

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

LAMONT SHEPARD,

Plaintiff,

v.

JAMES E. TILTON, et al.,

Defendants.

CASE NO. 1:10-CV-00023-DLB PC

ORDER DENYING PLAINTIFF’S MOTION  
TO COMPEL

(DOC. 25)

**Order**

**I. Background**

Plaintiff Lamont Shepard (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on Plaintiff’s complaint, filed January 6, 2010, against Defendants L. A. Martinez, R. Perez, P. Garcia, J. Soto, E. De la Cruz, and A. Trevino for violation of the Eighth Amendment. Pending before the Court is Plaintiff’s motion to compel, filed August 17, 2011. Doc. 25. On August 26, 2011, Defendants filed their opposition. Doc. 26. On September 6, 2011, Plaintiff filed his opposition, construed as a reply. Doc. 29. The matter is submitted pursuant to Local Rule 230(l).<sup>1</sup>

---

<sup>1</sup> On September 15, 2011, Defendants filed a “supplement” to Plaintiff’s reply. Doc. 31. This supplement appears to be a surreply, which are not typically accepted by this Court. See L. R. 230(l). However, having reviewed the supplement, the Court finds that it provides clarification to the matter, and will thus consider it.

1 **II. Motion To Compel**

2 Plaintiff initially moved to compel responses to his first set of interrogatories, requests for  
3 admissions, and requests for production of documents. Pl.'s Mot. Compel 2-3, Doc. 25. Plaintiff  
4 also requests sanctions. *Id.* Defendants contend that they received extensions of time to respond  
5 to Plaintiff's discovery requests. July 6, 2011 Order Granting Extension Of Time, Doc. 22;  
6 August 12, 2011 Order Granting Extension Of Time, Doc. 24. Defendants submit proofs of  
7 service for all the responses. Defs.' Opp'n, Ex. A. Defendants' responses appear timely.  
8 Defendants thus will not be sanctioned pursuant to Federal Rule of Civil Procedure 37.

9 Plaintiff concedes the timeliness of Defendants' responses. Pl.'s Reply 1, Doc. 29.  
10 Plaintiff moves to compel further responses to Requests Nos. 4, 5, 10, 11, and 12. Defendants'  
11 supplemental opposition addresses each.

12 **A. Legal Standard**

13 In responding to discovery requests, Defendants must produce documents or other  
14 tangible things which are in their "possession, custody or control." Fed. R. Civ. P. 34(a). Actual  
15 possession, custody or control is not required, however. "A party may be ordered to produce a  
16 document in the possession of a non-party entity if that party has a legal right to obtain the  
17 document or has control over the entity who is in possession of the document. *Soto v. City of*  
18 *Concord*, 162 F.R.D. 603, 620 (N.D. Cal. 1995). As this Court explained in *Allen v. Woodford*,  
19 2007, U.S. Dist. LEXIS 11026, \*4-6, 2007 WL 309945, \*2 (E.D. Cal. Jan. 30, 2007) (internal  
20 citations and quotations omitted):

21 Property is deemed within a party's possession, custody, or control if the party has  
22 actual possession, custody, or control thereof or the legal right to obtain the  
23 property on demand. A party having actual possession of documents must allow  
24 discovery even if the documents belong to someone else; legal ownership of the  
25 documents is not determinative. Control need not be actual control; courts  
26 construe it broadly as the legal right to obtain documents upon demand. Legal  
27 right is evaluated in the context of the facts of each case. The determination of  
28 control is often fact specific. Central to each case is the relationship between the  
party and the person or entity having actual possession of the document. The  
requisite relationship is one where a party can order the person or entity in actual  
possession of the documents to release them. This position of control is usually  
the result of statute, affiliation or employment. Control may be established by the  
existence of a principal-agent relationship.

Such documents also include documents under the control of the party's attorney. *Meeks v.*

1 *Parson*, 2009 U.S. Dist. LEXIS 90283, 2009 WL 3303718 (E.D. Cal. September 18, 2009)  
2 (involving a subpoena to the CDCR); *Axler v. Scientific Ecology Group, Inc.*, 196 F.R.D. 210,  
3 212 (D. Mass. 2000) (A “party must produce otherwise discoverable documents that are in his  
4 attorneys’ possession, custody or control.”); *Gray v. Faulkner*, 148 F.R.D. 220, 223 (N.D. Ill.  
5 1992); *see also* Cal. Code Regs. tit. 15, § 3370(e) (“No case records file, unit health records, or  
6 component thereof shall be released to any agency or person outside the department, except for  
7 private attorneys hired to represent the department, the office of the attorney general, the Board  
8 of Parole Hearings, the Inspector General, and as provided by applicable federal and state law.”).

9 **B. Requests For Production**

10 Request No. 4: Any tape, recording, or photo’s [sic] of plaintiff on August 4, or 5, 2009.

11 Response: Responding party objects to this request on the grounds that it lacks  
12 foundation. Without waiving any objection, responding parties have no  
13 responsive documents in their possession, custody, or control other than  
14 the photographs produced in Attachments A and D. Plaintiff cannot  
15 posses [sic] in his cell a video cassette or DVD of the use-of-force  
interview conducted by Sergeant Cruz on August 5, 2009, but upon  
request to defense counsel, arrangements can be made for Plaintiff to view  
the video at a date and time to be determined by prison officials where  
Plaintiff is incarcerated.

16 Plaintiff complains about not receiving access to this use-of-force interview. Pl.’s Reply  
17 2, Doc. 29. However, Defendants’ counsel already informed Plaintiff that he could view the  
18 interview upon request to counsel. Defs.’ Supplement 2:3-6, Doc. 31. Defendants’s counsel has  
19 also requested that prison officials permit Plaintiff to view this interview. *Id.* Thus, Plaintiff’s  
20 motion to compel further response to Request For Production No. 4 is denied as moot.

21 Request No. 5: Any video feed off the yard camera on August 4, 2009.

22 Response: Responding parties have no responsive documents in their possession,  
23 custody, or control.

24 Plaintiff contends that Defendants have this video in their possession, or destroyed it.  
25 Pl.’s Reply 2. Defendants contend that Plaintiff has not proffered evidence that this video ever  
26 existed, or that it was not disposed of in the regular course of business. Defs.’ Supplement 2:7-  
27 10.

1 Plaintiff has made no showing as to the relevance of Request No. 5. It is unclear what  
2 purpose a video feed from the yard camera would show. As other district courts have found,

3 as the moving party, Plaintiff bears the burden of informing the court which  
4 discovery requests are the subject of his motion to compel, which of Defendants'  
5 responses are disputed, why he believes Defendants' responses are deficient, why  
6 Defendants' objections are not justified, and why the information he seeks through  
7 discovery is relevant to the prosecution of this action. *See, e.g., Brooks v.*  
8 *Alameida*, No. CIV S-03-2343 JAM EFB P, 2009 U.S. Dist. LEXIS 9568, 2009  
9 WL 331358, at \*2 (E.D. Cal. Feb. 10, 2009) (“Without knowing which responses  
10 plaintiff seeks to compel or on what grounds, the court cannot grant plaintiff's  
11 motion.”); *Ellis v. Cambra*, No. CIV 02-05646-AWI-SMS PC, 2008 U.S. Dist.  
12 LEXIS 109050, 2008 WL 860523, at \*4 (E.D. Cal. Mar. 27, 2008) (“Plaintiff  
13 must inform the court which discovery requests are the subject of his motion to  
14 compel, and, for each disputed response, inform the court why the information  
15 sought is relevant and why Defendant's objections are not justified.”).

16 *Haynes v. Sisto*, 2010 U.S. Dist. LEXIS 121246, at \*2-3 (E. D. Cal. Oct. 29, 2010). Plaintiff is  
17 required to explain the relevance of Request No. 5 to this action, which he did not do.<sup>2</sup>

18 Accordingly, Plaintiff's motion to compel further response to Request For Production No. 5 is  
19 denied.

20 Request No. 10: Request to test material of hot water heater.

21 Request No. 12: Request to have testins [sic] of hot water heater recorded during test.

22 Response: Responding parties object to this request on the grounds it is overbroad  
23 and unintelligible, lacks foundation, fails to state with reasonable  
24 particularity the documents sought, is irrelevant and not reasonably  
25 calculated to lead to the discovery of admissible evidence, and  
26 compromises the safety and security of the institution and staff. Without  
27 waiving any objection, and assuming Plaintiff is requesting pictures or  
28 diagrams of the air conditioning unit in the 3A Program Office, responding  
parties have no responsive documents in their possession, custody, or  
control other than the photographs produced in Attachments A and D.

Plaintiff requests to test the material of the hot water heater or air conditioner. Pl.'s Reply 2.

Plaintiff also requests to have the testing of the air conditioner recorded on film as to the  
material. *Id.* Defendants contend that such testing is not relevant to any issue in this case, what  
tests he seeks performed, who will perform such tests and how, and who will pay for such  
testing. Defs.' Supplement 2:11-17. Plaintiff also failed to show what material is to be tested.

---

<sup>2</sup> Additionally, Defendants cannot be made to produce a video if it does not exist. It is  
unclear whether Defendants attempted to search for the video.

1 *Id.* Defendants state that they have already produced photographs taken shortly after the incident  
2 of the 3A Program Office. *Id.*

3 Plaintiff is required to explain the relevance of his requests. *Haynes*, 2010 U.S. Dist.  
4 LEXIS 121246, at \*2-3. Again, Plaintiff failed to do so. Accordingly, Plaintiff's motion to  
5 compel further response to Request For Production Nos. 10 and 12 is denied.

6 Request No. 11: Request to have escort recorded.

7 Response: Responding parties object to this request on the grounds it is overbroad  
8 and unintelligible, lacks foundation, fails to state with reasonable  
9 particularity the documents sought, is irrelevant and not reasonably  
10 calculated to lead to the discovery of admissible evidence, and  
compromises the safety and security of the institution and staff. Without  
clarification of the documents sought, responding parties cannot respond  
to this request.

11 Plaintiff explains his request as seeking to recreate the escort from the yard to the  
12 program office. Plaintiff requests that he be handcuffed and timed as to how long Plaintiff was  
13 on the ground by the fence and how long it would take to be escorted from the fence to the office,  
14 then to the 3A05 "B" lower shower and to the clinic. Pl.'s Reply 2. Defendants contend that  
15 Plaintiff has failed to show how the proposed recreated escort is relevant. Defs.' Supplement  
16 2:18-25. Plaintiff can testify as to his own recollection of how long he was restrained, as can  
17 Defendants.

18 Plaintiff fails to explain the relevance of his request. Recreating the timing of each escort  
19 serves no purpose. Additionally, it is beyond the scope of Rule 34, which does not require the  
20 creation of documents or other tangible items, only the production of currently existing  
21 documents. *See Alexander v. FBI*, 194 F.R.D. 305, 310 (D.D.C. 2000) (court refused to compel  
22 FBI to create list of persons when no such list was in existence). Accordingly, Plaintiff's motion  
23 to compel further response to Request For Production No. 11 is denied.

24 Request No. 13: All to be done under Defendants control and to be recorded.

25 Response: Responding parties object to this request on the grounds it is overbroad, is  
26 vague and unintelligible in its entirety and fails to state with reasonable  
particularity the documents sought.

27 The Court agrees with Defendants' objection. It is obvious on its face that Request No.  
28 13 is vague and unintelligible as a discovery request. Plaintiff's motion to compel further

1 response to Request For Production No. 13 is denied.

2 **III. Conclusion And Order**

3 Based on the foregoing, it is HEREBY ORDERED that Plaintiff's motion to compel,  
4 filed August 17, 2011, is DENIED.

5 IT IS SO ORDERED.

6 **Dated: November 10, 2011**

/s/ Dennis L. Beck  
UNITED STATES MAGISTRATE JUDGE

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28