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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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9 JAQUES FEARENCE,

10 Plaintiff,

11 vs.

12 L. L. SCHULTEIS, et al.,

13 Defendants.
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1:08-cv-00615-LJO-GSA-PC

ORDER DENYING REQUEST FOR
ISSUANCE OF SUBPOENA,
WITHOUT PREJUDICE
(Doc. 76.)

15 **I. BACKGROUND**

16 Jaques Fearence ("Plaintiff") is a prisoner proceeding pro se in this civil rights action
17 pursuant to 42 U.S.C. § 1983. This case now proceeds on the Third Amended Complaint filed
18 by Plaintiff on November 22, 2013, against defendants Hopkins and Busby for use of excessive
19 force; against defendants Hopkins, Davis, Duffy, and Beckett for failure to protect Plaintiff;
20 and against defendants Hopkins, Busby, Davis, Duffy, and Beckett for conspiracy to use
21 excessive force. (Doc. 64.)

22 This case is currently in the discovery phase, pursuant to the court's scheduling order
23 issued on February 19, 2014. (Doc. 74.) On March 3, 2014, Plaintiff filed a request, seeking
24 the issuance of a subpoena duces tecum commanding non-party Kim Holland, Warden of the
25 California Correctional Institution/Litigation Office, to provide the following documents and
26 information:

27 -- Any designated documents or electronically stored information including
28 writings, drawings, graphs, charts, photographs, sound and video recordings,

1 images, and other data or data compilations in regard to Plaintiff's cell
2 extraction on August 11, 2005; and

3 -- Any and all policies, directives, or instructions to staff concerning the use of
4 force with MK-9 foggers OC pepper spray, in year 2005.

5 For the reasons set forth below, Plaintiff's present request is denied, without prejudice.

6 Subject to certain requirements set forth herein, Plaintiff is entitled to the issuance of a
7 subpoena commanding the production of documents from non-parties, and to service of the
8 subpoena by the United States Marshal. Fed. R. Civ. P. 45; 28 U.S.C. 1915(d). However, the
9 Court will consider granting such a request *only if* the documents sought from the non-party are
10 not equally available to Plaintiff and are not obtainable from Defendants through a request for
11 production of documents. Fed. R. Civ. P. 34. Also, some of the documents sought by Plaintiff
12 may be kept in Plaintiff's central file at the prison, to which he is entitled to access.

13 If Plaintiff wishes to make another request for the issuance of a records subpoena, he
14 may file a motion requesting the issuance of a subpoena duces tecum that (1) identifies with
15 specificity the documents sought and from whom, and (2) makes a showing in the motion that
16 the records are only obtainable through that third party.

17 For the reasons set forth above, IT IS HEREBY ORDERED that Plaintiff's request for
18 the issuance of subpoenas, filed on March 3, 2014 is DENIED, without prejudice.

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20 IT IS SO ORDERED.

21 Dated: March 6, 2014

22 /s/ Gary S. Austin
23 UNITED STATES MAGISTRATE JUDGE
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