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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JARED M. VILLERY,
Plaintiff,
v.
JAY JONES, ET. AL.,
Defendants.

Case No. 1:15-cv-01360-DAD-HBK
ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S MOTION
TO COMPEL
(Doc. No. 120)

Pending before the Court is Plaintiff's motion to compel directed at Defendant Nelson. (Doc. No. 120, "Motion"). Defendant Nelson filed an opposition to the Motion. (Doc. No. 122, "Response"). Plaintiff filed a reply. (Doc. No. 125, "Reply"). On June 25, 2021, the Court ordered Plaintiff and Defendant Nelson to confer regarding the discovery at issue in Plaintiff's Motion and file a Joint Statement no later than July 23, 2021. (Doc. No. 138). On July 21, 2021, Defendant Nelson filed his Statement, seemingly resolving many of the disputed requests in Plaintiff's Motion.¹ (See Doc. No. 142, "Nelson's Statement"). On July 28, 2021, Plaintiff filed his Statement, agreeing in large part with Nelson's Statement. (See Doc. No. 144 "Plaintiff's Statement"). The Court now addresses those items the parties list as "unresolved" in their respective statements as set forth in more detail below.

¹ The Court ordered the parties to submit a "joint statement" regarding the outstanding discovery. (Doc. No. 138). Plaintiff explains the parties agreed to file separate statements due to "logistical issues" with his incarceration. (Doc. No. 144 at 1). The Court reviews both parties' statements.

I. Background and Plaintiff's claims

1
2 Plaintiff is proceeding *pro se* on his First Amended Complaint. (Doc. No. 16). The
3 court's § 1915A screening findings and recommendation order, adopted by the District Court
4 (Doc. No. 23), found in pertinent part that Plaintiff stated a First Amendment retaliation claim for
5 damages against Defendant Nelson for re-housing Plaintiff with inmate Jones. (Doc. No. 19 at
6 17-18).

7 On June 25, 2021, the Court granted Plaintiff's motion to file a belated motion to compel.
8 (Doc. No. 137). Plaintiff's Motion was initially directed at Defendant Nelson, compelling more
9 information as to RFP Nos. 1 through 5; and Interrogatories 5, 9, and 11 through 14. In Response,
10 Defendant Nelson addressed each of Plaintiff's RFP's and interrogatories in turn, setting forth
11 Nelson's objections and, when appropriate, Nelson's responses thereto. (Doc. No. 125).

12 Following the Court's June 25 Order, Nelson and Plaintiff concede the parties have
13 mostly resolved Plaintiff's Motion directed at Interrogatories 5, 9, and 11 through 14. (*See* Doc.
14 No. 142 at 1-2; Doc. No. 144 at 2). Defendant states he is providing supplemental responses to
15 Plaintiff addressing all interrogatories at issue in the Motion by August 6, 2021. (Doc. No. 142 at
16 2). Plaintiff confirms Nelson will provide him with supplemental responses to the foregoing
17 Interrogatories no later than August 6, 2021 and acknowledge if the responses "prove adequate,
18 this dispute will be resolved." (Doc. No. 144 at 2).

19 Regarding Plaintiff RFPs, Nelson identifies RFP No. 1, Nelson's work attendance records,
20 as unresolved. (Doc. No. 142 at 2). In addition to his stated objections, Nelson explains that
21 CDCR only has attendance that date back five years, no further. (*Id.*). Nelson states he is
22 attempting to obtain his CDCR 998-A and will make a "third attempt" to obtain the records from
23 CDCR and provide them to Plaintiff no later than August 6, 2021. (*Id.*). Similarly, Plaintiff's
24 Statement states that the only issue remaining concerning Nelson's work attendance records is
25 whether Nelson can obtain records that are dating back 5 years, or whether Nelson can obtain
26 records from 6 years ago. (Doc. No. 144 at 2) (stating "Nelson has agreed to look for such
27 records and, will update Plaintiff no later than August 6, 2021. Should the records be produced,
28 the issue will be resolved.").

1 The parties identify RFP Nos. 2 and 3 as mostly resolved. (Doc. No. 142 at 2; Doc. No.
2 144 at 2). Defendant submits that he served Plaintiff with supplemental responses on July 12,
3 2021. (Doc. No. 142 at 2). Plaintiff, however, contests the redactions of the inmates' names on
4 RFP Nos. 2 and 3. (Doc. No. 144 at 2-3) (Plaintiff acknowledging "Nelson provided [him] with
5 supplemental response to these requests, along with redacted copies of the documents requested.
6 However, by improperly redacting the names of inmates, whose housing was changed as recorded
7 in these records, the documents are now worthless for trial.").

8 The parties agree that RFP Nos. 4 and 5 remain entirely unresolved. (Doc. No. 142 at 2-3;
9 Doc. No. 144 at 2). The Court will address the unresolved discovery: RFP Nos. 1, 4, and 5, and
10 the issue of the redactions of all inmates' names on RFP Nos. 2 and 3.

11 II. Legal Standards of Review

12 A. Rule 26- Scope of Discovery Generally

13 "[U]nless otherwise limited by court order, the scope of discovery
14 is as follows: Parties may obtain discovery regarding any
15 nonprivileged matter that is relevant to any party's claim or defense
16 and **proportional to the needs of the case**, considering the
17 importance of the issues at stake in the action, the amount of
18 controversy, the parties' relative access to relevant information, the
19 parties' resources, the importance of the discovery in resolving the
20 issues, and whether the burden and expense of the proposed
21 discovery outweighs the benefit. Information within the scope of
22 discovery need not be admissible in evidence to be discoverable."

19 Fed. R. Civ. P. 26(b)(1) (emphasis added). District courts have "broad discretion to manage
20 discovery." *Avila v. Willits Env'tl. Remediation Tr.*, 633 F.3d 828, 833 (9th Cir. 2011).

21 B. Rule 26(b)(2)- Limitations on Frequency and Extent

22 Rule 26(b)(2) permits sets limits on the frequency and extent of
23 discovery as follows:

24 *When Permitted.* By order the court may alter the limits in these rules
25 on the number of depositions and interrogatories or on the length of
26 depositions under Rule 30. By order or local rule, the court may also
27 limit the number of requests under Rule 36.

26 Fed. R. Civ. P. 26(b)(2)(A) (emphasis in original).

27 *When Required.* On motion or on its own, the court must limit
28 frequency or extent of discovery otherwise allowed by these rules

1 or by local rule if it determines that: (i) the discovery sought is
2 unreasonably cumulative or duplicative, or can be obtained from
3 some other source that is more convenient, less burdensome, or less
4 expensive;” (ii) that the party seeking discovery has had ample
5 opportunity to obtain the information by discovery in the action; or
6 (iii) the proposed discovery is outside the scope permitted by Rule
7 26(b)(1).

8 Fed. R. Civ. P. 26(b)(2)(C).

9 **C. Fed. R. Civ. P. 34- Production of Documents**

10 “A party may serve on any other party a request within the scope of Rule 26(b) to produce
11 and permit the requesting party . . . to inspect [and] copy . . . any designated documents . . . in the
12 responding party’s possession, custody or control.” Fed. R. Civ. P. 34(a)(1). “The request must
13 describe with reasonable particularity each item or category of items to be inspected.” Fed. R.
14 Civ. P. 34(b)(1)(A). The party to whom the request is directed must respond in writing within 30
15 days of being served that inspection and related activities will be permitted as requested, or state
16 an objection to the request, including the reasons. Fed. R. Civ P. 34(b)(2).

17 **D. Fed. R. Civ. P. 37, Local Rule 251 - Motions to Compel**

18 A party propounding discovery may seek an order compelling disclosure when an
19 opposing party has failed to respond or has provided evasive or incomplete responses. Fed. R.
20 Civ. P. 37(a)(3)(B). “[A]n evasive or incomplete disclosure, answer, or response must be treated
21 as failure to disclose, answer, or respond.” Fed. R. Civ. P. 37(a)(4). “It is well established that a
22 failure to object to discovery requests within the time period constitutes a waiver of any
23 objection.” *Richmark Corp. v. Timber Falling Consultants*, 949 F.2d 1468, 1473 (9th Cir. 1992)
24 (citing *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981)). The moving party bears the
25 burden of demonstrating “actual and substantial prejudice from the denial of discovery.” See
26 *Hallet v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (citations omitted).

27 Local Rule 251 requires that parties confer after filing a motion to compel. L.R. 251(b).
28 The rule requires that “parties set forth their differences and the bases therefor in a Joint
Statement re Discovery Disagreement.” *Id.* at (b)-(c).

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1 **III. Analysis**

2 Upon review, the Court grants in part and denies in part Plaintiff's Motion. As set forth in
3 more detail below, the Court grants Plaintiff's Motion as to RFP Nos. 2 and 3, as modified, and
4 RFP No. 4. The Court denies Plaintiff's Motion as to RFP Nos. 1 and 5. Plaintiff's Motion
5 pertaining to Interrogatory Nos. 1, 5, 11, 12, and 13-15 is denied as moot, without prejudice,
6 considering Nelson is providing supplemental responses to Plaintiff by August 6, 2021.

7 **A. Unresolved Requests for Production Nos. 1, 4, and 5**

8 REQUEST FOR PRODUCTION NO. 1:

9 Please identify and produce at least one set of records, including, but
10 not limited to, your CDCR 998-A Employee's Attendance Records,
11 which identify the position numbers of where you were working at
12 CCI from January 15, 2014 through July 30, 2014.

13 NELSON'S RESPONSE TO REQUEST FOR PRODUCTION NO.
14 1:

15 Responding party objects that the request for seven months of
16 Defendant's CDCR employee attendance records from 2014 is
17 overly broad and unduly burdensome. Responding party further
18 objects that the request seeks documents that are irrelevant to any
19 claim or defense in this action. There are no claims involving
20 Defendant's attendance record at CCI.

21 Plaintiff argues given the specificity of RFP No. 1, it cannot be deemed overbroad, nor
22 can it be deemed unduly burdensome because the CDCR998-A form is likely no more than seven
23 pages long. (Doc. No. 120 at 11). In opposition, Nelson states written discovery responses to
24 date have already sufficiently addressed that Nelson worked during the period in question and in
25 close proximity to correctional officer Schmidt. (Doc. No. 122 at 3). Nelson also explains that
26 CDCR does not keep records in excess of five years. (Doc. No. 142 at 2). Thus, he does not have
27 attendance records from 2014. Nelson nonetheless agreed to ask CDCR for a third time to try to
28 locate these records. (*Id.*). In reply, Plaintiff states Nelson's work attendance records are necessary to
prove Nelson was working in Plaintiff's housing unit on particular dates to show he worked with
Schmidt and also had knowledge that Plaintiff was often housed alone in a cell. (Doc. No. 120 at 11-
12). Nelson's Statement re-asserts the same arguments Nelson previously raised. (Doc. No. 142 at
2). Plaintiff's Statement appears to contend that while conferring, Nelson agreed to look for the

1 attendance records, but noted that the CDCR only keeps attendance records for a five-year time
2 period. (Doc. No. 144 at 2).

3 At the outset, the Court notes that Nelson cannot produce the records if they no longer exist.
4 Nelson has represented that he has on at least two other occasions sought these attendance records but
5 CDCR does not keep records more than five years of age. Here the seven-month period is now seven
6 years old. Further, the Court finds Nelson's work attendance records requested are duplicative. As
7 stated above, Plaintiff states that he needs RFP No. 1 to prove Nelson worked on the day of the
8 incident and that he worked with Schmidt. Nelson admits to working in Plaintiff's housing unit
9 during the relevant time and working in proximity with Schmidt. Thus, there is no dispute concerning
10 whether Nelson was working in Plaintiff's housing unit when the incident giving rise to the cause of
11 action occurred. Thus, to the extent that further efforts by Nelson to obtain the records from CDCR
12 prove unfruitful, Plaintiff's Motion is denied as to RFP No. 1.

13 The next RFP in dispute is RFP No. 4, concerning documents showing inmates' cell
14 movements. (Doc. No. 142 at 3); (Doc. No. 144 at 2-3).

15 **REQUEST FOR PRODUCTION NO. 4:**

16 Please identify and produce any and all CDCR 128-G's,
17 Classification Committe [sic] Chronos, and/or any other records
18 from the Central File of the inmate that you had moved from cell C2-
19 148 to cell C2-217 on July 24, 2014, who you identified as a
20 "Southern California Skinhead" in response to Plaintiff's
21 Interrogatory No. 5, which document that this inmate was classified
22 by the CDCR as an active "Skinhead," as of July 24, 2014. (The
scope of this request is limited to documents generated by CDCR
personnel, or other law enforcement agencies, from January 1, 2013
through July 24, 2014. The name and CDCR Number of this inmate
must remain unredacted; however, any other sensitive or private
information may be redacted).

23 **RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

24 Responding party objects to this request as it seeks confidential
25 documents of non-party inmates, its production presents a safety and
26 security threat to the institution, and it violates the privacy interests
27 of non-party inmates. Without waiving the objections, responding
28 party is not the custodian of the confidential records, does not have
access to the requested confidential records, and therefore
responding party does not have responsive documents in his
possession, custody, or control.

1 Plaintiff asserts that Nelson claims Plaintiff was returned to the housing unit because the only
2 other inmate available to be housed with Plaintiff posed a security risk to Plaintiff because they were
3 a “Southern California Skinhead.” (Doc. No. 120 at 15). In opposition, Defendant Nelson asserts the
4 records pose a security risk and identify another inmate as a violent gang member. (Doc. No. 122 at
5 5). Nelson further asserts his employment does not mean he has possession of the documents, and
6 Plaintiff must instead subpoena CDCR. (*Id.*). Nelson’s Statement re-asserts not having possession,
7 control, or custody of the documents, and recognizes he cannot produce without an order from the
8 Court. (Doc. No. 142 at 3). Plaintiff’s Statement reiterates that the documents are “crucial” to
9 impeach Nelson on his justifications for moving Jones into his cell. (Doc. No. 144 at 2-3).

10 The Court understands Defendant Nelson’s position that documents concerning a non-
11 party inmate, who has been described as a gang member, may indeed pose a security risk to the
12 non-party inmate, or the institution. However, if Nelson’s position is that the inmate identified as
13 a “Southern California Skinhead” was the only other inmate, aside from Jones, available to be
14 housed with Plaintiff, then the documentation pertaining to cell housing decisions dated the time
15 of the incident are relevant and proportional to the issues in this case. The documents could
16 either support Nelson’s position or show Nelson’s statement was untrue.

17 To the extent Nelson argues he does not have the documents in his care, custody, or
18 control, despite his continued employment with the CDCR, the District Court’s October 28, 2020
19 Order granting Plaintiff’s motion for reconsideration ruling on a May 29, 2019 motion to compel
20 in this case, specifically noted that courts often deem correctional officials to have “constructive
21 control” over documents held by their employer, unless correctional officials contend they do not
22 have constructive possession of the documents and provide factual support for the contention.
23 (Doc. No. 105 at 3-4) (citations omitted); (*See also* Doc. No. 134 at 14) (citations omitted).

24 “Control is defined as the legal right to obtain documents on demand.” *Lopez v.*
25 *Chertoff*, No. 07-cv-1566-LEW (PC), 2009 WL 1575214, at *1 (E.D. Cal. June 2, 2009) (citations
26 omitted). Former employees of government agencies cannot be deemed to have control of
27 documents in former employers’ possession. Here, based on Nelson’s own assertion, he remains
28 employed with CDCR. (Doc. No. 122 at 5). Nelson has not provided factual support for the

1 contention that he cannot request the document from his employer. Thus, to the extent such
2 documents exist in response to RFP No. 4, Nelson must make the documents available to Plaintiff
3 within seven (7) days from the date on this Order.

4 Next, Plaintiff's RFP No. 5 remains unresolved. (Doc. No. 142 at 3); (Doc. No. 144 at 3).

5 **REQUEST FOR PRODUCTION NO. 5:**

6 Please identify and produce any and all inmate attendance records,
7 including, but not limited to, attendance rosters, sign-in sheets,
8 and/or inmate pass lists, which identify the names and CDCR
9 numbers of all inmates on Facility C at CCI, who attended any form
10 of religious services on July 24, 2014. (Such records are available to
11 you through the Head Chaplin at the California Correctional
12 Institution. You may redact the names and CDCR numbers of all
13 inmates on any responsive records, with the exception of Inmate
14 Cedric Jones, CDCR# AK-2526).

15 **RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

16 Responding party objects to this request as it seeks confidential
17 documents of non-party inmates, and it violates the privacy interests
18 of non-party inmates. Without waiving the objections, responding
19 party does not have access to the requested records, and therefore
20 responding party does not have responsive documents in his
21 possession, custody, or control.

22 Plaintiff states the information he seeks is relevant to defend against a statement Nelson
23 made (to the effect that Plaintiff could have refused to enter the cell with Jones when he was
24 moved in with him on July 24, 2014, but he did not). (Doc. No. 120 at 17). Plaintiff says inmate
25 Jones was attending Islamic religious services and was not present in the cell when he returned.
26 (Id.). In response, Nelson objects to RFP No. 5, raising the privacy and confidentiality concerns
27 of non-party inmates with respect to their attendance at religious services. (Doc. No. 122 at 6).
28 Additionally, Nelson asserts he does not have possession of documents responsive to RFP No. 5.
(Id.). Finally, Nelson argues that such documentation is unnecessary and duplicative of
Plaintiff's testimony as a witness. (Doc. No. 122 at 6). Nelson's Statement reiterates that he does
not have possession of documents responsive to RFP 5. (Doc. No. 142 at 3). Further, Nelson
explains to the extent the CDCR makes documents responsive to RFP 5 available to Plaintiff,
then the third-party inmate names must be redacted. (Id.). Plaintiff's Statement contends that
Nelson should have provided a declaration supporting his claims that third-party inmates' names

1 must be redacted. (Doc. No. 144 at 3).

2 The Court has previously rejected Nelson's argument concerning his lack of possession or
3 control of other CDCR documents. *Supra* at 7-8. However, the Court agrees in part with Nelson
4 because documents concerning all inmates' attendance at religious services requested in RFP No.
5 5 is not relevant in this case and is overly broad. Plaintiff alleges that Jones was not in the cell
6 when he was escorted back to his cell because he believes Jones was attending religious services
7 at the time. It is of no consequence *where* inmate Jones was when Plaintiff was escorted to the
8 cell. Plaintiff's position is that inmate Jones was not in the cell. Plaintiff cannot be permitted to
9 go on a fishing expedition to discover where in fact inmate Jones was when he purports Jones was
10 not in his cell.

11 Further, as worded, RFP No. 5 is overly broad to the extent it seeks information on "all
12 inmates" attendance at religious services. Plaintiff has not articulated a valid reason why he
13 needs "all inmates" attendance at religious services on July 24. Producing documentation
14 regarding all inmates' religious services attendance on July 24 is also not proportional to the
15 needs of the case. Nevertheless, whatever the reason inmate Jones was not in the cell when
16 Plaintiff was escorted to the cell, whether it be for religious attendance or for some other
17 appointment, is of no consequence to Plaintiff's case. Plaintiff's Motion directed at RFP No. 5 is
18 denied.

19 **B. Parties' Partially Resolved RFP Nos. 2 and 3**

20 The Court now turns to address RFP Nos. 2 and 3, which Plaintiff's Statement
21 acknowledges Nelson supplemented, but challenges the redactions of the third-party inmates'
22 names. (Doc. No. 144 at 2). RFP Nos. 2 and 3 both pertain to the Bed Request Batch, RFP No.
23 2 is directed at inmate Brent Walkins and RFP No. 3 directed at inmate Jones.

24 **REQUEST FOR PRODUCTION NO. 2:**

25 Please produce the SOMS generated Bed Request Batch that was
26 submitted on January 22, 2014, through which staff requested the
27 move of inmate Brent Walkins CDCR# AP-5668, into cell C2-104.
(The names of the staff members who requested and reviewed this
28 request must not be redacted).

NELSON'S RESPONSE TO REQUEST FOR PRODUCTION

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NO. 2:

Responding party objects to this request as the cell move of inmate non-party Brent Walkins on January 22, 2014 is not related to claims or defenses involving responding Defendant Nelson. Pursuant to the screening order at Doc. 19, Plaintiff’s retaliation claim against Defendant Nelson involves Plaintiff’s re-housing with inmate Jones in July 2014. (See Doc. 19 at 6:15-23, 17:14-25). Without waiving the objection, Defendant has previously stated in response to Plaintiff’s special interrogatory No. 9: “Defendant has no recollection of moving any inmate named Brent Walkins into a cell occupied by Plaintiff on any date.”

Plaintiff argues these documents could show a conspiracy between Schmidt and Nelson in placing inmate Jones in his cell because a Bed Request Batch will document this information. (Doc. No. 120 at 12). In response, Defendant Nelson notes that Plaintiff’s request for Bed Batch documents regarding the moving of inmate Walkins will not show movement of inmate Jones, the subject of the lawsuit. (Doc. No. 122 at 3).

REQUEST FOR PRODUCTION NO. 3:

Please produce the SOMS generated Bed Request Batch that was submitted on July 9, 2014, through which staff requested the move on inmate Cedric Jones, CDCR# AK-2526, into cell C2-217. (The names of the staff members who requested and reviewed this request must not be redacted).

RESPONSE TO REQUEST FOR PRODUCTION NO. 3:

Responding party objects that details of the cell movement of non-party inmate Jones on July 9, 2014 is not related to claims or defenses in this action. Without waiving the objection, responding party asserts that he is not the custodian of inmate records, and the bed request batch is not readily obtainable.

Plaintiff argues this information is relevant to proving Jones’ instability and confrontational behavior with cellmates and to challenge Nelson’s credibility that there was no evidence demonstrating that Plaintiff and inmate Jones could not be housed together. (Doc. No. 120 at 15). In opposition, Defendant Nelson argues that the request is not likely to produce relevant evidence, that such documents do not contain the narratives that Plaintiff appears to envision they contain, and maintains he is not the custodian of inmate records, despite his current employment. (Doc. No. 122 at 4).

To the extent it appears Defendant Nelson has provided Plaintiff with documents

1 responsive to RFP Nos. 2 and 3, but has redacted all inmates' names, it is unclear why *all* inmate
2 names would be redacted when RFP No. 2 requested documents specific to inmate Walkins and
3 RFP No. 3 requested as to inmate Jones. Thus, to the extent such documents exist concerning the
4 Bed Request Batch submitted on July 9, 2014, Nelson shall provide supplemental documents with
5 the names of inmates Walkins and Jones unredacted within seven (7) days from the date on the
6 order.

7 Accordingly, it is **ORDERED**:

8 1. Plaintiff's Motion is **granted in part** and **denied in part** as follows: (a) RFP No. 1 is
9 denied to the extent CDCR does not maintain attendance records in excess of five years; (b) RFP
10 2 and 3, supplemented, is **granted as modified** to the limited extent that if inmates Jones' and
11 Walkins' names appear, such names shall be unredacted on the documents Nelson produces to
12 Plaintiff; (c) RFP No. 4 is **granted**; (d) RFP No. 5 is **denied**. Defendant must produce documents
13 responsive to RFP Nos. 2, 3, and 4 **within seven (7) days from the date on this order**.

14 2. Plaintiff's motion to compel directed at Interrogatories Nos. 5, 9, 11 through 14 is
15 **denied as moot, without prejudice**.

16 3. Affording Plaintiff an opportunity to review the ordered discovery, Plaintiff's response
17 to Defendant Nelson's motion for summary judgment (Doc. No. 85) shall be delivered to
18 correctional officials for mailing **no later than September 19, 2021**.

19
20 Dated: August 5, 2021


HELENA M. BARCH-KUCHTA
UNITED STATES MAGISTRATE JUDGE