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6 **UNITED STATES DISTRICT COURT**
7 **EASTERN DISTRICT OF CALIFORNIA**
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11 ANDREW W. MARTIN,

12 Plaintiff,

13 vs.

14 F. CHAVEZ et al.,

15 Defendants.
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) 1:11-cv-01461-AWI-DLB (PC)
)
)

) ORDER GRANTING IN PART
) PLAINTIFF'S MOTION TO COMPEL
)

) ORDER STAYING DEFENDANTS'
) MOTION FOR SUMMARY JUDGMENT
)

) (ECF No. 44)

17 **I. PROCEDURAL HISTORY**
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19 Plaintiff Andrew W. Martin ("Plaintiff") is a prisoner proceeding pro se and in forma
20 pauperis in this civil rights action. Plaintiff is proceeding on her First Amended Complaint,
21 filed, September 6, 2012.¹

22 Pursuant to the Court's March 12, 2013, order, this action is proceeding against
23 Defendant A. Flores for excessive force, in violation of the Eighth Amendment, and against
24 Defendants Smith and Krpan for deliberate indifference to a serious medical need, in violation of
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28 ¹ Plaintiff is a male to female transgender inmate. On December 17, 2013, the Court granted Plaintiff's motion for reconsideration for referring to Plaintiff with the feminine pronoun.

1 the Eighth Amendment.² (ECF No. 13.) The discovery cut-off date was December 1, 2013.
2 (ECF No. 28.)

3 On November 25 , 2013, Plaintiff filed a motion to compel the production of discovery
4 documents from defendants. (ECF No. 44.) Defendants opposed the motion on December 9,
5 2013. On December 9, 2013, Plaintiff filed a notice that Defendants initial disclosures did not
6 follow the Court’s discovery order and Defendants responded on December 20, 2013. (ECF
7 Nos. 46 & 50.) The motion is now deemed submitted pursuant to Local Rule 230(l).
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9 **II. MOTION TO COMPEL LEGAL STANDARD**

10 “Parties may obtain discovery regarding any matter, not privileged, that is relevant to the
11 claim or defense of any party Relevant information need not be admissible at the trial if the
12 discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Fed.
13 R. Civ. P. 26(b)(1). Defendants are required to “furnish such information as is available” to him
14 in responding to Plaintiff’s interrogatories, and documents which are in his “possession, custody
15 or control” in responding to Plaintiff’s request for the production of documents. Fed. R. Civ. P.
16 33(a), 34(a). If Defendant objects to one of Plaintiff’s discovery requests, it is Plaintiff’s burden
17 to demonstrate why the objection is not justified. Plaintiff must inform the court which
18 discovery requests are the subject of his motion to compel, and, for each disputed response,
19 inform the Court why the information sought is relevant and why Defendant’s objections are not
20 justified.
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22 **III. DISCUSSION**

23 **A. Legal Standard**

24 A party may serve on any other party a request within the scope of Rule 26(b) to produce
25 and permit the requesting party or its representative to inspect, copy, test, or sample the
26 following items in the responding party’s possession, custody or control: any designated
27 documents or tangible things. Fed. R. Civ. P. 34(a)(1) (quotation marks omitted). “Property is

28 ² On February 21, 2014, the Court dismissed Defendants Borges and Cope from this action, without prejudice, for Plaintiff’s failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a). (ECF No. 62.)

1 deemed within a party's 'possession, custody, or control' if the party has actual possession,
2 custody, or control thereof or the legal right to obtain the property on demand." *Allen v.*
3 *Woodford*, No. CV-F-05-1104 OWW LJO, 2007 WL 309945, *2 (E.D. Cal. Jan. 30, 2007)
4 (citing *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995)); accord *Bovarie v.*
5 *Schwarzenegger*, No. 08cv1661 LAB (NLS), 2011 WL 719206, at *4 (S.D. Cal. Feb. 22, 2011);
6 *Evans v. Tilton*, No. 1:07CV01814 DLB PC, 2010 WL 1136216, at *1 (E.D. Cal. Mar. 19, 2010).

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8 In responding to discovery requests, a reasonable inquiry must be made, and if no
9 responsive documents or tangible things exist, Fed. R. Civ. P. 26(g)(1), the responding party
10 should so state with sufficient specificity to allow the Court to determine whether the party made
11 a reasonable inquiry and exercised due diligence, *Uribe v. McKesson*, No. 08cv1285 DMS
12 (NLS), 2010 WL 892093, at *2-3 (E.D. Cal. Mar. 9, 2010). If responsive documents do exist but
13 the responsive party claims lack of possession, control, or custody, the party must so state with
14 sufficient specificity to allow the Court (1) to conclude that the responses were made after a
15 case-specific evaluation and (2) to evaluate the merit of that response. *Ochotorena v. Adams*,
16 No. 1:05-cv-01525-LJO-DLB (PC), 2010 WL 1035774, at *3-4 (E.D. Cal. Mar. 19, 2010). As
17 with previously discussed forms of discovery, boilerplate objections do not suffice. Fed. R. Civ.
18 P. 34(b)(2)(B), (C); *Burlington N. & Santa Fe Ry. Co.*, 408 F.3d at 1149.

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20 **B. Plaintiff's Request for Production of Documents**

21 Plaintiff moves to compel Defendants to produce documents responsive to requests 1-6 in
22 her motion to compel.

23 **POD 1:** Copy of yard video that Defendant A. Flores reviewed and later took to ISU
24 evidence locker, on 01-04-11, Incident # SCC-TVO-11-01-0002.

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26 **Response:** Defendants initially objected to this request on the ground that Plaintiff, a
27 prisoner in the custody of the California Department of Corrections and Rehabilitation (CDCR),
28 has limitations on what items of personal property he may possess. Defendants further objected

1 on the ground that the video may implicate safety and security of the institution because it would
2 reveal the location of the yard surveillance cameras as well as the field of view captured by that
3 camera. If an inmate possessed knowledge of a particular camera's scope of view, the inmate
4 could purposely evade the camera's detection, which would compromise the safety and security
5 of the institution. Plaintiff's reasons for why he needs the video do not overcome the objection
6 concerning safety and security.
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8 **Ruling:** Plaintiff's motion to compel is granted, in part.

9 Plaintiff is no longer in custody and Defendants' security concerns regarding personal
10 possessions are no longer an issue.³ The videotape in question shows the incidents related to the
11 alleged use of excessive force by Defendant Flores and is material to Plaintiff's claim. In
12 consideration of Defendants' general security concerns, Defendants shall make the video
13 available to Plaintiff to view on a mutually agreed upon date and time at the Office of the
14 Attorney General located at 1300 I Street, Sacramento, California, and the video shall be
15 available to Plaintiff if the case proceeds to trial.
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17 **POD 2:** Plaintiff requests a copy of the video Lt. McVey and Sgt. Robinson, Jr., took of
18 Plaintiff's injuries on 01-05-13, including oral interview by Plaintiff to Lt. McVey.

19 **Response:** Defendants object to this request on the ground that Plaintiff, a prisoner in the
20 custody of the CDCR, has limitations on what items of personal property he may possess.
21 Without waiving this objection, Defendants will make the video available to the Litigation
22 Coordinator at the institution where he is incarcerated. Plaintiff will be permitted to view the
23 video by submitting a request to his Correctional Counselor.
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25 **Ruling:** The Court grants Plaintiff's motion to compel.
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³ Plaintiff notified the Court of her release from custody on December 23, 2013. (ECF No. 51.)

1 As previously stated, safety concerns or personal property limitations are no longer an
2 issue now that Plaintiff is no longer in custody. Defendants are ordered to produce a copy of the
3 videotape.

4 **POD 3:** Plaintiff requests a copy of the video from CDC-602 hearing held on or about
5 02-16-11, by Lt. L. Meunier, cameraman was Defendant E. Borges, Inmate Appeal # SCC-X-11-
6 00109.

7 **Response:** Defendants object to this request on the ground that Plaintiff, a prisoner in the
8 custody of the CDCR, has limitations on what items of personal property he may possess.
9 Moreover, it calls for documents protected from disclosure by the official information privilege,
10 California Government Code section 6254, and California Evidence Code sections 1040, 1041,
11 and 1043. Defendants further object to this request because it is vague and ambiguous, and may
12 seek documents protected from disclosure based on safety and security concerns. To the extent
13 Plaintiff is seeking a portion of an appeal inquiry interview, that is protected from disclosure by
14 safety and security concerns and also by regulation. Without waiving these objections,
15 Defendants do not have any such video in their custody or control.
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17 **Ruling:** Boiler plate assertions of privilege will not suffice to assert a privilege, however
18 failure to produce a privilege log within the time line required to respond to the request for
19 production does not waive the privilege. *Burlington Northern & Santa Fe Ry. Co.*, 408 F.3d
20 1142, 1149 (9th Cir. 2005). Additionally, the District Court has wide latitude in controlling
21 discovery. *In re State of Arizona*, 528 F.3d 652, 655 (9th Cir. 2008); *Burlington Northern*, 408
22 F.3d at 1147. While Plaintiff argues that the documents requested are clearly not privileged, the
23 Court is mindful of the fact that some of the documents responsive to this request may in fact
24 contain information that, if turned over to an inmate, could seriously jeopardize the safety and
25 security of both inmates and personnel within the institution. Not wanting any untoward
26 consequences to result from procedural ineptitude and, realizing the shared interests that arise
27 since Defendants are CDCR employees, CDCR and Defendants are ordered to work together to
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1 locate documents responsive to Plaintiff's request. They shall redact any confidential
2 information. Defendants are ordered to produce any responsive documents that exist.

3 **POD 4:** Plaintiff requests a complete and full copy of her medical records, including:
4 medical; dental; and mental health records between 01-04-11 through 11-08-12.

5 **Response:** Defendants object to this request as being overbroad as to time and subject
6 matter. In response to Plaintiff's request for dental and mental health records, Defendants further
7 object on the grounds that the request is irrelevant and unlikely to lead to the discovery of
8 admissible evidence. Moreover, Plaintiff is able to obtain on her own copies of her medical
9 records by submitting a request for an Olsen Review. Without waiving these objections and out
10 of courtesy to Plaintiff, Defendants produced Plaintiff's relevant medical records for a six month
11 period following the January 4, 2011 incident, as follows:

- 13 1. Interdisciplinary Progress Notes (CDCR Form 7230), dated January 7, 2011; January
14 27, 2011; January 28, 2011, March 7, 2011; April 27, 2011; May 24, 2011; and June 21,
15 2011.
- 16 2. Notes from visit with Dr. Clair, dated January 5, 2011, and January 21, 2011.
- 17 3. Notes from visit with Dr. Krpan, dated January 12, 2011.
- 18 4. Notes from visits with Dr. Thomatos, dated January 27, 2011; January 28, 2011; and
19 March 7, 2011.
- 20 5. Health care services request forms (CDCR Form 7362), dated January 17, 2011;
21 January 21, 2011; January 22, 2011; January 24, 2011, and March 4, 2011.
- 22 6. Inmate Request for Interview, Item, or Service (CDCR Form 22), dated March 4,
23 2011.
- 24 7. Inmate Request for Interview, dated January 22, 2011.
- 25 8. Encounter Forms, dated January 4, 2011 (2 pages), and January 20, 2011 (2 pages)

1 **Ruling:** Plaintiff’s request for the production of documents is granted, in part.

2 These documents appear to be relevant and reasonably calculated to lead to the discovery
3 of admissible evidence. However, Plaintiff’s request is overly broad as it goes beyond the time
4 of the alleged deprivations contained in the complaint. Accordingly, the Court will narrow the
5 request. Defendants are ordered to produce any responsive documents, relating to Plaintiff,
6 created from January 4, 2011 through January 4, 2012.

7 **POD 5:** Plaintiff requests all documents as it relates to the rolling-blackouts – staff
8 reduction that was in place on 01-04-11, including guidelines and all policy statements.

9 **Response:** Defendants object to this request on the grounds that it is vague, overly broad,
10 compound and seeks information not reasonably calculated to lead to the discovery of admissible
11 evidence. Without waiving these objections, Defendants do not have any responsive documents
12 in their custody or control.

13 **Ruling:** Plaintiff’s request for the production of documents is granted.

14 As discussed in above, boilerplate objections do not suffice. Fed. R. Civ. P. 34(b)(2)(B),
15 (C); *Burlington N. & Santa Fe Ry. Co.*, 408 F.3d at 1149. Policies related to the use of force
16 during a staff reduction are clearly relevant to this action. Defendants are ordered to produce any
17 responsive documents that may exist.

18 **POD 6:** Plaintiff requests all other written materials that might reveal official duties or
19 policies of defendants at the relevant times, written accounts of the incident at issue, and the
20 names of any other knowledgeable or responsible person.

21 **Response:** Defendants object to this request on the grounds that it is vague, overly broad
22 as to time and subject matter, compound, and not reasonably calculated to lead to the discovery
23 of admissible evidence. Without a more specific request, Defendants are unable to respond.
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1 **Ruling:** Plaintiff's motion to compel is granted, in part.

2 Plaintiff's request is vague and overly broad. Accordingly, the Court will narrow Plaintiff
3 request in light of her *pro se* status. Defendants are ordered to produce all written incident
4 reports related to Plaintiff's excessive force and deliberate indifference claims.

5 **IV. SANCTIONS**

6 Plaintiff seeks sanctions for his motions to compel under Federal Rule of Civil Procedure
7 37. Rule 37(a)(4) permits plaintiff to seek an award of reasonable expenses incurred in filing his
8 motion, if his motion is granted in whole or in part, or if the discovery sought is served after the
9 motion is filed. Fed. R. Civ. P. 37(a)(4). The court may decline to award such expenses where
10 the movant failed to make a good faith effort to resolve the dispute without court intervention,
11 where the opposing party's position was substantially justified, or where other circumstances
12 make the award unjust. *Id.* Rule 37(d) permits plaintiff to seek sanctions for the complete
13 failure to respond to interrogatories and requests for the production of documents. Fed. R. Civ.
14 P. 37(d). Such a motion must be accompanied by a certification that the movant made a good
15 faith effort to resolve the dispute without court intervention. *Id.*

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17 With respect to Rule 37(a)(4), plaintiff's motion to compel was granted in part.
18 However, much of the Court's ruling depended on Plaintiff's release from custody, which
19 occurred after the discovery period ended. As a result, and given that plaintiff is proceeding *pro*
20 *se*, the expenses incurred by defendants in opposing the motion undoubtedly outweigh the
21 expenses incurred by plaintiff in filing the motions to compel. Accordingly, the Court denies
22 Plaintiff's motions for sanctions.

23 **V. CONCLUSION AND ORDER**

24 Based on the foregoing, it is HEREBY ORDERED that:

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26 1. Plaintiff's motion to compel the production of documents filed November 25,
27 2013, is granted in part as follows:

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a. Plaintiff's request for PODs 1-6 are granted, in part;

b. Defendants shall produce the documents within thirty (30) days from the date of service of this order;

2. Plaintiff's motion for sanctions is DENIED; and

3. Defendant's motion for summary judgment is stayed pending the resolution of discovery matters.

IT IS SO ORDERED.

Dated: July 9, 2014

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE