaintiff's motion for a stay, filed October 25, 2012, is DENIED as moot.

IT IS SO ORDERED.

Dated: October 29, 2012

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE