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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FEDERICO HERNANDEZ,
Plaintiff,
v.
M. HERNANDEZ, et al.,
Defendants.

CASE NO. 1:13-cv-01625-MJS (PC)
ORDER REGARDING DISCOVERY
**TEN (10) DAY DEADLINE FOR
DEFENDANTS' PRODUCTION OF
DOCUMENTS**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 42 U.S.C. § 1983. The action proceeds against Defendants Hernandez, Zambrano, Clark, Rodriguez, and Martin on Plaintiff's Eighth Amendment excessive force claim. Trial is set for August 11, 2015. (ECF No. 86.)

On June 3, 2015, Plaintiff filed a motion requesting a telephonic discovery dispute conference to address items contained in Defendants' supplemental privilege log. (ECF No. 77.) The issues raised by Plaintiff were discussed during the pretrial conference, and Defendants were ordered to provide the disputed documents to the Court for *in camera* review. (ECF No. 92.) The Court received Defendants' documents on June 25, 2015, reviewed them, and here addresses the privileges asserted against their production.

1 **I. PLAINTIFF'S REQUEST**

2 Plaintiff asks that documents listed in Defendants' privilege log be released to
3 him. Specifically, he asks that Defendants reveal statements concerning the following:
4 (1) whether CDCR policy was followed; (2) whether officials used excessive force; and
5 (3) whether CDCR officers were disciplined in connection with the incident.

6 **II. LEGAL STANDARD**

7 **A. Privilege Generally**

8 The Supreme Court has long noted that privileges are disfavored. Jaffee v.
9 Redmond, 518 U.S. 1, 9 (1996). "The party asserting an evidentiary privilege has the
10 burden to demonstrate that the privilege applies to the information in question." Tornay
11 v. United States, 840 F.2d 1424, 1426 (9th Cir. 1988). Privileges are to be "strictly
12 construed" because they "impede full and free discovery of the truth." Eureka Fin. Corp.
13 v. Hartford Acc. and Indem. Co., 136 F.R.D. 179, 183 (E.D. Cal. 1991). "If the privilege is
14 worth protecting, a litigant must be prepared to expend some time to justify the assertion
15 of the privilege." Id.

16 In civil rights cases brought under section 1983, questions of privilege are
17 resolved by federal law. Kerr v. U.S. District Court for the Northern District of California,
18 511 F.2d 192, 197 (9th Cir. 1975). "State privilege doctrine, whether derived from
19 statutes or court decisions, is not binding on federal courts in these kinds of cases." Kelly
20 v. City of San Jose, 114 F.R.D. 653, 655-56 (N.D. Cal. 1987).

21 **B. Official Information Privilege**

22 Nevertheless, "[f]ederal common law recognizes a qualified privilege for official
23 information." Sanchez v. City of Santa Ana, 936 F.2d 1027, 1033 (9th Cir. 1990) (citing
24 Kerr, 511 F.2d at 198). The official information privilege ensures disclosure of
25 discoverable information without compromising the state's interest in protecting the
26 privacy of law enforcement officials and in ensuring the efficacy of its law enforcement
27 system. Kelly, 114 F.R.D. at 662-63.

1 “To determine whether the information sought is privileged, courts must weigh the
2 potential benefits of disclosure against the potential disadvantages. If the latter is
3 greater, the privilege bars discovery.” Sanchez, 936 F.2d at 1033-34. “In the context of
4 civil rights suits against [corrections officials], this balancing approach should be
5 ‘moderately pre-weighted in favor of disclosure.’” Soto, 162 F.R.D. at 613 (quoting Kelly,
6 114 F.R.D. at 661).

7 The party invoking the privilege must at the outset make a “substantial threshold
8 showing” by way of a declaration or affidavit from a responsible official with personal
9 knowledge of the matters attested. Soto, 162 F.R.D. at 613. “The claiming official must
10 ‘have seen and considered the contents of the documents and himself have formed the
11 view that on grounds of public interest they ought not to be produced’ and state with
12 specificity the rationale of the claimed privilege.” Kerr, 511 F.2d at 198 (citation omitted).
13 The affidavit must include: (1) an affirmation that the agency generated or collected the
14 material in issue and has maintained its confidentiality; (2) a statement that the official
15 has personally reviewed the material in question; (3) a specific identification of the
16 governmental or privacy interests that would be threatened by disclosure of the material
17 to plaintiff and/or his lawyer; (4) a description of how disclosure subject to a carefully
18 crafted protective order would create a substantial risk of harm to significant
19 governmental or privacy interests, and (5) a projection of how much harm would be done
20 to the threatened interests if disclosure were made. Soto, 162 F.R.D. at 613. In addition,
21 “[t]he asserting party, as in any case where a privilege is claimed, must sufficiently
22 identify the documents so as to afford the requesting party an opportunity to challenge
23 the assertion of privilege.” Miller v. Panucci, 141 F.R.D.292, 300 (C.D. Cal. 1992).

24 **C. Self-Critical Analysis Privilege**

25 Though raised by Defendants, the Ninth Circuit has not recognized the “self-
26 critical analysis” privilege. See Union Pac. R.R. Co. v. Mower, 219 F.3d 1069, 1076 n. 7
27 (9th Cir. 2000), and citations therein.

1 **D. Deliberative Process Privilege**

2 The deliberative process privilege is intended to protect the quality of agency
3 decisions by promoting frank and independent discussion among those responsible for
4 governmental decision-making. See, e.g., Fed. Trade Comm'n v. Warner Commc'ns,
5 Inc., 742 F.2d 1156, 1161 (9th Cir. 1984). A litigant may obtain discovery of materials
6 protected by the privilege if the need for the materials outweighs the governmental
7 interest in keeping the decision-making process confidential. In deciding whether to
8 override the privilege and allow discovery, there are four factors to be considered: "(1)
9 the relevance of the evidence; (2) the availability of other evidence; (3) the government's
10 role in the litigation; and (4) the extent to which disclosure would hinder frank and
11 independent discussion regarding contemplated policies and decisions." Id.

12 However, the deliberative process privilege generally is not applicable in civil
13 rights cases against officers. Soto, 162 F.R.D. at 612. This privilege "should be invoked
14 only in the context of communications designed to directly contribute to the formulation
15 of important public policy." Id. It does not shield internal affairs investigations or records
16 of witness and officer statements. Id.

17 **III. DISCUSSION**

18 Defendants' supplemental privilege log contains nine items. (ECF No. 57-1.)
19 Following an April 29, 2015 discovery dispute conference, the Court conducted an in
20 camera review of Items 2, 3, 8, and 9, and concluded that they contained no relevant
21 information. (ECF No. 71.) Accordingly, Defendants were not required to disclose these
22 items. The Court will not revisit that ruling. The remaining items on Defendants'
23 supplemental privilege log are discussed below.

24 **A. Item No. 1**

25 Item No. 1 is a Correctional Lieutenant's April 9, 2013, "Report of Findings" to
26 Acting Facility Captain Nate Greene and Associate Warden Dave Fischer concerning
27 the incident at issue. It was generated in response to Plaintiff's staff complaint.

1 Defendants claim privilege under Federal Rule of Evidence 501, the official information
2 privilege, and the critical self-analysis privilege. They state that CDCR has maintained
3 the document's confidentiality pursuant to state law. Staff complaints are "maintained
4 under lock and key with access allowed to only authorized personnel." The
5 investigations are not available to inmates under the California Code of Regulations,
6 and are available to staff only in limited circumstances.

7 Defendants state that maintaining the confidentiality of the investigations into
8 staff complaints encourages witnesses to make truthful statements. They further
9 contend that release of the information, even pursuant to a protective order, would
10 endanger institutional safety "as it would disclose the process and procedures used to
11 respond to inmate violence, and could jeopardize a correctional officer's authority
12 because another officer may be critical of their action," even if those actions comply
13 with regulations and the law. Disclosure could inform inmates of CDCR's investigatory
14 techniques and hamper future investigations. They contend this holds true even if the
15 documents are released pursuant to a protective order.

16 **B. Item Nos. 4-7**

17 Item Nos. 4-7 were generated as part of the institution's own internal review
18 process, a process undertaken whenever force is used to ensure compliance with
19 CDCR policy.

20 Item No. 4 is a Memorandum concerning the incident, dated January 30, 2014,
21 and authored by Associate Director Connie Gibson. Defendants claim the same
22 privileges as with respect to Item No. 1.

23 Item No. 5 is a "Report of Findings," dated March 5, 2013. Defendants claim the
24 same privileges as with respect to Item Nos. 1 and 4.

25 Item No. 6 is a "Confidential Use of Force Critique Package" concerning the
26 incident. Defendants claim the self-critical analysis privilege, the official information
27 privilege, and the deliberative process privilege.

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1 Item No. 7 is the “Institution Executive Review Committee Critique and
2 Qualitative Evaluation” concerning the incident. Defendants claim the self-critical
3 analysis privilege, the official information privilege, and the deliberative process
4 privilege.

5 Defendants claim the documents have the potential to jeopardize institutional
6 safety by disclosing investigatory techniques and corrective measures taken as a result
7 of such investigation. Inmates could use the information to sabotage staff attempts to
8 deal with disruptive inmate conduct and undermine investigations into such attempts.
9 Inmates could set staff up for disrespect or unwarranted discipline. Inmates could tailor
10 allegations of staff misconduct to the criteria used in the review process. Disclosure
11 could interfere with staff’s ability to control violent disturbances with minimal use of
12 force. Disclosure would interfere with staff morale, making it difficult to hire qualified
13 staff. This is true even is the documents are released pursuant to a protective order.

14 **C. Analysis**

15 As nited above, the Ninth Circuit has not recognized the self-critical analysis
16 privilege, Union Pac. R.R. Co., 219 F.3d at 1076 n. 7, and the deliberative process
17 privilege is inapplicable to the type of internal investigatory documents discussed here,
18 Soto, 162 F.R.D. at 612. Accordingly, the issue here is whether the documents may be
19 withheld under the official information privilege.

20 The Court has weighed the potential benefits of disclosure against the potential
21 disadvantages, Sanchez, 936 F.2d at 1033–34, and concludes that the balance tips
22 rather clearly in favor of disclosure. The Court is sensitive to Defendants’ need to
23 maintain institutional safety and security. Similarly, the Court appreciates the benefit to
24 society and institutions within it when thorough and accurate investigations into alleged
25 wrongdoing are promoted. However, these records contain highly relevant information
26 bearing directly on the incident at issue and potential liability. Contrary to earlier
27 representations, the records contain reports of internal inquiries into the incident and
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1 the level of force used, and opinions and determinations as to whether particular
2 exercises of force were or were not appropriate and in accordance with policy. These
3 records include differing views of the propriety of the actions during the event than
4 those reflected in the position taken by Defendants in this case. Justice would be
5 poorly served if their contents were not made available for use in questioning, and
6 possibly impeaching, lay and expert witnesses at the trial of this case.

7 Given the foregoing, judicial preference for admitting competent, relevant
8 evidence, and recognition that the balance is “moderately pre-weighted in favor of
9 disclosure” in these cases, Soto, 162 F.R.D. at 613 (quoting Kelly, 114 F.R.D. at 661),
10 the Court cannot justify withholding these records from Plaintiff on any basis proffered
11 by Defendants. Accordingly, Defendants will be ordered to produce to Plaintiff the
12 records listed as Items Nos. 1 and 4-7 in their supplemental privilege log, subject to the
13 limitations discussed below.

14 **IV. PROTECTIVE ORDER**

15 Defendants requested the opportunity to seek a protective order prohibiting
16 Plaintiff from disclosing these confidential documents to others if produced to him. A
17 protective order is indeed warranted given the institutional concerns articulated by
18 Defendants. In light of the limited time remaining before trial, and the relatively
19 straightforward nature of Defendants’ request, there is no need for Defendants to file a
20 separate motion seeking a protective order. The Court’s Protective Order shall issue,
21 *sue sponte*, as follows:

22 Defendants shall produce the said material and Plaintiff may review it and use it
23 in litigating this matter subject to and strictly in accordance with following terms and
24 conditions:

- 25 1. The confidential documents may be submitted to the possession of the
26 following persons:

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- a. The Litigation Coordinator at the institution where Plaintiff is now housed;
 - b. Counsel for Plaintiff in this action, should Plaintiff acquire counsel;
 - c. Paralegal, stenographic, clerical, and secretarial personnel regularly employed by counsel for Plaintiff;
 - d. Court personnel and stenographic reporters engaged in such proceedings as are incidental to the preparation for trial or trial of this action;
 - e. Any outside expert or consultant retained by Plaintiff's counsel for purposes of this action; and
 - f. Non-inmate witnesses to whom the materials need be disclosed as necessary for preparation for trial and trial of this case, provided that each witness shall be informed of and agree in writing to be bound by the terms of this order, and shall not, in any event, be permitted to take or retain copies of the material .
2. Plaintiff will be allowed to review the confidential materials, but he may not copy them, retain them, or retain copies of them in his possession. The Litigation Coordinator at Plaintiff's institution shall allow Plaintiff up to 90 minutes to review the materials and to take notes. Plaintiff may not disclose the documents to, or discuss their content with, any other inmate, nor may any other inmate review or have possession of the materials or Plaintiff's notes.
3. All material produced hereunder in possession of the Litigation Coordinator shall be destroyed or returned to the Defendants' counsel no later than thirty days after trial of this matter.
4. Upon final judgment and resolution of any appeal, Plaintiff or his counsel shall return or destroy all such materials still in or subject to their possession

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or control, and shall provide Defendants' counsel with sworn declarations stating they have done so.

5. Confidential material obtained by Plaintiff or his counsel shall not be disclosed, except as is necessary to the litigation of this case or its appeal, and for no other purpose.

6. Any confidential material filed with the Court by either party shall be filed and maintained under seal.

7. Any violation of this Protective Order may be punishable as Contempt of Court and also may subject the violating party to litigations sanctions, including dispositive sanctions, in the Court's discretion;

8. Nothing in this Protective Order is intended to prevent officials or employees of the State of California, or other authorized government officials, from having access to confidential material to which they would have access in the normal course of their official duties.

9. The provisions of this Protective Order are without prejudice to the right of any party:

- a. To apply to the Court for a further protective order relating to this or any confidential material or relating to discovery in this litigation;
- b. To apply to the Court for an order removing the confidential material designation from any documents;
- c. To apply to the Court for an order modifying this Protective Order for good cause shown; or
- d. To object to a discovery request.

10. The provisions of this order shall remain in full force and effect until further order of this Court.

1 **V. ORDER**

2 Based on the foregoing, it is HEREBY ORDERED that, within ten days of this
3 order, Item Nos. 1 and 4-7 on Defendants' supplemental privilege log shall be
4 produced in accordance with the Protective Order, and kept in the care and custody of
5 the institution's Litigation Coordinator and Plaintiff's counsel, if any he has. The
6 Litigation Coordinator shall make arrangements for Plaintiff to have 90 minutes to
7 review the materials. Plaintiff may take notes, but no copy of the materials shall be
8 provided to Plaintiff.

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10 IT IS SO ORDERED.

11 Dated: July 2, 2015

/s/ Michael J. Seng
12 UNITED STATES MAGISTRATE JUDGE

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