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

10  
11 GINA CARUSO,

12 Plaintiff,

13 v.

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15 OFFICER G. SOLORIO, et al.,

16 Defendants.  
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**Case No. 1:15-cv-00780-AWI-EPG (PC)**

**ORDER RE: PRODUCTION OF  
DOCUMENTS SUBMITTED FOR IN  
CAMERA REVIEW**

**(ECF NOS. 57, 58, 70)**

18 **I. BACKGROUND**

19 Gina Caruso (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* in  
20 this civil rights action filed pursuant to 42 U.S.C. § 1983. On February 23, 2018, Plaintiff filed  
21 a Request for Appointment of Counsel for Indigent Inmate Unable to Get Discovery Privilege.  
22 (ECF No. 57). Plaintiff’s motion explained that “Plaintiff has requested documents to help  
23 prove her case and the defendants are claiming privilege at every staff related request. Using  
24 generalizations, non-specific hiding [sic] behind privilege, the Defendants are not acting in  
25 good faith.” (ECF No. 57, at p. 1).

26 Plaintiff attached Defendants’ Responses to Plaintiff’s Request for Production of  
27 Documents, Set One. Defendants objected to many requests on the basis that “The documents  
28 requested are part of a confidential investigation and as such are subject to the official

1 information privilege,” and refused to produce such documents. (ECF No. 57, at pgs. 7-9).  
2 Plaintiff attached Defendants’ Declaration of D. Villegas in support of Defendants’ Privilege  
3 Log. That declaration stated that “CDCR’s ISU officers and employees generated or collected,  
4 and preserved, in the normal course of business, all of the documents in the Privilege Log as  
5 confidential official information, and have maintained their confidentiality.” (ECF No. 57, at p.  
6 16). It also represented that “Disclosure of this type of information could undermine staff’s  
7 ability to function and control violent episodes or prevent the distribution of contraband,” and  
8 “[t]here is simply no manner in which this information could be disseminated, particularly in a  
9 pro se case, that would preserve the institution’s interests as inmates do not have the same  
10 incentives to obey orders as do officers of the court.” (ECF No. 57, at pgs. 16-17). Another  
11 declaration in support of Defendants’ privilege log, this one from J. Rowan, similarly  
12 represented that every document withheld as privileged had been reviewed, was confidential,  
13 and could not be disseminated to Ms. Caruso without serious risk to the institution. (ECF No.  
14 57, at pgs. 22-26). Ms. Caruso attached the privilege logs, which stated that Defendants  
15 claimed the privileged material was “confidential information that would jeopardize the safety  
16 and security of the institution if disclosed,” and was privileged under the “official information  
17 privilege.” (ECF No. 57, at pgs. 19-20; 27-28).

18 On February 28, 2018, the Court issued an order construing Plaintiff’s Request for  
19 Appointment of Counsel and Request to Depose Correctional Officer Bates as also including  
20 motions to compel. (ECF No. 61).<sup>1</sup>

21 Defendants filed an opposition of Plaintiff’s Motions to Compel. (ECF No. 63).  
22 Among other things, Defendants argued that “To the extent the request seeks documents  
23 contained within the personnel files of the officers, these documents are protected by the  
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25 <sup>1</sup> On April 16, 2018, Plaintiff filed a request for *in camera* review of documents claimed  
26 confidential. (ECF No. 70). Plaintiff requests that the Court conduct an *in camera* review of the documents that  
27 are the subject of Plaintiff’s motions to compel. As this request is duplicative of the requests in Plaintiff’s motions  
28 to compel, this request will be denied as moot. In this same request, Plaintiff asks the Court to compel Defendants  
to produce original copies of the incident reports at issue. There appears to be no reason why Defendants should  
not produce original copies of the incident reports at issue to Plaintiff. Accordingly, to the extent that they are in  
Defendants’ possession, custody, or control, the Court will order Defendants to produce original copies of the  
incidents reports at issue to Plaintiff.

1 official information privilege.” (ECF No. 63, at p. 3). Similarly, Defendants argued that “The  
2 documents requested are a part of a confidential investigation and as such are subject to the  
3 official information privilege.” (ECF No. 63, at p. 4). Defendants also represented that “the  
4 elements of the confidential investigation contain sensitive information that would jeopardize  
5 the security of the institution if released.” (ECF No. 63, at p. 4).

6 After receiving Plaintiff’s motion, the Court ordered production to the Court for *in*  
7 *camera* review of all documents withheld as privileged under the official information privilege.  
8 (ECF No. 61). Defendants have provided the Court with those documents.

9 Following a hearing in this case, on April 4, 2018 (ECF No. 66), Defendants filed  
10 supplemental briefing to defend their invocation of the official information privilege.  
11 Defendants argued in that supplemental brief that they also sought to protect a confidential  
12 inmate informant. (ECF No. 71, at p. 3).

## 13 **II. LEGAL STANDARDS**

14 In *Kerr v. United States Dist. Ct. for the N. Dist. of Cal.*, 511 F.2d 192 (9th Cir. 1975),  
15 *aff’d*, 426 U.S. 394 (1976), the Ninth Circuit Court of Appeals examined the government’s  
16 claim of the official information privilege as a basis to withhold documents sought under the  
17 Freedom of Information Act. It explained that the “common law governmental privilege  
18 (encompassing and referred to sometimes as the official or state secret privilege) . . . is only a  
19 qualified privilege, contingent upon the competing interests of the requesting litigant and  
20 subject to disclosure . . . .” *Id.* at 198 (internal citations omitted).

21 The Ninth Circuit has since followed *Kerr* in requiring *in camera* review and a  
22 balancing of interests in ruling on the government’s claim of the official information privilege.  
23 *See, e.g., Seminara v. City of Long Beach*, 68 F.3d 481 (9th Cir. 1995) (affirming a magistrate  
24 judge order compelling disclosure and stating “Federal common law recognizes a qualified  
25 privilege for official information.”); *Breed v. U.S. Dist. Ct. for N. Dist. of Cal.*, 542 F.2d 1114,  
26 1116 (9th Cir. 1976) (quoting *Kerr*, 426 U.S. at 406) (“Also, as required by *Kerr*, we recognize  
27 ‘that in camera review is a highly appropriate and useful means of dealing with claims of  
28 governmental privilege.’”); *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033-34 (9th Cir.

1 1990), *as amended on denial of reh'g* (Feb. 27, 1991), *as amended on denial of reh'g* (May 24,  
2 1991) (internal citations omitted) (“Government personnel files are considered official  
3 information. To determine whether the information sought is privileged, courts must weigh the  
4 potential benefits of disclosure against the potential disadvantages. If the latter is greater, the  
5 privilege bars discovery.”).

6 In interpreting the official information privilege in this context, the Court also looks to  
7 the U.S. Supreme Court’s statements related to the requirement that prisoners exhaust  
8 administrative remedies. The Supreme Court has upheld the “proper exhaustion” requirement  
9 in part because of the evidentiary value of the documents generated as a result of that process.  
10 *Woodford v. Ngo*, 548 U.S. 81, 94-95 (2006) (“Finally, proper exhaustion improves the quality  
11 of those prisoner suits that are eventually filed because proper exhaustion often results in the  
12 creation of an administrative record that is helpful to the court. When a grievance is filed  
13 shortly after the event giving rise to the grievance, witnesses can be identified and questioned  
14 while memories are still fresh, and evidence can be gathered and preserved.”).

15 **III. DOCUMENTS WITHHELD BY DEFENDANTS UNDER THE OFFICIAL**  
16 **INFORMATION PRIVILEGE**

17 Defendants have withheld every document regarding their investigation into the  
18 underlying event, including every statement describing the search from defendants, Plaintiff,  
19 and any other witness. Below is a review of the main items withheld:<sup>2</sup>

- 20
- Notes of every interview, including from Defendant correctional sergeant G.  
21 Ingram (016-017), Defendant Correctional Officer D. Martinez (017), Defendant  
22 Correctional Officer C. Lopez (017-018), Defendant Correctional Officer G.  
23 Solorio (018-019), Correctional Officer S. Bates (019), and Correctional Captain  
24 M. Villegas (020).
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28 <sup>2</sup> This list includes the primary category of documents, but does not list every time that type of document that appeared. It also omits documents that Defendants have said were separately provided to Plaintiff.

- 1 • Notes of interviews from two inmates who witnessed the event. Notably these  
2 inmate witnesses were not informants about the alleged contraband—they were  
3 witnesses to the search at issue. (020)
- 4 • Report regarding the prison’s conclusion about whether excessive force was  
5 used. (021)
- 6 • A confidential supplement to the appeal, which is a conclusion from another  
7 prison officer regarding the events at issue. This includes notes of that officer’s  
8 interview of percipient witnesses. (023-025)
- 9 • Notices to interviewees including a list of their rights. (026-029)
- 10 • Memorandum regarding an attempt to interview Plaintiff. (030)
- 11 • Laboratory tests of urinalysis testing. (031)
- 12 • An institutional correctional review, which includes a synopsis of events, as well  
13 as conclusions regarding whether staff acted appropriately. (036-037)
- 14 • Notes of the interviews listed above. (045-048)
- 15 • Handwritten notes, without a clear author. (049)
- 16 • Various notices and explanation of procedures throughout. (E.g., 059)
- 17 • Crime incident reports completed by correctional officers who performed the  
18 search. (074-093)
- 19 • References to dozens of photographs taken as part of the investigation. (077-  
20 079)
- 21 • Medical report of injury. (097)

#### 22 **IV. ANALYSIS OF OFFICIAL INFORMATION PRIVILEGE**

23 The Court has conducted an *in camera* review and finds that the witness statements,  
24 including interview notes, written notes of interviews, and synopses, are highly relevant to the  
25 dispute and do not implicate any legitimate security interest. They are accounts of the search at  
26 issue, taken as part of the investigation into Plaintiff’s complaint, by percipient witnesses to the  
27 event, close in time to the event. These are precisely the sort of statements that the Supreme  
28 Court envisioned when it stated that “proper exhaustion often results in the creation of an

1 administrative record that is helpful to the court” because “witnesses can be identified and  
2 questioned while memories are still fresh, and evidence can be gathered and preserved.”  
3 Woodford, 548 U.S. at 94-95.

4 Indeed, the documents include statements from Defendants and the Plaintiff in this case.  
5 Surely what the parties said at the time of the event about what happened is exceedingly  
6 relevant. This is all the more true in a case with a *pro se* incarcerated witness with limited  
7 ability to depose individuals. Having the defendants’ own statements will greatly assist the  
8 parties and the finders of fact in determining what happened that day.

9 So too is all evidence gathered in connection with the investigation, including any  
10 photographs and laboratory tests.<sup>3</sup> These are exceedingly relevant and do not expose the prison  
11 or anyone else to a security issue.

12 Defendants’ initial submissions defending the privilege are unpersuasive. In  
13 withholding every single document associated with the investigation, Defendants provided  
14 Plaintiff with a privilege log with a single entry stating “Confidential information that would  
15 jeopardize the safety and security of the institution if disclosed. Cal. Code Regs. Tit. 15 §§  
16 3321(a), 3450(d), Cal Gov’t Code § 6254(f).<sup>4</sup> Official Information Privilege.” In other words,  
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18 <sup>3</sup> The photographs were not included in the *in camera* submission, but are merely referred to in  
19 the documents. It is possible that these have been provided to Plaintiff. However, given Plaintiff’s complaints  
about receiving very little in discovery, it appears likely that Defendants have withheld the photographs as well.

20 <sup>4</sup> 15 C.C.R. § 3321(a) states: “The following types of information shall be classified as  
21 confidential: (1) Information which, if known to the inmate, would endanger the safety of any person. (2)  
Information which would jeopardize the security of the institution. (3) Specific medical or psychological  
22 information which, if known to the inmate, would be medically or psychologically detrimental to the inmate. (4)  
Information provided and classified confidential by another governmental agency. (5) A Security Threat Group  
23 debrief report, reviewed and approved by the debriefing subject, for placement in the confidential section of the  
central file.” Cal. Code Regs., tit. 15, § 3321(a). 15 C.C.R. 3450(d) states: “No inmate or parolee shall prepare,  
24 handle, or destroy any portion of a departmental record containing confidential information as that term is defined  
in Section 3321.” 15 C.C.R. 3450(d). Cal Gov’t Code § 6254(f) states: “Records of complaints to, or  
25 investigations conducted by, or records of intelligence information or security procedures of, the office of the  
Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police  
26 agency, or any investigatory or security files compiled by any other state or local police agency, or any  
investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or  
27 licensing purposes. However, state and local law enforcement agencies shall disclose the names and addresses of  
persons involved in, or witnesses other than confidential informants to, the incident, the description of any  
28 property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in  
the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an  
authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any  
person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary,

1 Defendants claimed that disclosure of any single part of the investigation, including all  
2 evidence and witness statements, would jeopardize the safety and security of the institution.  
3 Based on the content of the underlying documents, this is not a credible assertion. These are  
4 not documents about prison security techniques or procedures. These do not provide an inmate  
5 with a way of evading prison security. These are not the sort of documents that Courts have  
6 protected as privileged based on safety and security reasons. See, e.g., United States v. Wilson,  
7 791 F.2d 1383 (9th Cir. 1986) (in criminal prosecution for escape, district court properly denied  
8 discovery requests for records concerning prison security measures and informant information);  
9 Candler v. Santa Rita County Jail Watch Commander, 2014 WL 2120310, \*3–4 (N.D.Cal. May  
10 21, 2014) (relying on official information privilege to deny motion to compel further  
11 production of jail's policies and procedures regarding classification of inmates that  
12 “implicat[ed] some specifics on how inmates are classified”); Walker v. Ryan, 2012 WL  
13 1599984, \*3–4 (D.Ariz. 2012) (denying motion to compel further responses to discovery  
14 requests seeking information about methods for identifying prison gang members and  
15 collecting and analyzing gang intelligence); Ibanez v. Miller, 2009 WL 3481679, \*2–3  
16 (E.D.Cal. 2009) (denying discovery request regarding how prison officials respond to prison  
17 alarms). Rather, these are statement by percipient witnesses, including the Plaintiff and  
18 Defendants, regarding what happened *after* Plaintiff was found with contraband.

19 The Court pressed Defendants during the hearing for any legal basis for the breadth of  
20 the asserted privilege. In response, Defendants pointed to the unpublished case of Haddix v.  
21 Burris, 2014 WL 6983287 (2014), supposedly for the proposition that inmate statements  
22 generally should be shielded from disclosure. That Court in Haddix found that the inmate  
23 statements were protected by the privilege because “inmate witnesses are less likely to  
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26 fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of  
27 Section 13951, unless the disclosure would endanger the safety of a witness or other person involved in the  
28 investigation, or unless disclosure would endanger the successful completion of the investigation or a related  
investigation. However, this subdivision does not require the disclosure of that portion of those investigative files  
that reflects the analysis or conclusions of the investigating officer.” Cal Gov’t Code § 6254(f).

1 cooperate if they fear being labelled as snitches or identified persons cooperating with  
2 authorities because of the increased likelihood of being targeted for assault.” Id. at \*6.

3 While the Court agrees that there is a security interest in protecting unidentified inmate  
4 witnesses who could be labelled as “snitches” or “persons cooperating with authorities,” this is  
5 not an issue here. First of all, Plaintiff herself identified the inmates who were interviewed as  
6 witnesses to the events, so Plaintiff is already aware of their identity and herself encouraged  
7 investigators to speak with them. (020). Moreover, in this instance, they will not be accused of  
8 “snitching” on Plaintiff as they do not accuse Plaintiff of improper conduct. Rather, they  
9 provide percipient facts regarding the search.

10 Defendants also state that the documents should be protected because “there was  
11 information from a confidential informant which precipitated the search.” (ECF No. 71, p. 3).  
12 They thus suggest that disclosure could threaten that confidential informant. However, the  
13 documents cited do not provide any further information besides that already disclosed in  
14 Defendants brief, i.e., there was a confidential informant who told prison officers about  
15 potential contraband. The confidential informant is not named or otherwise identified in the  
16 documents. Nor is any more specific information provided by that informant. (016, 046).  
17 Furthermore, the inmate witnesses who provided statements are not the confidential informant.  
18 Under the circumstances, it is misleading to suggest that these documents were withheld to  
19 protect a confidential informant.

20 Defendants next state that they are attempting to preserve information related to an  
21 ongoing criminal enterprise. (ECF No. 71, at p. 3). They state that the prison needs all witness  
22 cooperation to counter entry of contraband or narcotics. However, the documents do not  
23 concern the way that Plaintiff obtained contraband, or the way that the confidential informant  
24 learned of the contraband. They only concern what happened after contraband was detected.  
25 This argument too is highly misleading.

26 Defendants also claim that Plaintiff “was apprised of the investigation (and its results)  
27 through the CDCR Form 837 . . . .” (ECF No. 71, at p. 4). Defendants do not attach the  
28 documents provided to Plaintiff. Certainly if Plaintiff already has these documents, there is no



1 issue with their disclosure. But given Defendants' claim of privilege and briefing, it appears  
2 that Defendants are withholding the witness statements themselves and other evidence. To the  
3 extent Defendants are referring to the conclusions of the prison after the investigation, such an  
4 opinion is far from a substitute for actual witness statements and evidence, which could be used  
5 to impeach such witnesses at trial.

6 Finally, Defendants claim that there is little evidentiary value in producing documents  
7 regarding how staff members are notified of their rights during the investigation process.  
8 Similarly, Defendants object to production of "notes or critiques." While the Court does not  
9 see any threat to the safety and security of the prison in disclosure of such documents, it also  
10 does not see their relevance. The correspondence with witnesses soliciting their interview,  
11 providing their rights, and explaining similar procedures are not relevant to the lawsuit. Nor is  
12 there any relevance to the findings of the prison, which are not binding on the Court and likely  
13 not admissible. The Court appreciates that the prison should be free to make findings for or  
14 against their staff without such findings being used in subsequent litigation. Accordingly,  
15 Defendants are permitted to withhold/redact any documents regarding the procedures for the  
16 interviews or conclusions of the prison. However, all summaries of witness statements and  
17 other evidence must be produced even if contained within a document reaching a conclusion  
18 regarding that evidence.

19 In conclusion, the Court will overrule the official information privilege as to witness  
20 statements and evidence as described in this order. The Court is also troubled by the use of the  
21 privilege in this instance. Defendants withheld all evidence generated from their investigation  
22 by claiming that any disclosure would threaten safety and security. The content of the  
23 documents do not bear out Defendants' description. Instead, it appears that Defendants  
24 improperly invoked the official information privilege to withhold all pertinent evidence from  
25 Plaintiff, contrary to Supreme Court case law endorsing disclosure of such evidence.  
26 Moreover, they took these questionable positions in a case with a *pro se* litigant, who lacks the  
27 legal training to adequately challenge Defendants' positions. To the extent such positions are  
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1 part of a legal strategy, and not just an isolated mistake, the Court encourages defense counsel  
2 to reconsider such a strategy going forward.

3 **V. CONCLUSION AND ORDER**

4 Accordingly, IT IS HEREBY ORDERED that:

- 5 1. Plaintiff's request for *in camera* review of documents claimed confidential is  
6 granted in part. Within **14 days** from the date of this order, to the extent that they  
7 are in Defendants' possession, custody, or control, Defendants shall produce to  
8 Plaintiff original copies of the incidents reports at issue.
- 9 2. Plaintiff's motions to compel are granted in part. Within **14 days** from the date of  
10 this order, Defendants shall produce to Plaintiff the documents withheld under the  
11 official information privilege and provided *in camera* to the Court to the extent the  
12 withheld documents contain:
- 13 a. Witness statements.
  - 14 b. Reports by witnesses, including incident reports.
  - 15 c. Summaries of evidence or witness statements.
  - 16 d. Evidence, including reports of drug tests, photographs, or any other evidence  
17 collected regarding the search at issue.
- 18 3. Defendants may redact/withhold:
- 19 a. Confidential identifying information about prison officers, if any, including  
20 their first names, addresses, social security number or similar personal  
21 information.<sup>5</sup>
  - 22 b. Statements of rights given to witnesses, or other purely procedural  
23 documents not including any statement about the underlying event; and

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28 <sup>5</sup> The Court did not notice any such information, but includes this order in the abundance of  
caution.

1 c. Conclusions or analysis of any prison authority regarding the complaint,  
2 including whether staff acted appropriately and consistent with prison  
3 procedure. However, summaries of any witness statements or evidence  
4 included in such analysis documents must be provided.

5  
6 IT IS SO ORDERED.

7 Dated: April 30, 2018

8 /s/ Eric P. Groj  
9 UNITED STATES MAGISTRATE JUDGE