



1 on his face and then refused to let him decontaminate, resulting in severe and permanent injury  
2 to the eye. When Plaintiff complained about what happened to prison officials, he was placed  
3 into Administrative Segregation for fourteen months without any charges or rules violation  
4 reports.

5 Defendants claim that numerous documents regarding the underlying incident should be  
6 shielded from disclosure under the official information privilege. These withheld documents  
7 include all incident reports, conclusions from a related rules violation report, all interview notes  
8 of the witnesses to the event, and all analyses and conclusions from investigating officials.  
9 Defendants have submitted these documents for *in camera* review.

10 The Court has reviewed all submitted documents and issues the following order regarding  
11 their production.

## 12 **II. LEGAL STANDARDS**

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

20 The Ninth Circuit has since followed *Kerr* in requiring *in camera* review and a balancing  
21 of interests in ruling on the government's claim of the official information privilege. *See, e.g.*,  
22 *Seminara v. City of Long Beach*, 68 F.3d 481 (9th Cir. 1995) (affirming a magistrate judge order  
23 compelling disclosure and stating "Federal common law recognizes a qualified privilege for  
24 official information."); *Breed v. U.S. Dist. Ct. for N. Dist. of Cal.*, 542 F.2d 1114, 1116 (9th Cir.  
25 1976) (quoting *Kerr*, 426 U.S. at 406) ("Also, as required by *Kerr*, we recognize 'that in camera  
26 review is a highly appropriate and useful means of dealing with claims of governmental  
27 privilege.'"); *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033-34 (9th Cir. 1990), *as amended*  
28 *on denial of reh'g* (Feb. 27, 1991), *as amended on denial of reh'g* (May 24, 1991) (internal

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

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

14 It is also worth noting that District Judge Anthony W. Ishii overruled a similar objection  
15 based on the official information privilege by correctional officer defendants to production of  
16 prison investigation documents, including witness statements and summaries of the evidence.  
17 *Caruso v. Solorio*, 2018 WL 2254365, at \*2 (E.D. C.A., May 17, 2018) (“That endorsement  
18 [from *Woodford*] is relevant to the balancing test in that it shows the relevance and beneficial use  
19 of evidence gathered in a prison’s investigation, which should be balanced against the prison’s  
20 security interests in evaluating the official information privilege. In short, it is appropriate to  
21 note that the Supreme Court has referred to the usefulness of witness statements that were  
22 generated from an investigation of a grievance.”).

### 23 **III. DOCUMENTS WITHHELD BY DEFENDANTS UNDER THE OFFICIAL** 24 **INFORMATION PRIVILEGE**

25 Defendants have withheld the following categories of documents, on the basis of the  
26 official information privilege:

- 27 • Institutional Executive Review Committee (IERC) Critique and Qualitative  
28 Evaluation, which includes a synopsis of the underlying incident and evaluation

1 of use of force.

- 2 • Administrative Review of Use of Force, reviewing all evidence and witness
- 3 accounts of events and concluding regarding the sufficiency of the evidence.
- 4 • Report of Findings, Inmate Interview, summarizing an interview of Plaintiff as
- 5 well as a witness regarding the incident.
- 6 • Various copies of Form 602 grievances submitted by Plaintiff, as well as the
- 7 prison's responses to those grievances, sent to Plaintiff.
- 8 • Confidential Supplement to Appeal Inquiry, including summaries of witness
- 9 interviews, which it notes were not recorded, as well as the conclusion by
- 10 reviewing officials.
- 11 • Crime Incident Reports created by correctional officers at time of incident
- 12 regarding their description of events.
- 13 • Notice of Interview, regarding notification of interview for witnesses and rights
- 14 of the interviewees.
- 15 • Advisement of Rights to correctional officer regarding staff complaint.
- 16 • Brief Form Regarding Conclusion of Appeal.
- 17 • Conclusions from a Rules Violation Report against Plaintiff.

18 In summary, Defendants have withheld all documents regarding all investigations into  
19 the underlying incident, including incident reports written by the correctional officer defendants;  
20 evaluation of the 602s; notes of interviews of Plaintiff, witnesses, and defendants; summaries of  
21 all evidence; findings of all reviewing officers.

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

23 The Court begins its analysis with the potential advantages of disclosure. Those benefits  
24 are substantial. The documents contain contemporaneous statements and interview notes from  
25 witnesses close in time to the events at issue. Those witnesses include the plaintiff and the  
26 defendants in this case. Their reports are particularly valuable given the passage of time, as the  
27 incident took place almost five years ago. As the Supreme Court stated in *Woodford*, this  
28 litigation can certainly be assisted by the information gathered in the prison investigation process

1 “while memories are still fresh, and evidence can be gathered and preserved.” The documents  
2 are also important to the factfinding in this case because they include witness statements and  
3 incident reports regarding the central allegations in the case, i.e., use of force and medical care  
4 on the date in question. Without question, the documents would be subject to discovery under  
5 the standards of Federal Rule of Civil Procedure 26(b)(1) because they are relevant to Plaintiff’s  
6 claim, proportional to the needs of the case, and important to resolving the issues.

7 The investigation documents are also highly relevant in this case because of the specific  
8 claim of retaliation, which alleges that Plaintiff was placed in Administrative Segregation in  
9 retaliation for filing a staff complaint, and that Defendants’ investigation was used as a pretext  
10 to keep him in Administrative Segregation. The process and conclusion of that investigation is  
11 relevant that claim.

12 In support of their claim of official information privilege, Defendants have submitted the  
13 Declaration of J. Wood, acting litigation coordinator at California Correctional Institution. First,  
14 Mr. Wood claims that “disclosure of these records and results would inform inmates about  
15 CDCR’s excessive force review procedures, hampering future investigations. If this information  
16 is disclosed to Inmate Molina, inmates would be aware of how **all** use-of-force reviews are  
17 conducted, and under what circumstances incidents are referred for an inquiry or investigation.”  
18 (ECF No. 94, p. 3).

19 The Court does not find that this potential disadvantage supports withholding the  
20 documents. First of all, such logic would justify withholding all documents in all investigations  
21 of use of force, such that prison inmates would never receive the benefit of the contemporaneous  
22 witness statements and other documents. Especially in light of the Supreme Court’s statements  
23 mentioned above, the Court declines to hold that the official information privilege should shield  
24 production of any such documents. Moreover, the underlying documents do not include policy  
25 statements or instructions to officers regarding how to weigh evidence and proceed, to the extent  
26 that such information would be revealing. They merely include an evaluation of the witness  
27 statements and available evidence. Revealing that basic investigation procedure is hardly  
28 endangering to the prison’s safety and security. Indeed, J. Wood’s description of the process in

1 the public disclosure supporting Defendants' claim of privilege describes the procedure in as  
2 much detail as an inmate could glean from these documents. In sum, the Court does not see a  
3 safety and security threat created by an inmate learning the basic steps of investigation procedure  
4 already described in J. Wood's declaration.

5 Through that declaration, Defendants next argue that "This material has been treated as  
6 highly sensitive and has been kept confidential with access only by certain CDCR staff. The  
7 release of these documents, even under a protective order, would mean that CDCR would no  
8 longer control the sensitive information contained in those documents and that the information  
9 could reach prison inmates, including gang members, with potentially catastrophic results. The  
10 release of this information could also jeopardize the security of any institution where inmates are  
11 being held." (ECF No. 94, p. 3). While J. Wood's conclusions are indeed dire and "catastrophic,"  
12 the Court does not understand how they follow from the proposed disclosure. Again, the  
13 withheld documents are incident reports, witness statements, and investigation analyses  
14 regarding a specific event in December 2013. There is no mention of confidential informants.  
15 There is no mention of gang activity. There is no mention of any confidential surveillance  
16 techniques. Indeed, J. Wood does not point to a single statement or piece of information in those  
17 documents that would lead to "catastrophic results." The Court finds the assertion that allowing  
18 an inmate to see a report that the CDCR initially marked confidential would result in catastrophe  
19 to be wholly unsupported and hyperbolic.

20 J. Wood also claims that disclosure would have a chilling effect on witnesses to the  
21 investigation. (Id. at 4). The Court does not believe this to be so, and J. Wood provides no  
22 support for the assertion. Witnesses already have an incentive to be truthful in an investigation.  
23 The fact that those statements could be turned over to a plaintiff and possibly used in a court of  
24 law would seem to only add to the need for truthful testimony. Again, J. Wood does not point to  
25 anything unique about these statements or these investigations that would cause a security issue,  
26 and the Court does not agree that disclosure of contemporaneous accounts would necessarily  
27 chill cooperation or truthful testimony in a prison investigation. Moreover, such an argument  
28 would be true in every investigation and such an application would result in withholding all

1 witness statements and similar evidence, against the Supreme Court’s direction in *Woodford*.

2 J. Wood repeats these concerns regarding the Administrative Review related to  
3 allegations of excessive force. (Id. at 4-5). J. Woods further alleges that if the documents are  
4 disclosed to Plaintiff, he could potentially use the contents of confidential interviews to  
5 undermine working relationships between correctional officers. (Id.). The Court finds those  
6 concerns, especially concerning the gathering of evidence and witness statements, baseless for  
7 the same reasons as stated above. The Court has also reviewed the content and finds nothing in  
8 the witness statements that would undermine those relationships in this case, and J. Wood did  
9 not refer to any specific documents that would give rise to this concern. Again, this particular  
10 review was the alleged basis to keep Plaintiff in Administrative Segregation so has heightened  
11 relevant to this case.

12 Lastly, J. Wood claims that the confidential documents would be considered contraband  
13 and that “[i]f Inmate Molina’s cell is searched, the confidential documents are subject to search  
14 and seizure.” (Id. at 5). The Court finds this reasoning to be circular and dismissive of this  
15 Court’s orders. J. Wood appears to be claiming that this Court should allow Defendants to  
16 withhold discoverable documents because the CDCR will ignore any court order and seize the  
17 documents anyway, even without any legal basis to do so. Surely, this is not a proper basis for  
18 an official information privilege. If this Court finds that Plaintiff is entitled to these documents,  
19 then he has a right to have the documents in his possession and they will not be contraband. If  
20 the CDCR nevertheless seizes Plaintiff’s documents, notwithstanding this Court’s order, the  
21 CDCR would be violating Plaintiff’s access to the Courts as well as this order, and be subject to  
22 sanctions by this Court as well as potential liability to Plaintiff. Threatening to ignore this Court’s  
23 order is not persuasive.

24 After engaging in a balance of interests as required under law in evaluating the official  
25 information privilege, this Court holds that the official information privilege does not provide a  
26 basis to withhold the investigation documents, with one exception noted below. Incident reports,  
27 witness statements, summaries of witness statements, investigation documents, and related  
28 evidence are highly relevant to this case. The countervailing disadvantages regarding revealing

1 this information to an inmate are not persuasive and would apply in every investigation, thus  
2 eviscerating the advantages explained by the United States Supreme in *Woodford*. Defendants  
3 have not pointed to any unique piece of information that would jeopardize safety and security if  
4 disclosed. Thus, Defendants must produce this information, with the following exception.

5 The Court will permit Defendants to redact any conclusion(s) made by any prison  
6 investigators regarding whether staff in fact used excessive force to the extent that conclusion  
7 has not already been shared with Plaintiff. To be clear, this does not apply to investigators’  
8 summary of the evidence—it only applies to their ultimate conclusion(s). The Court finds that  
9 the investigators’ ultimate conclusion(s) have little if any relevance to this case because that  
10 question is one for the jury and the conclusion of the prison factfinder is not relevant and will  
11 likely be subject to exclusion in any event. Moreover, the Court finds credible Defendants’ claim  
12 that prison investigators could be chilled from finding against their own staff if they believed that  
13 their conclusions could be used against the staff in a court of law. Finally, the Court notes that  
14 the Supreme Court’s direction only explicitly applied to underlying evidence gathered in the  
15 factual investigation, and not to the conclusion of that investigation. Based on this Court’s  
16 balancing, and taking into account the U.S. Supreme Court’s direction, the Court finds that the  
17 official information privilege shields the conclusions from any prison investigators regarding  
18 whether defendants violated any prison policy or used excessive force against Plaintiff.

19 As to Defendants’ request for an “attorney’s eyes only” protective order, that request will  
20 be denied. As discussed above, the documents are highly relevant, and Defendants have not  
21 pointed to any unique piece of information that would jeopardize safety and security if disclosed.  
22 Accordingly, the Court sees no need for an “attorney’s eyes only” protective order.

23 **V. CONCLUSION AND ORDER**

24 Accordingly, IT IS HEREBY ORDERED that:

- 25 1. Within **14 days** from the date of service of this order, Defendants shall produce to  
26 Plaintiff the documents withheld under the official information privilege and provided  
27 *in camera*, **with the exception** of the following:

- 28 a. Confidential identifying information about prison officers, if any, including



