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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

IRVIN VAN BUREN,  
Plaintiff,  
v.  
C. WADDLE, et al.,  
Defendants.

**Case No. 1:14-cv-01894-DAD-MJS (PC)**  
**ORDER DENYING IN PART,  
GRANTING IN PART, AND  
DEFERRING IN PART PLAINTIFF'S  
MOTION TO COMPEL DEFENDANTS  
TO PRODUCE DOCUMENTS**  
**(ECF No. 32)**  
**FOURTEEN DAY DEADLINE**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 28 U.S.C. § 1983. The case proceeds against Defendants Waddle, Neibert, Ronquillo, and Walinga for excessive force and against Defendant Waddle for failure to protect, all in violation of the Eighth Amendment of the Constitution, and against Defendant Lesniak for violating Plaintiff's Fourteenth Amendment procedural due process rights during a rules violation hearing (ECF No. 7.)

Before the Court is Plaintiff's March 7, 2016, motion to compel discovery. (ECF No. 32, hereafter "Pl. Mot. to Compel.") Defendants filed their opposition to Plaintiff's motion to compel on March 30, 2016. (ECF No. 38, hereafter "D. Opp'n.") Plaintiff did not file a reply. The matter is submitted pursuant to Local Rule 230(/).

**I. PROCEDURAL HISTORY**

On October 19, 2015, Plaintiff propounded his first set of discovery on Defendant

1 (“Set 1”), including six Requests for Production of Documents (“RPD”). Pl. Mot. Compel,  
2 Ex. A. On December 17, 2015, Defendants responded to Plaintiff’s Set 1. Pl. Mot. to  
3 Compel, Ex. B. On December 31, 2015, Plaintiff propounded his second set of  
4 discovery (“Set 2”), which included two more RPDs. Pl. Mot. to Compel, Ex. C. On  
5 February 16, 2016, Defendants submitted responses to Plaintiff’s Set 2. Pl. Mot. to  
6 Compel, Ex. E.

7 Dissatisfied with Defendants’ responses to certain RPDs propounded in Set 1  
8 and Set 2, Plaintiff filed a motion to compel on March 7, 2016. Defendants filed their  
9 opposition on March 30, 2016. After an initial review of these filings, the Court  
10 scheduled a telephonic discovery dispute conference (“TDDC”) to try to resolve the  
11 disputes informally. In anticipation of the TDDC, the Court directed Defendants to  
12 submit for *in camera* review: (1) reports in Defendants possession, custody, or subject  
13 to their control of the investigation of the incident at issue in this case; (2) a list of all  
14 identified witnesses to the incident at issue and copies of all statements in Defendants  
15 possession, custody, or subject to their control given by or taken from witnesses to the  
16 incident; and (3) a listing by date, type and duration of all known incidents of gang  
17 violence and/or gang-related lockdowns in C facility during the time period from  
18 February 1, 2014 to May 30, 2014.

19 On June 17, 2016, Defendants submitted the following documents for the Court’s  
20 review: CDCR Form 115 Rules Violation Reports; CDCR Form 837 Crime Incident  
21 Reports; CDCR Forms 3036, 3034, 3014, 3012, 3011, and 3010 (collectively, “Use of  
22 Force Critique documents”); a holding cell log from May 14, 2014; and a general chrono  
23 reflecting the date and time Plaintiff viewed his videotaped interview. Defendants  
24 explained that they were unable to provide lockdown records because they were still  
25 trying to compile them.

26 On June 22, 2016, the parties, Irvin Van Buren, appearing pro se, and Deputy  
27 Attorney General Gabriel Ullrich, on behalf of all Defendants, participated in the  
28

1 telephonic discovery dispute conference.

2 **II. LEGAL STANDARD**

3 The discovery process is subject to the overriding limitation of good faith. Asea,  
4 Inc. v. S. Pac. Transp. Co., 669 F.2d 1242, 1246 (9th Cir.1981). Parties may obtain  
5 discovery regarding any non-privileged matter that is relevant to any party's claim or  
6 defense, and for good cause, the Court may order discovery of any matter relevant to  
7 the subject matter involved in the action. Fed. R. Civ. P. 26(b)(1). Relevant information  
8 need not be admissible at the trial if the discovery appears reasonably calculated to  
9 lead to the discovery of admissible evidence. Id.

10 A party may serve on any other party a request within the scope of Rule 26(b) to  
11 "produce and permit the requesting party or its representative to inspect, copy, test, or  
12 sample" any documents, electronically stored information, or tangible things "in the  
13 responding party's possession, custody or control." Fed. R. Civ. P. 34(a)(1). A party  
14 may move for an order compelling production where the opposing party fails to produce  
15 documents as requested under Rule 34. Fed. R. Civ. P. 37(a)(3)(B)(iv).

16 Generally, if the responding party objects to a discovery request, the party  
17 moving to compel bears the burden of demonstrating why the objections are not  
18 justified. E.g., Grabek v. Dickinson, No. CIV S-10-2892 GGH P., 2012 WL 113799, at  
19 \*1 (E.D. Cal. Jan. 13, 2012); Ellis v. Cambra, No. 1:02-cv-05646-AWI-SMS (PC), 2008  
20 WL 860523, at \*4 (E.D. Cal. Mar. 27, 2008). This requires the moving party to inform  
21 the Court which discovery requests are the subject of the motion to compel, and, for  
22 each disputed response, why the information sought is relevant and why the responding  
23 party's objections are not meritorious. Grabek, 2012 WL 113799, at \*1; Womack v.  
24 Virga, No. CIV S-11-1030 MCE EFB P., 2011 WL 6703958, at \*3 (E.D. Cal. Dec. 21,  
25 2011).

26 The court must limit discovery if the burden of the proposed discovery outweighs  
27 its likely benefit. Fed. R. Civ. P. 26(b)(2)(C)(iii). "In each instance, the determination  
28

1 whether . . . information is discoverable because it is relevant to the claims or defenses  
2 depends on the circumstances of the pending action.” Fed. R. Civ. P. 26 Advisory  
3 Committee’s Note (2000 Amendment) (Gap Report) (Subdivision (b)(1)).

4 **III. DISCUSSION**

5 Plaintiff’s motion to compel seeks the production of the following evidence. After  
6 reviewing the parties’ filings and discussing each party’s position during the TDDC, the  
7 Court rules as follows with regard to each such request:

8  
9 **A. RPD No. 5, Set 2:**

10 **Request (ECF 32 at 13):**

11 For the reasons that Plaintiff **does not** know the names of these inmates  
12 who was (sic) in the C Facility Medical Clinic at the time of the incident  
13 involving the Plaintiff, but may have been a witness to this incident in  
14 question (sic); Plaintiff requests of the defendant to produce to Plaintiff:  
**the names of all the inmates who was (sic) scheduled and transported to the C Facility Medical Clinic on the date of 5/14/2014 and was held in the C Facility Medical Clinic’s holding cell.**

15 **Response (ECF No. 32 at 17):**

16 Responding Party objects that the request is outside the scope of  
17 discovery, as the incident did not happen at the C Facility Medical Clinic,  
18 and that the request might seek private medical information. Without  
19 waiving the objection, Responding Party is not aware of any responsive,  
20 discoverable documents.

21 Plaintiff argues the excessive force in question occurred on the C Facility Patio,  
22 which, Plaintiff claims, is adjacent to the medical clinic. Plaintiff believes there are  
23 inmates who were in the medical clinic at the time who may have witnessed the  
24 incident. Plaintiff seeks only those inmates’ identities, not any other information about  
25 them or their reason for being in the area. At the TDDC, Plaintiff acknowledged that he  
26 did not know whether any such inmates witnessed the attack; he knows only that some  
27 witnessed his injuries after the fact and may have been in a position to have observed  
28 the event.

Defendants raise several objections. First, they argue that Plaintiff’s request

1 improperly seeks confidential health information. Also, they argue that to seek out,  
2 interview, and depose these witnesses would be costly, time-consuming, burdensome  
3 and oppressive. Finally, Defendants argue that the witnesses can make no relevant  
4 contribution because the alleged excessive force event occurred in a location not  
5 viewable from the medical clinic. They propose photographing the sightlines between  
6 the medical clinic and the patio where the event occurred to show the latter was not  
7 within sight of the former. Defendants also offered to provide the names of prison  
8 employees working in the medical clinic at the time.

9 The Court concludes that identifying individuals in the vicinity would not reveal  
10 medical or other confidential information. It also concludes that Defendants' proposal to  
11 provide photographs showing whether or not the Facility Patio is viewable from the  
12 medical clinic would likely precipitate a mini trial as to the objectivity of the photographs  
13 and thus was not the most efficient or productive way to proceed at this time. It seems  
14 Defendants could relatively easily and economically determine which individuals were in  
15 the clinic in the 30 or so minutes preceding and following the time of the alleged  
16 incident. Defendants were directed to so inquire and report, at or prior to a continued  
17 4:00 PM, July 20, 2016 TDDC, their success or inability in doing so. If potential  
18 witnesses, if any, are identified, the parties, with Court assistance if need be, can  
19 undertake to determine whether any purport to have seen the incident and, if so, if they  
20 recall what they saw.

21 Ruling on this request will therefore be deferred until the continued July 20, 2016  
22 TDDC.

23 **B. RPD No. 6, Set 1:**

24 **Request (ECF 32 at 13):**

25 Plaintiff requests of Defendant to produce for inspection reasons; (sic) "all  
26 documentation" of incident reports and lock-downs statas (sic)  
27 reports of C Facility program yard during the timeframe period of  
February 1, 2014 through May 30, 2014.

28 **Response (ECF No. 52-1 at 5):**

1 Responding Party objects that the request is outside the scope of  
2 discovery, as the incident does not pertain to any lockdown and  
3 Responding Party is informed that the lockdown ended a day before the  
4 incident. Responding Party will not comply with the request.

5 Plaintiff argues that the lockdown records will show the frequency of C Facility  
6 lockdowns attributable to high levels of gang violence which in turn put Defendants on  
7 notice of the heightened risk to Plaintiff of a gang-related attack and thus should have  
8 led Defendants to take additional steps to protect Plaintiff from that risk.

9 Defendants argue that lockdown records are irrelevant to Plaintiff's claims, which  
10 do not involve gang-related violence. Moreover, they claim, lockdown records are  
11 voluminous, and it would be burdensome to produce them.

12 Plaintiff's failure to protect claim proceeds on his allegation that Defendant  
13 Waddle failed to protect him from a risk of harm at the hands of prison gang members  
14 by housing him in the C Facility alongside Plaintiff's known enemies.<sup>1</sup> The correlation  
15 Plaintiff seeks to establish between the prison lockdown records and the risk to  
16 Plaintiff's safety, however, is tenuous at best and will not warrant the production of all  
17 lockdown records. The alleged attack at issue came at the hands of prison staff. There  
18 is no allegation here that Plaintiff suffered an attack by any member of any gang.  
19 Plaintiff fear of the "Mexican 2-5" gang and Defendant Waddle's alleged failure to  
20 protect him from that gang is not alleged to have caused any actual damage to Plaintiff  
21 while he was housed at KVSP. Even if the contrary were true, the frequency of lock-  
22 downs would shed little light on the reasonableness of Plaintiff's concerns, and much  
23 less on Defendant's imputed knowledge of the validity of those concerns and the need  
24 to protect him against them. In short, the Court concludes that the potential relevancy  
25 of such lockdown records is so remote as not to justify the cost and time of producing  
26 them. Plaintiff's request for lockdown records will therefore be denied. However, as

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27 <sup>1</sup> During the TDDC, there was a dispute over the basis for Plaintiff's Eighth Amendment failure to protect claim  
28 against Defendant Waddle. Plaintiff argued that Defendant Waddle failed to protect him from gang violence.  
Defendants believed Defendant Waddle was charged with failing to protect Plaintiff from violence at the hands of  
Defendants Ronquillo, Walinga, and Neibert. Review of the pleadings shows that Plaintiff is correct.

1 noted during the TDDDC, nothing in this ruling precludes Plaintiff from testifying as to  
2 his own knowledge of the number of lockdowns if the Court finds that knowledge to be  
3 relevant.

4 **C. RPD No. 1, Set 2:**

5 **Request (ECF No. 32 at 21):**

6 For the reasons that Plaintiff does not have in his current possession (sic),  
7 Plaintiff requests that Defendant produce for him; (sic) **the photos of all**  
8 **the injuries Plaintiff suffered on the date of May 14, 2014 during the**  
9 **incident in question.**

10 **Response (ECF No. 32 at 27):**

11 Responding Party objects that the request is argumentative and  
12 Responding Party denies that Plaintiff was injured in the incident. Without  
13 waiving the objection, Responding Party will comply with the request in  
14 whole and produce the two photographs taken of Plaintiff shortly after the  
15 incident.

16 During the TDDC, Plaintiff acknowledged that the issue regarding the  
17 photographs had been resolved and he withdrew his request for an order related  
18 thereto. Plaintiff's request will therefore be denied as moot

19 **D. RPD No. 2, Set 2**

20 **Request (ECF No. 32 at 21-22):**

21 For the reasons that Plaintiff does not have access to the information in  
22 question, Plaintiff requests that Defendant produce for Plaintiff; (sic) **(1) a**  
23 **list of all the surveillance cameras depicted on the lower C facility**  
24 **from the Salley Port patio area, as well as on the main lower yard**  
25 **area, and (2) requesting a diagram photo of the two areas depicting**  
26 **the locations of all the cameras in question.**

27 **Response (ECF No. 32 at 27-28):**

28 Responding Party objects that the request is not proportional to the needs  
of the case, as Defendants have already submitted a sworn declaration  
from the institution's person most qualified that the incident was not video  
recorded and the C facility Patio is not video recorded. Responding Party  
further objects that the request calls for information protected under the  
official information privilege, as the request calls for information protected  
under the official information privilege, as the request for information about  
inmate surveillance calls for state secrets (sic) and invokes government  
privilege. *Kerr v. U.S. Dist. Ct.*, 511 F.2d 192 (9th Cir. 1975). Finally,  
Responding Party is not aware of any "list" of the surveillance cameras to  
produce or a diagram photograph of "all the cameras in question,"

1 therefore there is nothing in Responding Party's possession, custody or  
2 control to produce. Plaintiff is directed to the Declaration of B. Hancock in  
3 support of Defendant Lesniak's motion for summary judgment, which  
4 explains that there are no video recording devices on the C Facility Patio  
or anywhere in the institution which record the C Facility Patio. No  
production will be made in response to this request.

5 As an initial matter, the Court agrees (and Plaintiff did not dispute) that providing  
6 an inmate with a diagram depicting the locations of video surveillance cameras within  
7 the prison could create a serious security issue. Plaintiff's request for a diagram of the  
8 video cameras will therefore be denied.

9 Defendants assert that no video camera filmed the area where the incident took  
10 place. They have submitted, in support, a sworn declaration from Litigation Coordinator  
11 B. Hancock, the individual charged with maintaining the video surveillance and  
12 recording systems at KVSP. (ECF No. 18-1.) Plaintiff concedes that he has no direct  
13 evidence to the contrary; he simply finds it unlikely that the area would not have been  
14 under surveillance.

15 The Court cannot compel Defendants to produce that which they declare under  
16 penalty of perjury does not exist. However, for reasons discussed below,<sup>2</sup> Defendants  
17 are well advised to renew their investigation into the possible existence of a videotape  
18 of the incident and, of course, give notice if that investigation reveals that any such  
19 video exists or ever existed. Defendants shall advise of the results of this investigation  
20 at the July 20, 2016 TDDC.

21 **E. Documents Reviewed *In Camera***

22 Plaintiff and Defendants confirmed that Plaintiff has received a copy of every  
23 document reviewed *in camera* except for those within the Use of Force Critique.  
24 Defense counsel objected to turning over the Use of Force Critique documents on the  
25 ground that they would reveal the nature and manner of investigation of such matters in  
26 a way that prisoners, aware of same, could conceivably create a scenario which would  
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28 <sup>2</sup> See footnote 3, below.



1 be more likely to expose a correctional officer to criticism.

2 With one exception, the Court agrees with Defendants' position. The forms  
3 contain checklists of the numerous factors the institution considers when conducting  
4 internal review of staff use of force incidents. To disclose these to an inmate could  
5 enable him to tailor his excessive force claims to conform to the factors on the lists,  
6 thereby making them appear more credible. Moreover, with the same single exception  
7 mentioned above, the Court's *in camera* review of those documents revealed nothing  
8 that was favorable to, or would support or corroborate, directly or indirectly, any of  
9 Plaintiff's claims. In short, the security concerns expressed by Defendants far outweigh  
10 any interest Plaintiff may have in reviewing the documents.

11 The twice-mentioned "exception" is the CDCR Form 3014 "Use of Force Critique,  
12 Report of Findings – Inmate Interview," signed by Lt. R. Molina, and dated May 26,  
13 2014. This document contains statements attributed to Plaintiff by prison officials  
14 investigating his allegations of excessive force. It does not appear to contain any  
15 privileged information or material in need of protection for security reasons. Moreover,  
16 Defense counsel advised that while the CDCR does not typically provide Use of Force  
17 Critique forms to prisoner litigants, Plaintiff's CDCR Form 3014 appeared "innocuous."  
18 Therefore, Defendants shall provide Plaintiff with a copy of the May 26, 2014 CDCR  
19 Form 3014<sup>3</sup>, but no other Use of Force documents.

20 **IV. CONCLUSION AND ORDER**

21 For the foregoing reasons, as to Plaintiff's motion to compel (ECF No. 32) IT IS  
22 HEREBY ORDERED as follows:

- 23 1. The ruling on Plaintiff's request for the names of any inmates present in the  
24 medical facility on May 14, 2014 is DEFERRED until the July 20, 2016

25 \_\_\_\_\_  
26 <sup>3</sup> On the second page of that form, there is a checklist of the types of evidence a reviewing authority may  
27 consider in determining whether Plaintiff was subjected to excessive force. One of the items checked as  
28 having been reviewed in this case is "Incident Videotape." On its face, this statement is inconsistent with  
the Hancock Declaration discussed above. Hence, the above-noted need for further investigation into the  
possible existence of a video of the incident.

1 telephonic discovery dispute conference, pending Defendants' further  
2 investigation;

3 2. Plaintiff's request for lockdown records spanning the period from February 1,  
4 2014 to May 30, 2014 is DENIED;

5 3. Plaintiff's request for additional photographs of his injuries is DENIED as  
6 moot;

7 4. Plaintiff's request for a diagram depicting the locations of surveillance  
8 cameras within KVSP is DENIED;

9 5. Plaintiff's request for information regarding surveillance cameras on the C  
10 Facility Patio is GRANTED in part: Defendants are directed to further inquire  
11 into the presence of surveillance cameras on the C Facility Patio and disclose  
12 their findings to Plaintiff; and

13 As to the documents provided to the Court for in camera review, IT IS HEREBY  
14 ORDERED:

15 6. Defendant shall provide Plaintiff with a copy of the CDCR Form 3014 (the  
16 Inmate Interview) within fourteen days of this order;

17 7. Defendants are not required to turn over CDCR Forms 3036, 3034, 3012,  
18 3011, and 3010 to Plaintiff.

19  
20 IT IS SO ORDERED.

21  
22 Dated: June 28, 2016

23 /s/ Michael J. Seng  
24 UNITED STATES MAGISTRATE JUDGE  
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