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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

GABRIELLE RODRIGUEZ,) **CV F 09- CV - 1176 AWI MJS**
)
Plaintiff,)
) **ORDER ON DEFENDANTS'**
v.) **MOTION FOR**
) **RECONSIDERATION OF**
CITY OF FRESNO, JERRY DYER) **MAGISTRATE JUDGE'S**
ROBERT CHAVEZ, and DOES 1 to 20,) **ORDER ON PLAINTIFF'S**
inclusive,) **MOTION TO COMPEL**
) **DISCOVERY**
Defendants.)
) **Document # 36**
_____)

In this action, plaintiff Gabrielle Rodriguez ("Plaintiff") alleges civil rights violations under federal and state law against defendants City of Fresno, Jerry Dyer and Robert Chavez (collectively, "Defendants") based on injuries she sustained as a bystander during a police response to an incident at her home in the City of Fresno. During discovery, Plaintiff moved to compel disclosure of certain personnel records pertaining to Defendants Dyer and Chavez and pertaining to non-defendant Fresno Police Officer, Derek Avila ("Avila"). On September 1, 2010, the Magistrate Judge issued an order granting in part and denying in part Plaintiff's motion to compel (hereinafter, the "September 1 Order").

In the instant motion, Defendants seek reconsideration of the Magistrate Judge's September 1 Order to the extent it granted Plaintiff's motion to compel disclosure of records

1 that pertain to the personnel and internal affairs records of Avila. For the reasons that follow,
2 the court will deny Defendants' motion for reconsideration.

3 **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

4 The factual allegations set forth in the complaint differ sharply from those alleged by
5 Defendants in their motion for reconsideration. Defendants allege Fresno Police Department
6 dispatched defendant Chavez and officer Avila in response to a telephone report of a
7 disturbance at a residence located at 964 E. Princeton, Fresno. The caller reported a person
8 brandishing a gun and identified the person as Danny Hernandez, a Bulldog gang member,
9 and gave a description of him. The two officers approached the residence and parked about
10 300 feet away. As they approached on foot, Defendants allege they saw a person fitting the
11 description of the person who called in the report in the backyard and saw a person walking
12 out the front door of the apartment who was later identified as Hernandez. Defendants allege
13 they approached Hernandez with guns drawn and identified themselves whereupon
14 Hernandez turned and ran back to the apartment, opened the door and went inside. The
15 officers pursued Hernandez to the apartment and kicked the door open as Hernandez was
16 attempting to shut it. Defendants then allege as follows:

17 Officer Chavez continually ordered Hernandez to stop and show his
18 hands. Hernandez grabbed for his waistband [where a weapon was reportedly
19 concealed] and looked over his shoulder towards Officer Chavez, as if to size
20 him up. With his hand on his waistband, Hernandez' upper body started to
21 rotate toward Office Chavez. Officer Chavez believed his life was in danger
22 and feared for the safety of the others in the room. He [Chavez] then fired two
23 shots. Officer Chavez saw Hernandez either grab a female standing to the
24 right of him, or run into her causing her to turn and come between Officer
25 Chavez and Hernandez. Hernandez went down and a gun landed on the
26 ground. Officer Chavez kicked the gun away from Hernandez. The gun, later
27 determined to be loaded, matched the description provided by the original
28 reporting party.

Doc. # 36 at 3:9-17.

24 In contrast, Plaintiff's complaint alleges the following with regard to the same events
25 leading up to the point Plaintiff suffered the wound now complained of:

26 On January 1, 2009, [Plaintiff] was attending a New Years's Eve party at the
27 real property located at 964 E. Princeton Ave., Apt. A, Fresno, California (the
28 "Subject Premises") with her boyfriend Danny Hernandez ("Mr. Hernandez").
After engaging in a verbal argument with another guest inside the Subject

1 Premises, Mr. Hernandez went outside. While outside the Subject Premises,
2 Mr. Hernandez heard a noise, which caused him to inspect the area near the
3 gate. Mr. Hernandez was startled by men dressed in dark clothing, who
4 pointed their guns toward Mr. Hernandez's face. The men, who Mr.
5 Hernandez later learned were City of Fresno Police Officers, failed to identify
6 themselves, and carried guns with flashlights attached on top, identical to
7 those used by gang members in the area.

8 Accordingly, Mr. Hernandez, in fear that he was under attack by gang
9 members, fled into the Subject Premises for safety. Mr. Hernandez was not
10 carrying a weapon and did not otherwise pose a threat to the City of Fresno
11 Police Officers or any other persons. Having failed to identify themselves and
12 having no cause to follow a private citizen into a residence, shortly after Mr.
13 Hernandez entered the Subject Premises, the City of Fresno Police Officers
14 forcibly entered into the Subject Premises through the front door absent a
15 warrant and absent exigent circumstances.

16 [¶ . . . ¶]

17 [Plaintiff] was in the house at the time the police officers entered the dwelling
18 without consent. [Plaintiff] was simply standing in the house when the officers
19 entered and did not have any weapons on her person. Without provocation or
20 probable cause, Defendant Chavez intentionally, recklessly, and/or negligently
21 fired two rounds and shot [Plaintiff] and Mr. Hernandez. Mr. Hernandez was
22 struck in the back while [Plaintiff] was struck in the abdomen.

23 Doc. # 1 at 2:25 - 3:28 (Paragraph numbers omitted).

24 Plaintiff's complaint was filed on July 2, 2009. The complaint alleges eight claims for
25 relief. The first alleges violation of Plaintiff rights under the Fourth and Fourteenth
26 Amendments in violation of 28 U.S.C. § 1983 against Defendant Chavez. Plaintiff's second
27 claim for relief alleges Monell claims against Defendants Dyer and City of Fresno. Plaintiff's
28 third and fourth claims for relief allege negligence and battery claims respectively against
29 Defendants Chavez and City of Fresno. Plaintiff's fifth claim for relief alleges unlawful use
30 of violence based on race or gender in violation of California Civil Code section 51.7 against
31 Defendants Chavez and City of Fresno. Plaintiff's sixth claim for relief alleges violation of
32 California Civil Code, section 52.1 against all Defendants. Plaintiff's seventh claim for relief
33 alleges negligent hiring, training and supervision against Defendants Dyer and City of Fresno
34 and Plaintiff's eighth claim alleges vicarious liability against City of Fresno.

35 Plaintiff's motion to compel which was the subject of the Magistrate Judge's
36 September 1 Order was filed on June 24, 2010. The parties filed a joint statement of
37 discovery disagreement on July 28, 2010. On August 6, 2010, following hearing on the
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1 discovery dispute, the parties filed a stipulated order resolving certain issues and filed an
2 amended statement of discovery disagreement. The September 1, Order resolved the
3 remaining disputed discovery issues.

4 At issue in the instant motion for reconsideration is the Magistrate Judge's grant of
5 Plaintiff's motion to compel with respect to the following requests:

- 6 1. Use of force reports concerning officer Avila within the previous three years.
7 (Request # 10).
- 8 2. "Internal Affairs reports or reports of discipline, in which [Avila] is the
9 subject of a complaint which involves the use of force, lack of truth and/or
10 veracity, preparing false or inaccurate reports or actions which violate the civil
11 rights of a citizen within the last ten years." (Request # 12)
- 12 3. "Citizen complaints or any other documents in [Avila's] personnel file that
13 relate to or involve the use of force, lack of truth and/or veracity, preparing
14 false or inaccurate reports or actions which violate the civil rights of a citizen
15 within the last ten years." (Request # 39).

16 The instant motion for reconsideration of the September 1 Order was filed on
17 September 15, 2010. Plaintiff's opposition was filed on September 17, 2010.

18 **LEGAL STANDARD**

19 Motions to reconsider are committed to the discretion of the trial court. Rodgers v. Watt,
20 722 F.2d 456, 460 (9th Cir. 1983) (en banc); Combs v. Nick Garin Trucking, 825 F.2d 437,
21 441 (D.C.Cir. 1987). To succeed, a party must set forth facts or law of a strongly convincing
22 nature to induce the court to reverse its prior decision. See, e.g., Kern-Tulare Water Dist. v.
23 City of Bakersfield, 634 F.Supp. 656, 665 (E.D.Cal. 1986), *aff'd in part and rev'd in part on*
24 *other grounds*, 828 F.2d 514 (9th Cir. 1987). When filing a motion for reconsideration,
25 Local Rule 78-230(k) requires a party to show the "new or different facts or circumstances
26 claimed to exist which did not exist or were not shown upon such prior motion, or what other
27 grounds exist for the motion." The court reviews a motion to reconsider a Magistrate Judge's
28 ruling under the "clearly erroneous or contrary to law" standard set forth in 28 U.S.C. §

1 636(b)(1)(A); Fed. R. Civ. P. 72(a). As such, the court may only set aside those portions of
2 the Magistrate Judge’s order that are either clearly erroneous or contrary to law. Fed.R.Civ.P.
3 72(a); see also Grimes v. City and County of San Francisco, 951 F.2d 236, 240 (9th Cir.1991)
4 (discovery sanctions are non- dispositive pretrial matters that are reviewed for clear error
5 under Rule 72(a)).

6 DISCUSSION

7 Defendant’s arguments against Plaintiff’s motion to compel responses to requests
8 numbered 10, 12 and 39 are identical. Therefore, for purposes of analysis, the court will
9 consider each of the parties’ arguments as applicable to each of the subject requests for
10 production of documents. Defendants assert the following grounds for reconsideration of the
11 Magistrate Judge’s September 1 Order:

- 12 (1) The Use of Force reports, Internal Affairs reports, and Officer Avila’s
13 personnel file information are privileged and therefore non-discoverable.
- 14 (2) The Use of Force reports, Internal Affairs reports, and personnel file
15 information are not relevant nor reasonably calculated to admissible evidence.
- 16 (3) Plaintiff’s anticipated use of the Use of Force reports, Internal Affairs reports,
17 and personnel file documents render them neither discoverable nor relevant.

18 Pursuant to Rule 26(b)(1) of the Federal Rules of Civil Procedure, “[p]arties may
19 obtain discovery regarding any matter, not privileged, which is relevant to the claim or
20 defense of any party” Relevancy is to be considered broadly, to include “any matter
21 that bears on , or that reasonably could lead to other matter that could bear on, any issue that
22 is or may be in the case.” Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).
23 Accordingly, the court must determine whether the information sought is relevant and not
24 privileged.

25 *A. Relevance*

26 As explained in more detail below, Defendants have failed to produce the
27 documentation necessary to make the threshold showing that they are entitled to assert that
28 they are not required to disclose documents pertaining to Avila on the grounds the
information sought is privileged. Because the documents required in order to establish the

1 right to assert privilege – the privilege log and a declaration or affidavit explaining
2 Defendant’s claimed entitlement to privilege – are the same as the documents the court would
3 use to undertake a careful examination of relevance, the court is without sufficient
4 information to undertake the required examination of claims of irrelevance with regard to
5 specifically identified documents. However, to the extent Defendants are attempting to make
6 the blanket contention that there are no personnel records pertaining to Avila and no Internal
7 Affairs records pertaining to Avila that are relevant to Plaintiff’s case, the court will examine
8 those contentions.

9 Defendant’s main contention with regard to the relevance of Avila’s personnel and
10 Internal Affairs documents to Plaintiff’s action is that Avila is not a named defendant, did not
11 fire any shots, and is therefore merely a percipient witness. The court has two observations in
12 this regard. First, Avila is not a bystander, he is an agent of the entity Defendant, City of
13 Fresno. Given that the functional unit of response of City of Fresno to the type of factual
14 scenario alleged in this action (a domestic disturbance) may often be a pair of police officers,
15 rather than a single officer, it is reasonably probable that disclosure of personnel records or
16 Internal Affairs records pertaining to Avila may lead to admissible evidence pertaining to
17 how the unit of response, rather than the individual officer, customarily responds under
18 similar factual situations. Second, and perhaps more important, Avila is, as Defendants point
19 out, Defendants’ only percipient witness and the person who will be called upon to provide
20 defense testimony relevant to most, if not all, of Plaintiff’s claims for relief. It follows that
21 Avila’s personnel and Internal Affairs Records may lead to evidence that is admissible, at
22 minimum, to challenge Avila’s veracity and qualification to provide the testimony given.

23 To a significant extent, Defendants’ arguments are self-defeating in the context of the
24 instant motion for reconsideration. Defendants aver that “[w]hile portions of any Internal
25 Affairs investigation into the subject incident may be relevant, the entirety of the file may not
26 be relevant.” Doc. # 36 at 8:8-9 (citing Decampo v. City of Vallejo, 2007 WL 1589541 (E.D.
27 Cal.) at *6. Defendants are quite correct, but the argument, like most of the others posited by
28 Defendants, are arguments that favor carefully crafted protective orders, not blanket

1 determinations of irrelevance. As noted, Defendants have failed to satisfy their burden to
2 produce the documents necessary both to establish a right to consideration of claims of
3 privilege and to inform the court adequately as to any claim of irrelevance as to any particular
4 documents or pieces of requested information. Defendants citations to Kelly, Soto, and
5 similar cases, while sufficient to establish the proposition that there will likely be *some*
6 information contained in Avila's personnel and Internal Affairs records that ought to be
7 subject to a protective order, is completely insufficient to establish that *all* such information
8 should be held irrelevant.

9 ***B. Privilege***

10 Federal Law applies to privilege-based discovery disputes involving federal claims,
11 even where there are pendant state law claims. See, e.g., Pagano v. Oroville Hospital, 145
12 F.R.D. 683, 687 (E.D. Cal. 1993); Martinez v. City of Stockton, 132 F.R.D. 677, 681-683
13 (E.D. Cal. 1990). Privileges are narrowly construed because they impede the full and fair
14 discovery of the truth. Eureka Fin. Corp. v. Hartford Acc. & Indem. Co., 136 F.R.D. 179,
15 183 (E.D. Cal. 1991). Further, the party asserting a privilege has the burden to establish that
16 it applies. See e.g., United States v. O'Neill, 619 F.2d 222, 227 (3rd Cir. 1980). There has
17 been some disagreement among courts as to the extent to which state privilege law applies in
18 actions that allege claims under 42 U.S.C. § 1983 concurrently with state law claims. Based
19 on a review of relevant case authority from this district, the court concludes that the dominant
20 and most reasonable approach holds that "in mixed federal and state claim cases, although
21 federal law is ultimately binding, state privilege law which is consistent with its federal
22 equivalent significantly assists in applying privilege law to discovery disputes." Maldonado
23 v. California Dep't Corrections & Rehab., 2007 WL 4249811 (E.D. Cal. 2007) at * 2 (citing,
24 *inter alia*, Pagana and Martinez).

25 Defendants do not appear to have put a formal name to the privilege they seek to
26 invoke, but a fair reading of their moving papers as well as the pleadings submitted to the
27 Magistrate Judge indicate Defendants seek to invoke what is commonly referred to as the
28

1 “Governmental Privilege.”¹ The governmental privilege is recognized under federal common
2 law. Kerr v. United States Dist. Court for N.D. Cal., 511 F.2d 192, 198 (9th Cir. 1975).
3 However, the privilege is only a “qualified privilege” that “must be formally asserted and
4 delineated in order to be raised properly.” Id. at 198 (internal citations omitted).

5 To properly invoke the governmental privilege, “[t]he claiming official must ‘have
6 seen and considered the contents of the documents and himself have formed the view that on
7 grounds of public interest they ought not to be produced’ and state with specificity the
8 rationale of the claimed privilege.” Id. The party invoking the privilege must at the outset
9 make a “substantial threshold showing” by way of a declaration of affidavit from a
10 responsible official with personal knowledge of the matters to be attested to in the affidavit.
11 Soto v. City of Concord, 162 F.R.D. 603, 613 (N.D. Cal. 1995).

12 The affidavit must include: (1) an affirmation that the agency generated or
13 collected the material in issue and has maintained its confidentiality; (2) a
14 statement that the official has personally reviewed the material in question; (3)
15 a specific identification of the governmental or privacy interests that would be
16 threatened by disclosure of the material to plaintiff and/or his lawyer; (4) a
description of how disclosure subject to a carefully crafted protective order
would create a substantial risk of harm to significant governmental or privacy
interests, and (5) a projection of how much harm would be done to the
threatened interests if disclosure were made.

17 Id. In addition, “[t]he asserting party, as in any case where a privilege is claimed, must
18 sufficiently identify the documents so as to afford the requesting party an opportunity to
19 challenge the assertion of privilege.” Miller v. Pancucci, 141 F.R.D. 292, 300 (C.D. Cal.
20 1992).

21 In determining the protection afforded by the privilege, courts conduct a case by case
22 balancing analysis, in which the interests of the party seeking discovery are weighed against
23 the interest of the governmental entity asserting the privilege. Zackery v. Stockton Police
24 Dep’t, 2007 WL 1655634 (E.D. Cal. 2007) at * 3. The balancing approach should be
25 “moderately pre-weighted in favor of disclosure.” Soto, 162 F.R.D. at 613. In determining
26

27 ¹ What the court will refer to here as “Government Privilege” has variously been referred to as
28 “official information privilege,” “law enforcement privilege,” and “a type of ‘executive privilege.’” See Deocampo
v. City of Vallejo, 2007 WL 1589541 (E.D. Cal. 2007) at *4 (citing references for each variant).

1 the applicability of the governmental privilege to the subject material, the court keeps in mind
2 the purpose of the privilege, which is to prevent disclosure of law enforcement techniques
3 and procedures, to preserve the confidentiality of sources, to protect witness and law
4 enforcement personnel, to safeguard the privacy of individuals involved in an investigation,
5 and otherwise to prevent interference with an investigation. In re Dep't of investigation of
6 City of New York, 856 F.2d 481, 484 (2nd Cir. 1988).

7 Based on the foregoing, it is clear that resolution of discovery disputes that implicate
8 the governmental privilege involves two distinct steps. First, the court determines whether
9 the party claiming the privilege has satisfied the procedural requirements. If, and only if, the
10 procedural requirements are met, the court proceeds to the second step where it balances the
11 interests of the government in asserting the privilege against the interests of the plaintiff in
12 disclosure. See Kerr, 511 F.2d at 198 (court need not reach the question of what documents
13 the privilege reaches where the privilege was not “formally asserted and delineated”). The
14 first step is the necessary predicate to the second because it is the documents associated with
15 the procedural requirements that produce the information the court requires to carry out the
16 weighing process. Miller, 141 F.R.D. at 300.

17 So far as the court can determine, Defendants have failed to produce a detailed list of
18 documents for which privilege is claimed (i.e. a privilege log or its equivalent). In
19 conjunction with their opposition to Plaintiff's motion to compel, Defendants did submit
20 declarations by police personnel in charge of maintenance of both personnel records and
21 Internal Affairs reports. The court has examined these declarations and finds they are
22 essentially boilerplate assertions of governmental privilege that make blanket conclusory
23 allegations as to the existence of substantial governmental or privacy interests and assert the
24 impossibility of crafting protective orders that would mitigate harms arising from release.
25 The declarations also fail to show that the party claiming the privilege has personally
26 reviewed the documents responsive to Plaintiff's motion to compel. Just as the Magistrate
27 Judge found Defendants' objections to Plaintiff's requests for production insufficient because
28 of their boilerplate nature, see Lal v. Fekler, 2010 WL 582138 (E.D. Cal. 2010) (citing case

1 authority for the inappropriateness of various boilerplate objection), so too this court finds the
2 declarations submitted by Defendants with their opposition to Plaintiff’s motion to compel
3 are boilerplate in nature and insufficient to meet the requirements set forth in Kerr and its
4 progeny.

5 By a logic the court finds elusive, Plaintiff argues that Defendants have waived the
6 right to claim governmental privilege because they have not produced either a privilege log or
7 affidavit. Defendants argue that the failure to produce either or both of these does not result
8 in waiver. Waiver is not at issue here. Defendants asserted their right to governmental
9 privilege with regard to the disputed discovery requests before the Magistrate Judge. At the
10 time Defendants asserted the privilege, they had the burden to produce documents sufficient
11 to satisfy the formal requirements outlined in Kerr and related cases; that is, to produce a
12 privilege log or its equivalent and an affidavit showing individual consideration of the
13 relevant documents and reasons for the claim of privilege. The required threshold documents
14 were not produced and consequently Defendants failed to carry their burden of production to
15 claim the privilege.

16 In conjunction with their argument that the failure to produce a privilege log or
17 adequate declarations or affidavits does not give rise to waiver of rights to claim
18 governmental privilege, Defendants cite authority for two propositions. First, Defendants
19 contend the requirement for a privilege log “does not arise until there is a good faith dispute
20 as to the asserted privilege.” Doc. # 36 at 6:21-23 (citing Jackson v. County of Sacramento,
21 175 F.R.D. 653, 656 (E.D. Cal. 1997)). The portion of Jackson Defendants cite pertains to
22 the issue of waiver, and so is not relevant to the present discussion. However, to the extent
23 Defendants are attempting to use Jackson for the proposition that a privilege log or its
24 equivalent need not be produced until a court hearing on the matter, the court points out that a
25 “good faith dispute” for purposes of any attempt to invoke the governmental privilege exists
26 as of the time that a defendant decides to invoke the privilege in response to a request for
27 production. See Miller, 141 F.R.D. at 300 (threshold requirements to invoke governmental
28 privilege due at the time a party files and serves its response to the discovery request). There

1 is nothing in Jackson that excuses Defendants from the obligation to produce a privilege log
2 at the time they filed their opposition to Plaintiff's motion to compel.

3 Second, again in the context of their argument against waiver, Defendants cite
4 Jackson, as well as Lal, 2010 WL 582138 and Smith v. Crones, 2009 WL 1809919 (E.D.
5 Cal.) for the proposition that the failure to produce an adequate affidavit or declaration does
6 not result in waiver *and* that Defendants can supply both the privilege log and affidavit at
7 some later time should the court so require. Doc. # 36 at 6:24 - 7:3. In both Lal and Smith
8 the district court, in the context motions to compel in prisoner civil rights cases, noted the
9 failure of the defendants to meet the threshold requirements for the governmental privilege
10 and essentially granted additional time for the defendants to file the required documents. Lal,
11 2010 WL 582138 at *4-*5; Smith 2009 WL 1809919 at *3. Neither of these cases
12 establishes the *right* of a defendant to delay making the required threshold showing until
13 some later time when the court asks for it. As previously noted, the threshold showing
14 consisting of a privilege log or its equivalent are due at the time of objection of the
15 defendants' decision to invoke the privilege in response to a plaintiffs request for production
16 of documents. Merely noting that other courts have granted leave to file required documents
17 late provides no reason for this court to find the Magistrate Judge's refusal to grant such
18 leave clearly erroneous or contrary to law.

19
20 The court concludes that Defendants have failed to show that the Magistrate Judge's
21 September 1 Order to compel production of records pertaining to Avila was clearly erroneous
22 or contrary to law. Defendants' motion for reconsideration is therefore hereby DENIED.

23
24 IT IS SO ORDERED.

25
26 Dated: December 3, 2010

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28 
CHIEF UNITED STATES DISTRICT JUDGE