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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 GINA CARUSO,

12 Plaintiff,

13 v.

14 OFFICER G. SOLORIO, et al.,

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

ORDER DENYING DEFENDANTS'
REQUEST FOR RECONSIDERATION BY
THE DISTRICT COURT OF THE
MAGISTRATE JUDGE'S RULING
OVERRULING DEFENDANTS'
ASSERTION OF OFFICIAL
INFORMATION PRIVILEGE

(ECF No. 77)

17 Gina Caruso ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma pauperis* in
18 this civil rights action filed pursuant to 42 U.S.C. § 1983.

19 On May 11, 2018, Defendants filed a request for reconsideration by the district court
20 (ECF No. 77) of the magistrate judge's order (ECF No. 75), which overruled Defendants'
21 assertion of the official information privilege as to certain documents. For the reasons
22 described below, Defendants' request for reconsideration is denied.

23 **I. BACKGROUND**

24 In discovery, Defendants withheld numerous documents generated in the course of the
25 prison's investigation into Plaintiff's administrative complaints related to the search for
26 contraband. The magistrate judge was alerted to this issue by Plaintiff's motion for
27 appointment of counsel, which attached Defendants' responses to discovery request and argued
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1 that she was unable to properly litigate this case because Defendants were improperly
2 withholding most relevant documents as privileged. (ECF No. 57). Plaintiff attached
3 Defendants' privilege log, which indicated that the entire investigation related to Plaintiff's
4 grievance at the prison was privileged pursuant to the official information privilege because it
5 constituted "Confidential information that would jeopardize the safety and security of the
6 institution if disclosed." (ECF No. 57 at 19-20). The magistrate judge construed portions of
7 that motion as a motion to compel and ordered *in camera* review of the withheld documents.
8 (ECF No. 61). Defendants complied with the order.¹

9 Following additional briefing and the magistrate judge's review of the documents, the
10 magistrate judge overruled Defendants' objection as to certain categories of documents. The
11 magistrate judge set forth the legal standards as follows:

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13 In *Kerr v. United States Dist. Ct. for the N. Dist. of Cal.*, 511 F.2d 192 (9th Cir.
14 1975), *aff'd*, 426 U.S. 394 (1976), the Ninth Circuit Court of Appeals examined
15 the government's claim of the official information privilege as a basis to
16 withhold documents sought under the Freedom of Information Act. It explained
17 that the "common law governmental privilege (encompassing and referred to
18 sometimes as the official or state secret privilege) . . . is only a qualified
19 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
23 information privilege. *See, e.g., Seminara v. City of Long Beach*, 68 F.3d 481
24 (9th Cir. 1995) (affirming a magistrate judge order compelling disclosure and
25 stating "Federal common law recognizes a qualified privilege for official
26 information."); *Breed v. U.S. Dist. Ct. for N. Dist. of Cal.*, 542 F.2d 1114, 1116
27 (9th Cir. 1976) (quoting *Kerr*, 426 U.S. at 406) ("Also, as required by *Kerr*, we
28 recognize 'that in camera review is a highly appropriate and useful means of
dealing with claims of governmental privilege.'"); *Sanchez v. City of Santa Ana*,
936 F.2d 1027, 1033-34 (9th Cir. 1990), *as amended on denial of reh'g* (Feb. 27,
1991), *as amended on denial of reh'g* (May 24, 1991) (internal citations omitted)

¹ Defendants included numerous documents in that submission that were clearly not privileged, many of which had been shared with Plaintiff herself. The Court issued an order to show cause regarding these documents. (ECF No. 65). At the next hearing, defense counsel represented that those documents had already been provided to Plaintiff, despite being included in the *in camera* submission. The Court discharged the Order to Show Cause. (ECF No. 67).

1 (“Government personnel files are considered official information. To determine
2 whether the information sought is privileged, courts must weigh the potential
3 benefits of disclosure against the potential disadvantages. If the latter is greater,
4 the privilege bars discovery.”).

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

16 (ECF No. 75, pgs. 3-4).

17 Applying these legal principles, the magistrate judge evaluated the documents and
18 ordered Defendants to produce the following:

- 19 a. Witness statements.
- 20 b. Reports by witnesses, including incident reports.
- 21 c. Summaries of evidence or witness statements.
- 22 d. Evidence, including reports of drug tests, photographs, or any other evidence
23 collected regarding the search at issue.

24 (*Id.* at 10).

25 The Court allowed Defendants to redact or withhold the following:

- 26 a. Confidential identifying information about prison officers, if any, including their
27 first names, addresses, social security number or similar personal information.
- 28 b. Statements of rights given to witnesses, or other purely procedural documents not
including any statement about the underlying event; and
- c. Conclusions or analysis of any prison authority regarding the complaint,
including whether staff acted appropriately and consistent with prison procedure.
However, summaries of any witness statements or evidence included in such
analysis documents must be provided.

(*Id.*).

1 **II. LEGAL STANDARD**

2 Pursuant to Federal Rule of Civil Procedure 72(a), when reviewing a magistrate judge's
3 order, “[t]he district judge in the case must consider timely objections and modify or set aside
4 any part of the order that is clearly erroneous or is contrary to law.” *See also* 28 U.S.C. §
5 636(b)(1)(A); Local Rule 303. Under the clearly erroneous standard of review, a district court
6 may overturn a magistrate judge's ruling “only if the district court is left with the definite and
7 firm conviction that a mistake has been made.” *Computer Economics, Inc. v. Gartner Group,*
8 *Inc.*, 50 F.Supp.2d 980, 983 (S.D. Cal. 1999) (quoting *Weeks v. Samsung Heavy Indus. Co.,*
9 *Ltd.*, 126 F.3d 926, 943 (7th Cir. 1997)). Under the contrary to law standard, a district court
10 may conduct independent review of purely legal determinations by a magistrate judge. *Id.*

11 **III. DISCUSSION**

12 Defendants first argue that the magistrate judge erred in considering the Supreme Court
13 case of *Woodford v. Ngo*, 548 U.S. 81 (2006), because it did not address the official
14 information privilege. Defendants argue, “[w]ith reliance on *Woodford*, there would be no
15 balancing of the competing interests, and internal deliberations, critiques, or witness statements
16 would potentially be subject to release regardless of the security implications they may raise.”
17 (ECF No. 77, at p. 3). Defendants argue that “The Magistrate Judge’s reliance on *Woodford* for
18 analysis of the official information privilege is contrary to law and the ruling should be
19 overruled.” (*Id.*).

20 The Court has reviewed the magistrate judge’s order and does not find that it was
21 contrary to the law based on its reference to *Woodford*. The magistrate judge cited applicable
22 Ninth Circuit authority regarding the official information privilege and undertook a balance of
23 potential benefits of disclosure against the potential disadvantages, consistent with that Ninth
24 Circuit authority. The magistrate judge did not rely on *Woodford* to avoid this balancing test or
25 to ignore legitimate security interests. There was nothing legally erroneous about citing
26 *Woodford*’s endorsement of using evidence gathered as part of the inmate grievance process in
27 later litigation. *Woodford*, 548 U.S. at 94-95 (“Finally, proper exhaustion improves the quality of
28 those prisoner suits that are eventually filed because proper exhaustion often results in the creation

1 of an administrative record that is helpful to the court. When a grievance is filed shortly after the
2 event giving rise to the grievance, witnesses can be identified and questioned while memories are
3 still fresh, and evidence can be gathered and preserved.”). That endorsement is relevant to the
4 balancing test in that it shows the relevance and beneficial use of evidence gathered in a
5 prison’s investigation, which should be balanced against the prison’s security interests in
6 evaluating the official information privilege. In short, it is appropriate to note that the Supreme
7 Court has referred to the usefulness of witness statements that were generated from an
8 investigation of a grievance. Citing to *Woodford* in this way is not a reason to overrule the
9 magistrate judge’s order.

10 Defendants next argue that the magistrate judge erred in considering the *pro se* status of
11 Plaintiff. The relevant parts of the magistrate judge’s decision are as follows:

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

18 (ECF No. 75, p. 6); and

19 The Court is also troubled by the use of the privilege in this instance.
20 Defendants withheld all evidence generated from their investigation by claiming
21 that any disclosure would threaten safety and security. The content of the
22 documents do not bear out Defendants’ description. Instead, it appears that
23 Defendants improperly invoked the official information privilege to withhold all
24 pertinent evidence from Plaintiff, contrary to Supreme Court case law endorsing
25 disclosure of such evidence. Moreover, they took these questionable positions in
26 a case with a *pro se* litigant, who lacks the legal training to adequately challenge
27 Defendants’ positions.

28 (ECF No. 75, p. 9).

The Court does not find that these statements render the magistrate judge’s order legally
erroneous. The Ninth Circuit has stated that the reviewing court should evaluate “the
competing interests of the requesting litigant.” *Kerr*, 511 F.2d at 198. *See also Sanchez*, 936
F.2d at 1033-34 (9th Cir. 1990), *as amended on denial of reh’g* (Feb. 27, 1991), *as amended on*
denial of reh’g (May 24, 1991) (“To determine whether the information sought is privileged,

1 courts must weigh the potential benefits of disclosure against the potential disadvantages.”). It
2 was not legally erroneous for the magistrate judge to note the substantial benefits in this case of
3 witness statements made by Plaintiff and Defendants at the time of the incident. It was not
4 legal error to note that such information was of great value where a Plaintiff likely cannot take
5 a deposition.

6 The magistrate judge’s second comment regarding her opinion of Defendants’ position
7 also was not legal error. Although this paragraph appears to be the magistrate judge’s own
8 opinion of Defendants’ positions rather than her legal analysis, after having reviewed the
9 documents submitted for review and Defendants’ position, this Court must agree with the
10 magistrate judge’s assessment.

11 Next, Defendants argue that the magistrate judge erred in her balancing of the
12 competing interests in this case. Defendants claim that “the Magistrate Judge’s Order
13 disregarded the safety and security concerns of other inmates in the institution citing that it is
14 not snitching merely because they do not accuse Plaintiff of improper conduct,” and “[t]he
15 Magistrate Judge’s Order similarly disregarded Defendants’ concerns where the inmate is
16 shown to be involved in an ongoing criminal enterprise.” (ECF No. 77, pgs. 5-6). Defendants
17 also cite the concern of “preserving confidentiality of witnesses.” (*Id.* at 6).

18 The magistrate judge considered Defendants’ arguments regarding safety and security
19 in pages six through nine of her order. This Court has reviewed the underlying documents and
20 concurs. As the Magistrate Judge noted the witness statements were gathered after Plaintiff
21 herself identified those witnesses to be interviewed. These are not confidential informants—
22 they are not confidential and they did not “inform,” as they do not accuse Plaintiff of anything
23 improper. Moreover, while protection of a confidential informant is indeed a legitimate
24 security interest, these documents provide no more information than Defendants’ own brief.
25 The source of the prison’s information regarding contraband is not disclosed or discussed.
26 (Documents submitted for *in camera* review at 016-22, 046). Similarly, there is no discussion
27 of how the prison investigated the contraband. The documents concern what happened after
28 officers confronted Plaintiff, not how they learned of the contraband.

1 Finally, Defendants claim that “Plaintiff has been apprised of the results of the
2 investigation.” (ECF No. 77, p. 6). The magistrate judge addressed this issue when she wrote
3 “Defendants do not attach the documents provided to Plaintiff. Certainly if Plaintiff already
4 has these documents, there is no issue with disclosure. But given Defendants’ claim of
5 privilege and briefing, it appears that Defendants are withholding the witness statements
6 themselves and other evidence. To the extent Defendants are referring to the conclusions of the
7 prison after the investigation, such an opinion is far from a substitute for actual witness
8 statements and evidence, which could be used to impeach such witnesses at trial.” (ECF No.
9 75, pgs. 8-9). Defendants have not attached any documents to their objection, and the
10 magistrate judge’s reasoning here is sound.

11 **IV. CONCLUSION**

12 For the foregoing reasons, the May 1, 2018 order is not clearly erroneous or contrary to
13 law, and Defendants’ request for reconsideration (ECF No. 77) is DENIED.

14 IT IS SO ORDERED.

15 Dated: May 17, 2018

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17 SENIOR DISTRICT JUDGE
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