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2  
3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF CALIFORNIA  
5

6 LOUIS BRANCH,

7 Plaintiff,

8 vs.

9 D. UMPHENOUR, et al.,

10 Defendants.  
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1:08-cv-01655-AWI-GSA-PC

ORDER GRANTING IN PART  
PLAINTIFF'S MOTION TO COMPEL  
(Doc. 122.)

ORDER FOR DEFENDANT  
UMPHENOUR TO MAKE FURTHER  
RESPONSES TO PLAINTIFF'S  
REQUEST FOR PRODUCTION OF  
DOCUMENTS, SET FIVE, NOS. 37, 40,  
41, AND 42, PURSUANT TO THIS  
ORDER, WITHIN THIRTY DAYS

ORDER DENYING MOTION TO  
EXTEND DISCOVERY  
(Doc. 123.)

ORDER DENYING MOTION FOR *IN*  
*CAMERA* REVIEW  
(Doc. 125.)

18 **I. BACKGROUND**

19 Louis Branch ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis  
20 with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint  
21 commencing this action on July 7, 2008. (Doc. 1.) This action now proceeds on the Third  
22 Amended Complaint, filed by Plaintiff on July 10, 2013, against defendants Umphenour,  
23 Szalai, and Alvarez ("Defendants") for deliberate indifference to a serious risk to Plaintiff's  
24 safety in violation of the Eighth Amendment, and against defendant Umphenour for retaliation  
25 in violation of the First Amendment. (Doc. 94.)

26 On October 21, 2013, and February 21, 2014, the Court issued Scheduling Orders  
27 establishing a deadline of June 21, 2014, for the parties to complete discovery, including the  
28 filing of motions to compel. (Docs. 109, 120.) The discovery deadline has now expired.

1 On May 7, 2014, Plaintiff filed a motion to compel production of documents from  
2 defendant Umphenour. (Doc. 122.) On May 28, 2014, Defendants filed an opposition to the  
3 motion to compel. (Doc. 126.) On June 16, 2014, Plaintiff filed a reply to the opposition.  
4 (Doc. 131.)

5 On May 22, 2014, Plaintiff filed a motion for an *in camera* review of the documents  
6 sought by Plaintiff in the motion to compel, and a motion for an extension of the discovery  
7 deadline. (Docs. 123, 125.) On June 4, 2012, Plaintiff filed a declaration in support of his  
8 motion for an *in camera* review. (Doc. 129.) On June 12, 2014, Defendants filed an opposition  
9 to Plaintiff's motions. (Doc. 130.) On June 23, 2014, Plaintiff filed a reply to the opposition.  
10 (Doc. 132.)

11 Plaintiff's motion to compel, motion for *in camera* review, and motion to extend the  
12 discovery deadline are now before the court.

## 13 **II. PLAINTIFF'S ALLEGATIONS AND CLAIMS<sup>1</sup>**

### 14 **A. Allegations**

15 At the time of the events at issue, Plaintiff was incarcerated at Avenal State Prison  
16 (ASP) in Avenal, California, and defendants were employed as correctional officers at ASP.

17 In June 2004, Plaintiff submitted a sworn declaration that he had witnessed an inmate  
18 being battered and assaulted by an ASP Officer. (Third ACP, Doc. 94 at 9 ¶20.) Defendant  
19 Umphenour confronted Plaintiff and said he "would be 'dealt with' for submitting 'a false  
20 declaration against an officer.'" (*Id.* at 9 ¶21.) Immediately thereafter, ASP officials caused  
21 Plaintiff to be transferred within the prison five times in two weeks "amid the calumny and  
22 obloquy that [p]laintiff was a 'snitch' and a 'baby raper.'" (*Id.* at 9 ¶22.) Each of Plaintiff's  
23 verbal and written pleas resulted in Plaintiff being transferred to another facility or building.  
24 (*Id.* at 9 ¶23.)

25 After Plaintiff was transferred to Building 250 he was stabbed four times, bludgeoned  
26 about the head, and beaten to semi-consciousness while defendants Umphenour, Szalai, and  
27 \_\_\_\_\_

28 <sup>1</sup> This summary includes Plaintiff's allegations and claims against defendants Umphenour, Szalai, and Alvarez in the Third Amended Complaint upon which this action now proceeds.

1 Alvarez watched without intervening. (Id. at 9-10 ¶25.) Plaintiff was hospitalized and then  
2 placed in segregation. (Id. at 10 ¶26.)

3 **B. Retaliation Claim**

4 As discussed by the Ninth Circuit in Watison v. Carter:

5 “Prisoners have a First Amendment right to file  
6 grievances against prison officials and to be free from retaliation  
7 for doing so. Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir.  
8 2009). A retaliation claim has five elements. Id. First, the  
9 plaintiff must allege that the retaliated-against conduct is  
10 protected. The filing of an inmate grievance is protected conduct.  
11 Rhodes v. Robinson, 408 F.3d 559, 568 (9th Cir. 2005).

12 Second, the plaintiff must claim the defendant took  
13 adverse action against the plaintiff. Id. at 567. The adverse  
14 action need not be an independent constitutional violation. Pratt  
15 v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995). “[T]he mere  
16 *threat* of harm can be an adverse action....” Brodheim, 584 F.3d  
17 at 1270.

18 Third, the plaintiff must allege a causal connection  
19 between the adverse action and the protected conduct. Because  
20 direct evidence of retaliatory intent rarely can be pleaded in a  
21 complaint, allegation of a chronology of events from which  
22 retaliation can be inferred is sufficient to survive dismissal. See  
23 Pratt, 65 F.3d at 808 (“timing can properly be considered as  
24 circumstantial evidence of retaliatory intent”); Murphy v. Lane,  
25 833 F.2d 106, 108–09 (7th Cir. 1987).

26 Fourth, the plaintiff must allege that the “official's acts  
27 would chill or silence a person of ordinary firmness from future  
28 First Amendment activities.” Robinson, 408 F.3d at 568 (internal  
quotation marks and emphasis omitted). “[A] plaintiff who fails  
to allege a chilling effect may still state a claim if he alleges he  
suffered some other harm,” Brodheim, 584 F.3d at 1269, that is  
“more than minimal,” Robinson, 408 F.3d at 568 n.11. That the  
retaliatory conduct did not chill the plaintiff from suing the  
alleged retaliator does not defeat the retaliation claim at the  
motion to dismiss stage. Id. at 569.

Fifth, the plaintiff must allege “that the prison authorities’  
retaliatory action did not advance legitimate goals of the  
correctional institution....” Rizzo v. Dawson, 778 F.2d 527, 532  
(9th Cir.1985). A plaintiff successfully pleads this element by  
alleging, in addition to a retaliatory motive, that the defendant’s  
actions were arbitrary and capricious, id., or that they were  
“unnecessary to the maintenance of order in the institution,”  
Franklin v. Murphy, 745 F.2d 1221, 1230 (9th Cir.1984).”

Watison v. Carter, 668 F.3d 1108, 1114-15 (9th Cir. 2012).

1 The court found that Plaintiff stated a cognizable claim against defendant Umphenour  
2 for retaliation in violation of the First Amendment. (Doc. 103 at 10:18-21.)

3 **C. Failure to Protect – Eighth Amendment Claim**

4 The Eighth Amendment protects prisoners from inhumane methods of punishment and  
5 from inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th  
6 Cir. 2006). Although prison conditions may be restrictive and harsh, prison officials must  
7 provide prisoners with food, clothing, shelter, sanitation, medical care, and personal safety.  
8 Farmer v. Brennan, 511 U.S. 825, 832-33, 114 S.Ct. 1970 (1994) (internal citations and  
9 quotations omitted). Prison officials have a duty to take reasonable steps to protect inmates  
10 from physical abuse. Id.; Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005).

11 To establish a violation of this duty, the prisoner must establish that prison officials  
12 were “deliberately indifferent to a serious threat to the inmates’s safety.” Farmer, at 834. The  
13 question under the Eighth Amendment is whether prison officials, acting with deliberate  
14 indifference, exposed a prisoner to a sufficiently substantial ‘risk of serious damage to his  
15 future health . . . .’” Id. at 843 (citing Helling v. McKinney, 509 U.S. 25, 35 (1993)). The  
16 Supreme Court has explained that “deliberate indifference entails something more than mere  
17 negligence ... [but] something less than acts or omissions for the very purpose of causing harm  
18 or with the knowledge that harm will result.” Farmer at 835. The Court defined this “deliberate  
19 indifference” standard as equal to “recklessness,” in which “a person disregards a risk of harm  
20 of which he is aware.” Id. at 836-37.

21 The deliberate indifference standard involves both an objective and a subjective prong.  
22 First, the alleged deprivation must be, in objective terms, “sufficiently serious.” Id. at 834.  
23 Second, subjectively, the prison official must “know of and disregard an excessive risk to  
24 inmate health or safety.” Id. at 837; Anderson v. County of Kern, 45 F.3d 1310, 1313 (9th Cir.  
25 1995). To prove knowledge of the risk, however, the prisoner may rely on circumstantial  
26 evidence; in fact, the very obviousness of the risk may be sufficient to establish knowledge.  
27 Farmer, 511 U.S. at 842; Wallis v. Baldwin, 70 F.3d 1074, 1077 (9th Cir. 1995).

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1 The court found that Plaintiff stated cognizable claims against defendants Umphenour,  
2 Szalai, and Alvarez for failure to protect him in violation of the Eighth Amendment. (Doc. 103  
3 at 8:22-24.)

4 **III. MOTION TO COMPEL**

5 **A. Federal Rules of Civil Procedure 26(b), 34, and 37(a)**

6 Under Rule 26(b), “[U]nless otherwise limited by court order, the scope of discovery is  
7 as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to  
8 any party's claim or defense — including the existence, description, nature, custody, condition,  
9 and location of any documents or other tangible things and the identity and location of persons  
10 who know of any discoverable matter. For good cause, the court may order discovery of any  
11 matter relevant to the subject matter involved in the action.<sup>2</sup> “Relevant information need not be  
12 admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of  
13 admissible evidence.” Fed. R. Civ. P. 26(b)(1).

14 Pursuant to Rule 34(a) of the Federal Rules of Civil Procedure, “any party may serve on  
15 any other party a request to produce and permit the party making the request . . . to inspect and  
16 copy any designated documents . . . which are in the possession, custody or control of the party  
17 upon whom the request is served.” Fed. R. Civ. P. 34(a)(1). “[A] party need not have actual  
18 possession of documents to be deemed in control of them.” Clark v. Vega Wholesale Inc., 181  
19 F.R.D. 470, 472 (D.Nev. 1998) quoting Estate of Young v. Holmes, 134 F.R.D. 291, 294  
20 (D.Nev. 1991). “A party that has a legal right to obtain certain documents is deemed to have  
21 control of the documents.” Clark, 181 F.R.D. at 472; Allen v. Woodford, No. CV-F-05-1104  
22 OWW LJO, 2007 WL 309945, \*2 (E.D.Cal. Jan. 30, 2007) (citing In re Bankers Trust Co., 61  
23 F.3d 465, 469 (6th Cir.1995)); accord Evans v. Tilton, No. 1:07CV01814 DLB PC, 2010 WL  
24 1136216, at \*1 (E.D.Cal. Mar. 19, 2010).

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27 <sup>2</sup>“Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be  
28 without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401.

1 Under Rule 34(b), the party to whom the request is directed must respond in writing  
2 that inspection and related activities will be permitted as requested, or state an objection to the  
3 request, including the reasons. Fed. R. Civ. P. 34(b)(2). Also, “[a] party must produce  
4 documents as they are kept in the usual course of business or must organize and label them to  
5 correspond to the categories in the request.” Fed. R. Civ. P. 34(b)(E)(I).

6 Pursuant to Rule 37(a), a party propounding discovery may seek an order compelling  
7 disclosure when an opposing party has failed to respond or has provided evasive or incomplete  
8 responses. Fed. R. Civ. P. 37(a)(3)(B). “[A]n evasive or incomplete disclosure, answer, or  
9 response must be treated as a failure to disclose, answer, or respond.” Fed. R. Civ. P. 37(a)(4).  
10 “It is well established that a failure to object to discovery requests within the time required  
11 constitutes a waiver of any objection.” Richmark Corp. v. Timber Falling Consultants, 959  
12 F.2d 1468, 1473 (9th Cir. 1992) (citing Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981)).  
13 The moving party bears the burden of demonstrating “actual and substantial prejudice” from the  
14 denial of discovery. See Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002) (citations  
15 omitted.).

16 **A. Plaintiff’s Motion to Compel**

17 On or about April 9, 2014, defendant Umphenour served responses upon Plaintiff to  
18 Plaintiff’s Request for Production of Documents, Set Five. (Doc. 122 at 17:18-19.) Plaintiff  
19 now seeks an order compelling Defendant Umphenour to make further responses to Requests  
20 Nos. 34, 36, 37, 38, 39, 40, 41, and 42, as follows.

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23 > **REQUEST FOR PRODUCTION (RFP), SET FIVE, NO. 34:**

24 Please produce all Incident Reports (Dept. Operations Manual §51030 et seq.)  
25 and attachments, Rule Violation Reports pursuant to CDCR Rules and Regulations  
26 §3312(a)(3) and any documents that evidence, mention, or refer to inmates committing  
27 assaults and/or battery on other inmate(s) within Facility 2, Avenal State Prison,  
28 between 01/01/2004 and 07/11/2004.

1 > **RESPONSE TO RFP, SET FIVE, NO. 34:**

2 Objection. This request is duplicative of Request No. 22 in Plaintiff's  
3 Request for Production of Documents, Set Four. The request is also vague and  
4 ambiguous, and assumes facts not in evidence. Further the request is overly  
5 broad and burdensome. The request also seeks information that if disclosed,  
6 will violate the privacy rights of third parties. Further, the request seeks  
7 documents not related to the incident in plaintiff's complaint and thus seeks  
8 irrelevant information which is not reasonably calculated to lead to the  
9 discovery of admissible evidence. Without waiving these objections, defendant  
10 answers as follows: Defendant has already produced the incident report  
11 regarding the alleged incident on July 11, 2004 (Bates Nos. CDCR 0001-0017).

12 **Arguments**

13 Plaintiff argues that the requested reports will show that Facility 2 was rife with violent  
14 attacks against targeted prisoners, tending to prove that there was a policy and custom of  
15 purging targeted prisoners from the General Population by violent retribution, and that the  
16 officers protected each other by a Code of Silence.

17 Defendant asserts that he has already produced the report related to the assault against  
18 Plaintiff that is the subject of this lawsuit. Defendant argues that other reports about other  
19 inmate assaults are not relevant, and such disclosure would violate the privacy rights of third  
20 parties. Defendant also argues that to the extent Plaintiff requests character evidence, such  
21 evidence is not normally admissible in a civil rights case, and to the extent Plaintiff requests  
22 evidence of prison staff's past conduct with respect to prison assaults, Plaintiff will not be able  
23 to argue that Defendants acted in conformity therewith.

24 **Ruling:** Defendant Umphenour's objections on the grounds that this RFP is overly  
25 broad and burdensome are sustained, because the RFP, which requests "*any documents that*  
26 *evidence, mention, or refer to inmates committing assaults*" does not give Defendant reasonable  
27 notice of what is called for and what is not.

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1 This action now proceeds only on Plaintiff's claim against defendant Umphenour for  
2 retaliation, and Plaintiff's claims against defendants Umphenour, Szalai, and Alvarez for failure  
3 to protect him during an assault on Plaintiff. Plaintiff has not demonstrated, and the court does  
4 not find, that reports and documents concerning all inmate assaults on other inmates within  
5 Facility 2 during a six month period are relevant to Plaintiff's claims in this action. Therefore,  
6 Defendant is not required to provide a further response to RFP No. 34.

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9 > **RFP, SET FIVE, NO. 36:**

10 All redacted Incident Reports (DOM §51030 et seq.), and documents that  
11 evidence, mention, or refer to the inmate-on-inmate murder of a sex offender that  
12 occurred at Avenal, on Facility 4, in Building 450, in 2004.

13 > **RESPONSE TO RFP, SET FIVE, NO. 36:**

14 Objection. This request is vague and ambiguous, overly broad and  
15 burdensome, and assumes facts not in evidence. Further, the request seeks some  
16 information that if disclosed, will violate the privacy rights of third parties. The  
17 request also seeks documents not related to the incident in plaintiff's complaint  
18 and thus seeks irrelevant information which is not reasonably calculated to lead  
19 to the discovery of admissible evidence. Accordingly, no production is being  
20 made.

21 **Arguments**

22 Plaintiff argues that the requested documents are relevant because Plaintiff's  
23 unauthorized transfer to Building 420 was instigated by defendant Umphenour after Plaintiff  
24 submitted a complaint against Officer Perez for "sexual calumny," and it is "most significant"  
25 that Perez was assigned to Building 450 during the time of the 2004 murder of a sex offender at  
26 ASP. (Motion, Doc. 122 at 6:3-5.)

27 Defendant argues that Plaintiff has not demonstrated that this request is reasonably  
28 calculated to lead to the discovery of admissible evidence, because the information requested



1 by Plaintiff about Correctional Officer Perez does not concern conduct by any of the  
2 defendants. Defendant also argues that to the extent Plaintiff seeks the reports to show that  
3 Officer Umphenour and the other defendants acted in conformity with prior conduct, such  
4 evidence is inadmissible.

5 **Ruling:** Defendant Umphenour’s objections on the grounds that this RFP is overly  
6 broad, burdensome, and seeks irrelevant information are sustained. The Court finds that the  
7 request for “[a]ll . . . documents that evidence, mention, or refer to the inmate-on-inmate  
8 murder of a sex offender that occurred at Avenal, on Facility 4, in Building 450, in 2004” is  
9 overly broad and burdensome to Defendant, because it does not give Defendant reasonable  
10 notice of what is called for and what is not. In addition, Plaintiff has not demonstrated, and the  
11 court does not find, that evidence of the murder of a sex offender in 2004 is relevant to either of  
12 Plaintiff’s claims against defendants. Therefore, Defendant is not required to provide a further  
13 response to RFP No. 36.

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16 > **RFP, SET FIVE, NO. 37:**

17 Please produce the redacted communications by Special Agent LAURA  
18 WOODS (see DOM Special Agent §31140.4.8) of the CDCR Office of Internal Affairs,  
19 concerning WOOD’s investigation and interview of plaintiff in 01/2005 at Mule Creek  
20 Prison regarding the incident.

21 > **RESPONSE TO RFP, SET FIVE, NO. 37:**

22 Objection. This request is duplicative of Request No. 25 in Plaintiff’s  
23 Request for Production of Documents, Set Four. The request is also vague and  
24 ambiguous, overly broad, burdensome and assumes facts not in evidence.  
25 Further, the request also seeks information that is subject to the critical self-  
26 analysis privilege, deliberative process privilege and/or the official information  
27 privilege. Accordingly no production is being made. Without waiving these  
28 objections, defendant answers as follows:

1 Defendant does not have in his possession, custody or control any  
2 responsive documents. After performing a diligent search, the prison was  
3 unable to locate any responsive documents.

#### 4 **Arguments and Discussion**

5 Plaintiff argues that Defendants can obtain Agent Woods' communications from the  
6 CDCR's Office of Internal Affairs, and that this request is relevant because of information  
7 contained in Agent Wood's findings and communications regarding the July 11, 2004 assault  
8 on Plaintiff, which is at issue in this case.

9 Defendant Umphenour responds that he properly objected to the production of any  
10 Internal Affairs documents as subject to privileges, and that nevertheless, he does not have  
11 possession, custody, or control of such documents and cannot be compelled to produce  
12 documents in the possession of a third party. Defendant also asserts that the prison was unable  
13 to locate any responsive documents after a diligent search.

14 Defendant invokes the critical self-analysis privilege, deliberative process privilege  
15 and/or the official information privilege, but cites no controlling authority. In civil rights cases  
16 brought under federal statutes, questions of privilege are resolved by federal law. Kerr v.  
17 United States District Court, 511 F.2d 192, 197 (9th Cir. 1975). "State privilege doctrine,  
18 whether derived from statutes or court decisions, is not binding on federal courts in these kinds  
19 of cases." Kelly v. City of San Jose, 114 F.R.D. 653, 655-56 (N.D.Cal.1987). Plaintiff  
20 brought this case under a federal statute, 42 U.S.C. § 1983, and it is well settled that "questions  
21 of evidentiary privilege arising in the course of the adjudication of federal rights are governed  
22 by the principles of federal common law." United States v. Zolin, 491 U.S. 554, 109 S.Ct.  
23 2619, 105 L.Ed.2d 469 (1989)); see also Fed. R. Evid. 501.

24 The "critical self-analysis privilege" has not been recognized by the Ninth Circuit,  
25 Union Pacific R.R. Co. v. Mower, 219 F.3d 1069, 1076 n.7 (9th Cir. 2000); Dowling v.  
26 American Hawaii Cruises, 971 F.2d 423, 426 (9th Cir. 1992). In addition, it does not appear  
27 that California has recognized that privilege. Cloud v. Superior Court, 50 CalApp.4th 1552,  
28 1559, 58 Cal.Rptr.2d 365, 369 (1996) (naming thirteen privileges recognized in the California

1 Evidence Code, the self-critical analysis privilege not among them). Therefore, the court  
2 declines to apply this privilege.

3 The “deliberative process privilege” “permits the government to withhold documents  
4 that reflect advisory opinion, recommendations and deliberations comprising a part of a process  
5 by which government decision and policies are formulated.” Federal Trade Comm’n v. Warner  
6 Commc’ns, Inc., 742 F.2d 1156, 1161 (9th Cir. 1984); see NLRB v. Sears, Roebuck & Co., 421  
7 U.S. 132, 150, 95 S.Ct. 1504 (1975). There is no evidence before the court that the Internal  
8 Affairs investigation and interview reflects discussion among those responsible for  
9 governmental decision-making. Thus, the court cannot find that this privilege applies. Even if  
10 the deliberative process privilege applies, its protections are qualified, and a litigant may obtain  
11 discovery of materials protected by the privilege if the need for the materials outweighs the  
12 governmental interest in keeping the decision-making process confidential. Warner  
13 Commc’ns, 742 F.2d at 1161.

14 As for the “official information privilege,” which is a privilege of federal common law,  
15 Soto v. City of Concord, 162 F.R.D. 603, 613 (N.D.Cal.1995); Sanchez v. City of Santa Ana,  
16 936 F.2d 1027, 1033 (9th Cir.1990), “courts must weigh the potential benefits of disclosure  
17 against the potential disadvantages.” Sanchez, 936 F.2d at 1033–34. The balancing test “is  
18 moderately pre-weighted in favor of disclosure.” Kelly, 114 F.R.D. at 661. The privilege  
19 “must be formally asserted and delineated in order to be raised properly,” and the party  
20 opposing disclosure must “state with specificity the rationale of the claimed privilege.” Kerr,  
21 511 F.2d at 198. To properly invoke the governmental privilege, “[t]he claiming official must  
22 ‘have seen and considered the contents of the documents and himself have formed the view that  
23 on grounds of public interest they ought not to be produced’ and state with specificity the  
24 rationale of the claimed privilege.” Id. The party invoking the privilege must at the outset  
25 make a “substantial threshold showing” by way of a declaration or affidavit from a responsible  
26 official with personal knowledge of the matters to be attested to in the affidavit. Soto, 162  
27 F.R.D. at 613.

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1 While Defendant has submitted a privilege log in support of his objections, the privilege  
2 log does not address the documents from the Office of Internal Affairs' investigation and  
3 interview requested by Plaintiff in RFP No. 37. (Doc 126-1, Exh. C at 23.) See Oyarzo v.  
4 Tuolumne Fire District, No. 1:11-cv-01271-LJO-SAB, 2013 WL 1758798, at \*9-10 (citing  
5 Soto, 162 F.R.D. at 613 and Kelly, 114 F.R.D. 653, 660-61 (N. D. Cal. 1987)); see also Randle  
6 v. Franklin, No. CV 1-08-00845-JAT, 2010 WL 3069205, at \*3 (E.D. Cal. Aug. 3, 2010)  
7 (“[T]he Defendant has the burden of showing that confidentiality and safety concerns override  
8 the liberal discovery procedures outlined in Fed. R. Civ. P. 26.”). Defendant Umphenour has  
9 not made the required showing, and therefore has not properly invoked this privilege.

10 With respect to Defendant's objection that RFP No. 37 is vague and ambiguous, overly  
11 broad, burdensome and assumes facts not in evidence, the court disagrees and finds this RFP to  
12 contain sufficient particularity. The documents requested are limited to those from Agent  
13 Laura Woods' investigation of the July 11, 2004 incident at issue in this case, and Woods'  
14 January 2005 interview of Plaintiff during the investigation. Defendant's objections to the RFP  
15 do not show how the RFP assumes facts not in evidence. Therefore, Defendant's objections on  
16 the grounds that this request is vague, ambiguous, overly broad, burdensome, and assumes facts  
17 not in evidence are overruled.

18 Defendant also argues that he does not have possession, custody, or control of the  
19 documents requested. For document production requests, responding parties must produce  
20 documents which are in their “possession, custody or control.” Fed. R. Civ. P. 34(a)(1). As  
21 discussed above, “a party need not have actual possession of documents to be deemed in  
22 control of them, [and] a party that has a legal right to obtain certain documents is deemed to  
23 have control of the documents.” Clark, 181 F.R.D. at 472. It is this Court's experience that  
24 individual defendants who are employed by CDCR can generally obtain documents, such as the  
25 ones at issue here, from CDCR by requesting them. If this is the case, then, based on his  
26 relationship with CDCR, defendant Umphenour has constructive control over the requested  
27 documents, and the documents must be produced. See, e.g., Mitchell v. Adams, 2009 U.S.  
28 Dist. LEXIS 24289, \* 24-25, 2009 WL 674348, \*9 (E.D. Cal. Mar. 6, 2009) (even though

1 defendant warden was sued in his individual capacity, he had constructive control over  
2 requested documents because he had authority to obtain the requested documents from third  
3 party CDCR); see also Gray v. Faulkner, 148 F.R.D. 220, 223-24 (N.D.Ind. 1992) (requiring  
4 certification that responding parties “have conducted a search for the information reasonably  
5 available to them through their agents, attorneys, or others subject to their control and have  
6 determined that the information requested either does not exist or that it has been produced.”)

7 If defendant Umphenour chooses to stand on his objection that he has no possession,  
8 custody, or control, he must provide factual support for the assertion that, in spite of his  
9 relationship to CDCR, he does not have possession, custody or control of the requested  
10 documents. Defendant should also be mindful of the fact that he will be precluded from using  
11 the requested documents, or any documents of this kind, as evidence in support of summary  
12 judgment, in opposition to any of Plaintiff’s positions, and in any way during trial. See Fed. R.  
13 Civ. P. 37(c)(1). Should Defendant stand on this objection and subsequently seek to use the  
14 requested documents or like documents, he must, at minimum, supplement his response, and  
15 explain the method by which he obtained the documents. Id. Most importantly, he will also be  
16 required to demonstrate that the prior objection was taken in good faith given that he now has  
17 and seeks to use the requested documents. Fed. R. Civ. P. 26(e)(1).

18 **Ruling**

19 Defendant’s objections to this RFP are overruled. Defendant is required to provide a  
20 further response to Plaintiff’s RFP No. 37 within thirty days from the date of service of this  
21 order, as instructed by this order. Because Plaintiff requests only redacted documents, there  
22 should be no concerns about confidentiality or privacy. If Defendant asserts that he has made a  
23 diligent search and no such materials exist, Plaintiff must accept this response.

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26 > **RFP, SET FIVE, NO. 38:**

27 Please produce all CDCR Form 602 Inmate Appeals and any informal  
28 grievances or requests for redress filed/submitted by prisoner HAWKINS P93276, from

1 10/01/2003 to 01/01/2006, to include CDCR' Informal, First, Second and Third Level  
2 Responses to HAWKINS' Inmate Appeals and any additional responses to HAWKINS'  
3 informal grievances.

4 > **RESPONSE TO RFP, SET FIVE, NO. 38:**

5 Objection. This request is duplicative of Request No. 26 in Plaintiff's  
6 Request for Production of Documents, Set Four. The request also seeks  
7 documents not related to the incident in plaintiff's complaint and thus seeks  
8 irrelevant information which is not reasonably calculated to lead to the  
9 discovery of admissible evidence. Further, the request is vague and ambiguous,  
10 overly broad, burdensome and assumes facts not in evidence. The request also  
11 seeks some information that if disclosed, will violate the privacy rights of third  
12 parties. Accordingly, no production is being made.

13 **Discussion**

14 Plaintiff argues that inmate Hawkins' appeals and grievances are relevant to Plaintiff's  
15 retaliation claim, because defendant Umphenour acted in retaliation against Plaintiff for  
16 reporting that he saw Officer Dunn assault inmate Hawkins. Plaintiff argues that such  
17 information will support his allegations that retaliatory policy and custom existed, that  
18 defendants' acts were directed towards prisoners who engage in law-related activity, and that a  
19 "Code of Silence" existed among officers.

20 Defendant argues that such information is not relevant and would violate the privacy  
21 rights of third parties. Defendant also argues that Plaintiff has not explained why he needs  
22 three years' worth of Hawkins' records. Further, Defendant argues that any prejudice suffered  
23 by Plaintiff from denial of this discovery is outweighed by the prison's security interests in  
24 withholding information that contains information such as gang affiliations and may place  
25 inmate Hawkins' life at risk.

26 **Ruling:** Plaintiff has not demonstrated, and the court does not find, that Hawkins'  
27 appeals and grievances are relevant to Plaintiff's claims against defendant Umphenour. This  
28 case is not proceeding on claims that other prisoners were assaulted or retaliated against by

1 other officers. Plaintiff has not met his burden of establishing the relevance of the documents  
2 requested in RFP No. 38, or of establishing that Defendant's objections on the grounds of  
3 relevance are not meritorious. Therefore, Defendant Umphenour's objection against this RFP  
4 on the grounds of relevance is sustained, and Defendant is not required to provide a further  
5 response to RFP No. 38.

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8 > **RFP, SET FIVE, NO. 39:**

9 Please produce all CDCR Form 115 Rule Violation Reports, CDCR 114-D  
10 Segregation Orders, CDCR 128-G Classification Chronos and CDCR 128-G  
11 Classification Staff Representative (CSR) transfer endorsements/placements for  
12 prisoner HAWKINS P93276 from 10/01/2003 to 01/01/2006.

13 > **RESPONSE TO RFP, SET FIVE, NO. 39:**

14 Objection. This request is duplicative of Request No. 27 in Plaintiff's  
15 Request for Production of Documents, Set Four. The request also seeks  
16 documents not related to the incident in plaintiff's complaint and thus seeks  
17 irrelevant information which is not reasonably calculated to lead to the  
18 discovery of admissible evidence. Further, the request is vague and ambiguous,  
19 overly broad, burdensome and assumes facts not in evidence. The request also  
20 seeks some information that if disclosed, will violate the privacy rights of third  
21 parties. Accordingly, no production is being made.

22 **Discussion**

23 Plaintiff argues that inmate Hawkins' records are relevant to Plaintiff's retaliation  
24 claim, because defendant Umphenour acted in retaliation against Plaintiff after Plaintiff  
25 reported that he saw Officer Dunn assault inmate Hawkins. Plaintiff argues that such  
26 information will support his allegations that retaliatory policy and custom existed, that  
27 defendants' acts were directed towards prisoners who engage in law-related activity, and that a  
28 "Code of Silence" among officers existed. Plaintiff also argues that Hawkins' records will

1 authenticate the incident between Officer Dunn and Hawkins, supporting the information in  
2 Plaintiff's declaration.

3 Defendant argues that such information is not relevant and would violate the privacy  
4 rights of third parties. Defendant also argues that Plaintiff has not explained why he needs  
5 three years' worth of Hawkins' records. Further, Defendant argues that any prejudice suffered  
6 by Plaintiff from denial of this discovery is outweighed by the prison's security interests in  
7 withholding information that contains information such as gang affiliations and may place  
8 inmate Hawkins' life at risk.

9 **Ruling:** Plaintiff has not demonstrated, and the court does not find, that Hawkins'  
10 Rules Violation Reports, Chronos, and transfer/endorsement placements are relevant to  
11 Plaintiff's retaliation claim against defendant Umphenour. This case is not proceeding on  
12 claims that other prisoners were assaulted or retaliated against by other officers, and the truth of  
13 Plaintiff's declaration is not at issue. Plaintiff has not met his burden of establishing the  
14 relevance of the documents requested in RFP No. 38, or establishing that Defendant's objection  
15 on the ground of relevance is not meritorious. Therefore, defendant Umphenour's objections to  
16 this RFP on the ground of relevance are sustained, and Defendant is not required to provide  
17 further response to RFP No. 39.

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20 > **RFP, SET FIVE, NO. 40:**

21 Please kindly produce a Roster of all prisoners assigned to Dorm #1, Building  
22 250, effective 07/11/2004.

23 > **RESPONSE TO RFP, SET FIVE, NO. 40:**

24 Objection. This request is duplicative of Request No. 17 (erroneously  
25 labeled as No. 15) in Plaintiff's Request for Production of Documents, Set Three  
26 (erroneously labeled as Set Two). The request is also vague and ambiguous as  
27 to the term "Roster." The request is also overly broad, burdensome and assumes  
28 facts not in evidence. Also, the request seeks some information that if disclosed,



1 will violate the privacy rights of third parties. Further, the disclosure and  
2 dissemination of information relating to other inmates may pose a security risk  
3 to those individuals given that plaintiff is a convicted felon. Accordingly, no  
4 production is being made.

5 **Discussion**

6 See below: **Discussion Concerning RFP Nos. 40 & 41**

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**RFP, SET FIVE, NO. 41:**

10 Please kindly produce photographs of all prisoners assigned to Dorm 1, effective  
11 07/11/2004.

12 > **RESPONSE TO RFP, SET FIVE, NO. 41:**

13 Objection. This request is duplicative of Request No. 31 in Plaintiff's  
14 Request for Production of Documents, Set Four. The request is also vague and  
15 ambiguous, overly broad, burdensome and assumes facts not in evidence.  
16 Further, the request seeks some information that if disclosed, will violate the  
17 privacy rights of third parties. In addition, the disclosure and dissemination of  
18 photographs of other inmates may pose a security risk to those individuals given  
19 that plaintiff is a convicted felon. In addition defendants are under no obligation  
20 to take photographs of custody staff in order to produce them to plaintiff.  
21 Accordingly, no production is being made.

22 **Discussion Concerning RFP Nos. 40 & 41**

23 Plaintiff argues that the Roster and photographs will enable him to identify other  
24 inmates assigned to his dorm during the incident at issue, to assist him with gathering evidence  
25 from witnesses who may know the reasons for the assault on Plaintiff, what happened to  
26 Plaintiff's property, who owns the weapon found adjacent to the dorm, and the "origin of the  
27 life/safety endangering sexual calumny." (Motion, Doc. 122 at 8:22.) Plaintiff asserts that he

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1 has narrowed his request to the eleven inmates assigned to Dormitory 1, Facility 2, Bldg. 250  
2 on July 11, 2004.

3 Defendant reasserts his objections that dissemination of the Roster and photographs  
4 requested by Plaintiff would violate privacy rights and could pose a security risk, because the  
5 photos could be used to make identification cards in order to facilitate an escape. Defendant  
6 also argues that these two requests, Nos. 40 & 41, are duplicative of two of Plaintiff's prior  
7 discovery requests. In addition, Defendant argues that it would be overly burdensome to  
8 compel him to produce photographs of the eleven inmates, because the inmates would have  
9 been moved around and their photos would have to be obtained from their current prison  
10 central files, which are likely to be located in various facilities throughout the state. Defendant  
11 also asserts that according to the incident report related to Plaintiff's assault, Plaintiff was  
12 assaulted when he was trying to purchase an inmate manufactured weapon.

13 The court does not find RFP Nos. 40 & 41 to be vague and ambiguous, overly broad,  
14 burdensome, or assuming facts not in evidence, but instead finds them to be concise and now  
15 narrowed to names and photos of only eleven prisoners who were housed in one particular  
16 dorm facility on one particular date. While Defendant is not obligated to produce a Roster, or  
17 list, that does not exist, Defendant has not indicated whether he made a diligent search for such  
18 a list or even inquired whether such a list would have been kept. Nor has Defendant adequately  
19 supported his argument that a Roster of the names or photos of eleven prisoners housed in the  
20 dorm on one date more than ten years ago pose a security risk to those prisoners,  
21 notwithstanding Plaintiff's status as a convicted felon and the vague possibility that the photos  
22 could be used to create identification cards and facilitate escape.

23 Rule 26(b) of the Federal Rules of Civil Procedure allows “[p]arties [to] obtain  
24 discovery regarding any nonprivileged matter that is relevant to any party's claim or defense —  
25 including the existence, description, nature, custody, condition, and location of any documents  
26 or other tangible things and the *identity and location of persons who know of any discoverable  
27 matter.*” Fed R. Civ. P. 16(b) (emphasis added). Thus, the Roster and photographs requested  
28 by Plaintiff are relevant to the claims in this action, and Plaintiff is entitled to discover those

1 items as long as they are nonprivileged. Because Defendant has not sufficiently supported his  
2 argument that the items pose a security risk or violate privacy rights, Defendant's objections on  
3 those grounds shall be overruled. Moreover, Defendant has not shown that the eleven  
4 prisoners' privacy rights outweigh the prejudice to Plaintiff by denial of the discovery.

5 **Ruling:** Defendant's objections to RFP Nos. 40 & 41 on the grounds that they are  
6 vague and ambiguous, overly broad, burdensome, or assume facts not in evidence, or that  
7 production of the discovery would violate privacy rights and could pose a security risk, are  
8 overruled. Defendant shall be required to make a further response to RFP Nos. 40 & 41 by  
9 producing the items requested. Defendant is not, however, required to produce a Roster, or list,  
10 that does not exist or take photographs on Plaintiff's behalf to respond to RFP Nos. 40 & 41. If  
11 Defendant has serious, specific privacy and security concerns about providing these documents  
12 to Plaintiff, Defendant may submit the documents to the court for *in camera* review, together  
13 with arguments setting forth his serious, specific concerns with factual support. If Defendant  
14 asserts that he has made a diligent search and no such materials exist, Plaintiff must accept this  
15 response.

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18 > **RFP, SET FIVE, NO. 42:**

19 Please kindly produce photographs of the interior of Building 250 or facsimile  
20 thereof.

21 > **RESPONSE TO RFP, SET FIVE, NO. 42:**

22 Objection. This request is duplicative of Request No. 29 in Plaintiff's  
23 Request for Production of Documents, Set Four. The request is also vague and  
24 ambiguous, overly broad, burdensome and assumes facts not in evidence. The  
25 disclosure and dissemination of photographs of the interior facility buildings  
26 may pose a security risk to correctional staff and other inmates given that  
27 plaintiff is a convicted felon. In addition, defendants are under no obligation to

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1 take photographs of the buildings in order to produce them to plaintiff.  
2 Accordingly, no production is being made.

3 **Arguments**

4 Plaintiff argues that he simply requests “crime scene photographs” to assist the judge  
5 and jury at trial in “assess[ing] the veracity of defendant’s alibis.” (Motion, Doc. 122 at 9:10-  
6 22.) Defendant argues that the production of photos of the building to Plaintiff “may pose a  
7 security risk to correctional staff and other inmates,” and “he is under no obligation to take  
8 photographs of the buildings in order to produce them to [Plaintiff].” (Opposition, Doc. 126 at  
9 8:10-14.)

10 Defendant argues that dissemination of these photographs by Plaintiff could jeopardize  
11 security or cause harm to prison staff as well as other inmates.

12 **Ruling**

13 Plaintiff is entitled to photos, or a facsimile, of the specific area inside of Building 250  
14 where he was assaulted on July 11, 2004, if such photos or facsimile exist and can be located  
15 by Defendant during a diligent search. Therefore, Defendants shall be required to respond to  
16 this request -- as narrowed by the court to “photographs or facsimile thereof of the specific area  
17 and immediate surrounding areas of the interior of Building 250 where Plaintiff was assaulted  
18 on July 11, 2004.” However, Defendant is not required take photos on Plaintiff’s behalf.  
19 Defendant shall respond by producing the discovery requested or by making an assertion that  
20 he has made a diligent search and no such materials exist. Defendant may redact portions of  
21 photographs or facsimiles showing identifiable individuals or raising security or privacy  
22 concerns, before providing them to Plaintiff. If Defendant asserts that he has made a diligent  
23 search and no such materials exist, Plaintiff must accept this response.

24 **IV. MOTION FOR *IN CAMERA* REVIEW**

25 Plaintiff requests the court to compel Defendant to submit all of the documents and  
26 materials responsive to RFP 34, 36, 37, 38, 39, 40, 41, and 42 to the court for *in camera*  
27 review, to determine the validity of Defendant’s contention that the requested documents  
28 contain privilege information preventing disclosure.

1 In light of the fact that the Defendant's concerns of privilege, privacy, and  
2 confidentiality have been addressed in the rulings above, and Defendant has the option to  
3 submit documents responsive to RFP Nos. 40 & 41 to the court for *in camera* review,  
4 Plaintiff's motion for *in camera* review shall be denied as moot.

5 **V. MOTION TO EXTEND DISCOVERY DEADLINE**

6 Plaintiff also requests extension of the discovery deadline until October 1, 2014, to  
7 allow for further discovery. The current discovery deadline, June 16, 2014, has expired.

8 Modification of a scheduling order requires a showing of good cause, Fed. R. Civ. P.  
9 16(b), and good cause requires a showing of due diligence, Johnson v. Mammoth Recreations,  
10 Inc., 975 F.2d 604, 609 (9th Cir. 1992). To establish good cause, the party seeking the  
11 modification of a scheduling order must generally show that even with the exercise of due  
12 diligence, they cannot meet the requirement of the order. Id. The court may also consider the  
13 prejudice to the party opposing the modification. Id. If the party seeking to amend the  
14 scheduling order fails to show due diligence the inquiry should end and the court should not  
15 grant the motion to modify. Zivkovic v. Southern California Edison, Co., 302 F.3d 1080, 1087  
16 (9th Cir. 2002). A party may obtain relief from the court's deadline date for discovery by  
17 demonstrating good cause for allowing further discovery. Fed. R. Civ. P. 16(b)(4).

18 Here, Plaintiff argues that in the event further discovery is needed after Defendant  
19 produces documents pursuant to Plaintiff's motion to compel, the discovery deadline should be  
20 extended. Plaintiff also requests additional time to find counsel to assist with depositions of  
21 defendants and non-party witnesses. Plaintiff also notes that he has requested the court to order  
22 his mental examination. (Doc. 124.)

23 Defendant argues that no good cause exists for the extension of discovery, or for the  
24 court to modify the scheduling order. Defendant asserts that Plaintiff has already had six years  
25 to seek counsel and request a mental examination, and almost three years to conduct discovery  
26 since Defendant Umphenour appeared in this case in 2001 (Doc. 44).

27 Defendant's arguments have merit. Plaintiff has already had ample time to seek counsel  
28 and conduct discovery since defendant Umphenour appeared. Moreover, because Defendant

1 has not yet produced documents pursuant to the motion to compel, Plaintiff's argument that he  
2 may require additional time to conduct discovery is speculative, and he cannot show at this  
3 stage of the proceedings that the current discovery deadline needs to be extended for that  
4 purpose. The court has denied Plaintiff's request for a mental examination, Doc. 127, and thus  
5 there is no need to extend the discovery deadline to allow time for such examination.  
6 Therefore, the court finds no good cause to extend the discovery deadline, and Plaintiff's  
7 motion shall be denied.

8 **VI. CONCLUSION**

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

- 10 1. Plaintiff's motion to compel, filed on May 7, 2014, is GRANTED IN PART;
- 11 2. Within thirty days of the date of service of this order, defendant Umphenour is  
12 required to provide further responses to Plaintiff's Request for Production of  
13 Documents, Set Five, Nos. 37, 40, 41, and 42, as instructed by this order;
- 14 3. Plaintiff's motion for an *in camera* review, filed on May 22, 2014, is DENIED  
15 as moot; and
- 16 4. Plaintiff's motion to extend the discovery deadline in this action, filed on May  
17 22, 2014, is DENIED.

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19 IT IS SO ORDERED.

20 Dated: August 6, 2014

/s/ Gary S. Austin  
21 UNITED STATES MAGISTRATE JUDGE  
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