



1 motion is deemed submitted. Local Rule 230(l).

2 In his motion, Plaintiff states that on or about July 6, 2021, he received a response to the  
3 subpoena. (ECF No. 34.) The response, attached to Plaintiff’s motion, does not provide the  
4 requested document or the information requested in the subpoena. The affidavit of custodian of  
5 records provides that “a thorough search of our files was carried out by me or at my direction has  
6 revealed that this business or facility *does not* have the records described in the subpoena duces  
7 tecum.” (*Id.* at 4 (emphasis in original).) The affidavit is signed and dated June 30, 2021.<sup>1</sup> (*Id.*)

8 Plaintiff argues that the assertion that the Warden of CSATF is not in possession of the  
9 documents is a farce. Plaintiff states that he was previously assigned as a clerk in the program  
10 office at another institution and had previously been tasked with sorting such records. Per  
11 Plaintiff’s former supervisor, these records were to be kept for 7 years “by law.” Plaintiff thus  
12 argues that it is hard to believe that such records (or the information contained within) are no  
13 longer in existence, digitally or physically, by payroll or other means. Plaintiff further asserts that  
14 the response appears to be no more than a boilerplate answer. (*Id.* at 1.)

## 15 **II. Discussion**

16 A subpoena served pursuant to Federal Rule of Civil Procedure 45 shall “command each  
17 person to whom it is directed to do the following at a specified time and place: . . . produce  
18 designated documents, electronically stored information, or tangible things in that person’s  
19 possession, custody, or control . . . .” Fed. R. Civ. P. 45(a)(1)(A)(iii). Every document subpoena  
20 must state the court from which it issued, state the title of the action and its civil-action number,  
21 specify the time and place set for the production, and set out the text of Rule 45(d) and (e). Fed.  
22 R. Civ. P. 45(a)(1)(A)(i)-(iv). Serving a subpoena requires “delivering a copy to the named  
23 person,” which is interpreted to mean personal service. Fed. R. Civ. P. 45(b)(1). *See Prescott v.*  
24 *Cty. of Stanislaus*, No. 1:10-cv-00592 JLT, 2012 WL 10617, at \*3 (E.D. Cal. Jan. 3, 2012)  
25 (noting that a majority of courts interpreting “delivering” to require personal service).

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27 <sup>1</sup> The Court notes, however, that the typed portion of the affidavit states that it was “Executed at  
28 Corcoran, California on this 24<sup>th</sup> day of November 24,” which appears to be a clerical error.  
(ECF No. 34, p. 4.)

1 Pursuant to Rule 45(g), a court may “hold in contempt a person who, having been served,  
2 fails without adequate excuse to obey the subpoena or an order related to it.” Fed. R. Civ. P.  
3 45(g). Where a party seeks a contempt sanction against a nonparty, that nonparty has the right to  
4 be heard in a meaningful fashion. *United States Sec. & Exh. Comm’n v. Hyatt*, 621 F.3d 687,  
5 696–97(7th Cir. 2010); *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1342 (8th Cir. 1975).  
6 However, some courts have expressed concerns with issuing a contempt order imposing sanctions  
7 for a non-party’s non-compliance with a Rule 45 subpoena absent a court order compelling  
8 discovery. *See Schoonmaker v. Cty. of Eureka*, 2018 WL 5829851, at \*1 (N.D. Cal. Nov. 7,  
9 2018).

10 It does not appear disputed that a representative of the Warden of CSATF was served with  
11 a subpoena commanding it to produce responsive documents. The subpoena served on the  
12 Warden of CSATF complied with the substantive requirements of Rule 45. (ECF No. 32-1.) The  
13 subpoena was personally served on Ryan Laber, Office Technician, on June 28, 2021 at 11:00  
14 a.m. at P.O. Box 7100, Corcoran, California 93212. (ECF No. 33.) Finally, a response signed by  
15 Jason Barba, the Litigation Coordinator of CSATF and Corcoran State Prison was received by  
16 Plaintiff on July 6, 2021. (ECF No. 34, p. 4.)

17 Based on the above, it is not clear to the Court that the response from the Warden of  
18 CSATF warrants the Court finding the Warden has presented an “adequate excuse.” Though the  
19 response to the subpoena states that a thorough search was carried out and revealed that the  
20 business or facility does not have the records described in the subpoena, there is insufficient  
21 information for the Court to determine whether CSATF has presented “adequate excuse” for  
22 failing to produce the requested documents. Fed. R. Civ. P. 45(g). The Court has evidence that  
23 such documents do in fact exist, but the Court cannot be certain that a violation of the subpoena  
24 has occurred. *See Fremont Energy Corp. v. Seattle Post Intelligencer*, 688 F.2d 1285, 1287 (9th  
25 Cir. 1982).

26 Accordingly, the Court finds it appropriate to grant Plaintiff’s motion to compel, in part,  
27 to allow the Warden of CSATF to either produce the requested documents or to provide further  
28 explanation as to the extent of the search for the requested records. Any explanation should

1 include, but is not limited to, information such as whether such records or information ever  
2 existed, and if so, whether they were lost or destroyed, whether further specificity is required to  
3 identify a particular responsive document, or whether the responsive documents might be located  
4 at a different facility or building. The Court does not find other sanctions warranted at this time.  
5 However, the Court may issue further orders pursuant to Rule 45(g) if the Warden's response is  
6 determined insufficient to provide "adequate excuse" for the failure to provide the requested  
7 documents.

8 **III. Order**

9 Accordingly, IT IS HEREBY ORDERED as follows:

- 10 1. Plaintiff's motion to compel, (ECF No. 34), is GRANTED IN PART as discussed above;
- 11 2. Within **twenty (20) days** from the date of this order, the United States Marshals Service is  
12 directed to serve a copy of this order upon the Warden of CSATF;
- 13 3. The Warden of CSATF shall submit to the Court a written response within **forty-five (45)**  
14 **days** from the date of service of this order, either confirming production of the requested  
15 documents or providing an explanation of why the records could not be produced. Any  
16 explanation should include, but is not limited to, information such as whether such records  
17 or information ever existed, and if so, whether they were lost or destroyed, whether further  
18 specificity is required to identify a particular responsive document, or whether the  
19 responsive documents might be located at a different facility or building; and
- 20 4. The deadline for Plaintiff to file a motion to amend and a Second Amended Complaint  
21 substituting the names of Defendants Doe 1, Doe 2, and Doe 3 is VACATED and will be  
22 reset following resolution of the subpoena.

23 IT IS SO ORDERED.

24 Dated: July 15, 2021

25 /s/ Barbara A. McAuliffe  
26 UNITED STATES MAGISTRATE JUDGE