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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 TRACYE BENARD WASHINGTON,

12 Plaintiff,

13 vs.

14 HICKS, et al.,

15 Defendants
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1:19-cv-00156-NONE-GSA-PC

**ORDER GRANTING PLAINTIFF'S
MOTION TO COMPEL IN PART
(ECF No. 41.)**

**FORTY-FIVE-DAY DEADLINE FOR
DEFENDANT ROCHA TO PRODUCE
DOCUMENTS REQUESTED BY
PLAINTIFF IN HIS REQUEST FOR
PRODUCTION OF DOCUMENT, SET ONE,
NO. 2, PURSUANT TO THIS ORDER**

18 **I. BACKGROUND**

19 Tracie Benard Washington ("Plaintiff") is a state prisoner proceeding *pro se* with this
20 civil rights action pursuant to 42 U.S.C. § 1983. This case now proceeds with Plaintiff's original
21 Complaint filed on February 5, 2019, against defendants Sergeant David Hicks and Correctional
22 Officer Hipolito Rocha ("Defendants") for use of excessive force in violation of the Eighth
23 Amendment. (ECF No. 1.)¹

24 On December 7, 2020, Defendant Rocha filed an Answer to the Complaint. On December
25 8, 2020, the court issued a Discovery and Scheduling Order setting a discovery deadline of May
26 8, 2021 and a dispositive motions deadline of July 8, 2021. (ECF No. 28.) On December 23,
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28 ¹ On June 22, 2020, the court issued an order dismissing all other claims and defendants from this
action, based on Plaintiff's failure to state a claim. (ECF No. 19.)

1 2020, Defendant Hicks filed an Answer to the Complaint, and on January 18, 2021, the court
2 issued an order extending application of the Discovery and Scheduling Order to Defendant Hicks.
3 (ECF No. 36.)

4 On April 29, 2021, Plaintiff filed a motion to compel Defendant Rocha to produce
5 documents pursuant to Plaintiff's Request for Production of Documents, Set One, No. 2. (ECF
6 No. 41.) On May 20, 2021, Defendant Rocha filed an opposition to the motion. (ECF No. 50.)
7 On May 24, 2021, Plaintiff replied to the opposition. (ECF No. 52.)

8 **II. MOTION TO COMPEL – LEGAL STANDARD**

9 The Federal Rules of Civil Procedure govern discovery in this civil action. The discovery
10 process is subject to the overriding limitation of good faith, and callous disregard of discovery
11 responsibilities cannot be condoned. Asea, Inc. v. Southern Pac. Transp. Co., 669 F.2d 1242,
12 1246 (9th Cir. 1981) (quotation marks and citation omitted). Parties may obtain discovery
13 regarding any nonprivileged matter that is relevant to any party's claim or defense and
14 proportional to the needs of the case, considering the importance of the issues at stake in the
15 action, the amount in controversy, the parties' relative access to relevant information, the parties'
16 resources, the importance of the discovery in resolving the issues, and whether the burden or
17 expense of the proposed discovery outweighs its likely benefit. Information within this scope of
18 discovery need not be admissible in evidence to be discoverable. Fed. R. Civ. P. 26(b)(1)
19 (quotation marks omitted).

20 Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, A party seeking discovery
21 may move for an order compelling a discovery response when an opposing party has failed to
22 respond or has provided evasive or incomplete responses. Fed. R. Civ. P. 37(a)(3)(B). “[A]n
23 evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose,
24 answer, or respond.” Fed. R. Civ. P. 37(a)(4). The moving party bears the burden of
25 demonstrating “actual and substantial prejudice” from the denial of discovery. See Hallett v.
26 Morgan, 296 F.3d 732, 751 (9th Cir. 2002) (citations omitted).

27 Generally, if the responding party objects to a discovery request, the party moving to
28 compel bears the burden of demonstrating why the objections are not justified. E.g., Grabek v.

1 Dickinson, No. CIV S-10-2892 GGH P, 2012 WL 113799, at *1 (E.D. Cal. Jan. 13, 2012);
2 Womack v. Virga, No. CIV S-11-1030 MCE EFB P, 2011 WL 6703958, at *3; Mitchell v. Felker,
3 No. CV 08-119RAJ, 2010 WL 3835765, at *2 (E.D. Cal. Sep. 29, 2010); Ellis v. Cambra, No.
4 1:02-cv-05646-AWI-SMS PC, 2008 WL 860523, at *4 (E.D. Cal. Mar. 27, 2008). This requires
5 the moving party to inform the court which discovery requests are the subject of the motion to
6 compel, and, for each disputed response, why the information sought is relevant and why the
7 responding party's objections are not meritorious. Id. However, the court is vested with broad
8 discretion to manage discovery and notwithstanding these procedures, Plaintiff is entitled to
9 leniency as a *pro se* litigator; therefore, to the extent possible, the court endeavors to resolve his
10 motion to compel on its merits. Hunt v. County of Orange, 672 F.3d 606, 616 (9th Cir. 2012);
11 Survivor Media, Inc. v. Survivor Productions, 406 F.3d 625, 635 (9th Cir. 2005); Hallett, 296
12 F.3d at 751.

13 **III. PLAINTIFF'S MOTION TO COMPEL**

14 Plaintiff requests an order pursuant to Rule 37 of the Federal Rules of Civil Procedure
15 compelling Defendant Rocha to produce documents in response to Plaintiff's Request for
16 Production, Set one, No. 2. Plaintiff requests the production of Defendant Rocha's CDCR
17 personnel files/records regarding prior claims against him within five years prior to the events at
18 issue in this case.

19 Plaintiff claims that Defendant is objecting to and refusing to provide documents pursuant
20 to his request. Attached to the motion to compel, Plaintiff has submitted exhibits including his
21 Request for Production of Documents (Set One), Defendant Rocha's responses, and the Privilege
22 Log for Defendant Rocha submitted by B. Hancock, Litigation Coordinator at Kern Valley State
23 Prison, on behalf of Defendant Rocha. Following is Plaintiff's Request for Production of
24 Documents, No. 2 of Set One, and Defendant Rocha's response.

25 **REQUEST FOR PRODUCTION OF DOCUMENTS, SET ONE, NO. 2:**

26 "Produce the CDCR Personel (*sic*) file/records of Defendant H. Rocha; to
27 include any and all material and information regarding any prior claims within
28 five yeard (*sic*) prior the events in this civil action which reveal (1) allegations of

1 use of illegal, unnecessary or excessive force against a prisoner (2) perjury (3)
2 falsifying evidence (4) false statements (5) criminal convictions (6)
3 admonishments (6) (*sic*) suspensions (7) drug abuse falsifying documents (8)
4 tampering with evidence (9) destroying evidence. All while employed by CDCR
5 pursuant to California Senate Bill 1421, Evidence Code 1043, Pitchess v. Superior
6 Court (1974) 11 Cal 3d 531 and National Lawyers Guild v. City of Hayward
7 (2020) California Supreme Court. Good cause existing.”

8 (ECF No. 41 at 7:17-25.)

9 **DEFENDANT ROCHA’S RESPONSE TO REQUEST NO. 2, SET ONE:**

10 “Objection. The claims in this lawsuit involve a use of force on February
11 6, 2018. Documents regarding allegations of misconduct during other incidents
12 are not relevant to any party’s claim or defense, and are not proportional to the
13 needs of the case. Fed. R. Civ. P. 26(b)(1). Producing other non-party inmates’
14 grievances to Plaintiff also violates the privacy rights of those inmates and
15 implicates institutional security concerns. Defendant further objects that Plaintiff
16 has access to his own prison records concerning the incidents in this case under
17 California Code of Regulations, title 15 § 3370. Personnel-related files are also
18 subject to the qualified privilege of official information and federal common law
19 privilege. Sanchez v. City of Santa Ana, 936 F.2d 1027, 1033-34 (9th Cir. 1991).
20 Such records are also protected by the privacy rights of staff under applicable
21 California statutes, including Penal Code §§ 832.7 and 838.8, Government Code
22 § 6254, and Civil Code §§ 1798.24, as well as California Code of Regulations,
23 Title 15 §§ 3321, 3370, 3400, and 3450. Personnel files for peace officers are
24 also protected under California Evidence Code §§ 1040, 1043, and 1046.”

25 Consistent with these objections, Defendant withholds the following
26 records:

- 27 • Report of unrelated personnel matter for Hicks regarding incident on
28 August 21, 2013

- 1 • Report of unrelated personnel matter for Hicks regarding incident on
- 2 January 27 and 28, 2014
- 3 • Report of unrelated personnel matter for Hicks regarding incident
- 4 September 18, 2016
- 5 • Report of unrelated personnel matter for Hicks regarding incidents on
- 6 September 11, 2018, and September 12, 2018
- 7 • Report of unrelated personnel matter for Rocha regarding incidents on
- 8 September 11 and 12, 2018, and February 12, 2019
- 9 • Confidential Supplement to CDCR Form 602 log number KVSP-18-
- 10 00387

11 Without waiving these objections, Defendant produces the following
12 records:

- 13 • Plaintiff's administrative grievance log number KVSP-18-00387 (Bates
- 14 AGO001-035)

15 (Id. at 7:28-8:26.)

16 **IV. PLAINTIFF'S POSITION**

17 Plaintiff asserts that the allegations made in this lawsuit accuse two California State
18 Prison guards of using illegal, unnecessary, and excessive force upon Plaintiff with callous and
19 evil intent causing serious bodily injury. To prove that these officers acted illegally and callously,
20 Plaintiff requested information from Defendants regarding their past history while employed with
21 the California Department of Corrections and Rehabilitation. Plaintiff argues that his request is
22 not burdensome, overreaching, or privileged. Plaintiff cites law supporting the proposition that
23 the State Attorney General must disclose police misconduct files.

24 Plaintiff notes that the privilege log and declaration by B. Hancock reveal that both
25 Defendants Rocha and Hicks together were involved in a reported use of force incident in moving
26 an inmate other than Plaintiff on September 11 and September 12, 2018, just seven months after
27 the incident for which this lawsuit is brought.

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1 **V. DEFENDANT ROCHA’S OPPOSITION**

2 Defendant Rocha argues that Plaintiff’s motion to compel should be denied because
3 Plaintiff requests records for a totally unrelated event that occurred seven months after the
4 incident in this case; he did not attempt to resolve the dispute with Defendants via writing; he
5 failed to identify why the sought-after information is relevant to this action; he failed to discuss
6 why Rocha’s objections are not justified; he failed to provide any justification to overcome the
7 dangers of production discussed in the declaration supporting the privilege log; and he failed to
8 show how the case law cited in his motion favors production in this discovery dispute.

9 Defendant refers to the Declaration of B. Hancock, Litigation Coordinator at KVSP,
10 served on Plaintiff, which supports Defendant’s objections to disclosure of the records pursuant
11 to the qualified privilege for official information recognized in federal common law, as required
12 under Kerr v. U.S. Dist. Court for the N. Dist. Of Cal., 511 3d 192, 197 (9th Cir. 1975). (ECF
13 No. 41 at 17.) Defendant asserts that consistent with the requirements of Kerr, Hancock’s
14 declaration included: “(1) an affirmation that the agency has maintained the confidentiality of the
15 documents at issue; (2) a statement that the official has personally reviewed the documents; (3)
16 a specific identification of the governmental or privacy interests that would be compromised by
17 production; (4) a description of how disclosure subject to a carefully crafted protective order
18 would create a substantial risk of harm to these interests; and (5) a projection of how much harm
19 would be done to these interests if the disclosure were made.” Id.

20 **VI. DISCUSSION**

21 Defendant Rocha argues that the CDCR Personnel file/records sought by Plaintiff are
22 privileged. Rather than provide the documents, Defendant served Plaintiff with a privilege log
23 that identified the documents withheld as: (1) Report of personnel matter regarding incident on
24 August 21, 2013; (2) Report of personnel matter for Defendant Hicks regarding incident on
25 January 27 and 28, 2014; (3) Report of personnel matter for Defendant Hicks regarding incident
26 on September 18, 2016; (4) Report of unrelated personnel matter for Defendant Hicks regarding
27 incidents during September 2018; (5) Report of unrelated personnel matter for Defendant Rocha
28 regarding incidents during September 2018 and February 2019; and (6) Confidential Supplement

1 to CDCR Form 602 log number KVSP-18-00387. (ECF No. 41 at 11-16.) Defendant did
2 produce Plaintiff's administrative grievance log number KVSP-18-00387.

3 The privilege log asserts the following privileges: (1) Official information privilege; (2)
4 Federal common law; (3) Government Code § 6254; (4) Penal Code §§ 832.7, 832.8; (5) Civil
5 Code §§ 1798.24; (6) Evidence Code § 1040; (7) California Code of Regulations, Title 15, §§
6 3321, 3370, 3400, and 3450; (8) CDCR DOM §§ 13030.4, 13030.14, and 13030.19; and (9)
7 Privacy of employment-personnel records. (Id.)

8 Federal common law recognizes a qualified privilege for official information. Kerr, 511
9 F.2d at 198. In determining what level of protection should be afforded by this privilege, courts
10 conduct a case-by-case balancing analysis, in which the interests of the party seeking discovery
11 are weighed against the interests of the governmental entity asserting the privilege. Soto v. City
12 of Concord, 162 F.R.D. at 613–14. The balancing test “is moderately pre-weighted in favor of
13 disclosure.” Kelly v. San Jose, 114 F.R.D. 653, 661 (N.D. Cal. 1987). However, before a court
14 will engage in this balancing of interests, the party asserting the privilege must properly invoke
15 the privilege by making a “substantial threshold showing.” Soto, 162 F.R.D. at 613. The
16 privilege “must be formally asserted and delineated in order to be raised properly,” and the party
17 opposing disclosure must “state with specificity the rationale of the claimed privilege.” Kerr, 511
18 F.2d at 198.

19 In order to fulfill the threshold requirement, the party asserting the privilege must submit
20 a declaration or affidavit from a responsible official with personal knowledge of the matters to
21 be attested to in the affidavit. Id. “The claiming official must ‘have seen and considered the
22 contents of the documents and himself have formed the view that on grounds of public interest
23 they ought not to be produced’ and state with specificity the rationale of the claimed privilege.”
24 Kerr, 511 F.2d at 198. The affidavit must include: “(1) an affirmation that the agency generated
25 or collected the material in issue and has maintained its confidentiality; (2) a statement that the
26 official has personally reviewed the material in question; (3) a specific identification of the
27 governmental or privacy interests that would be threatened by disclosure of the material to
28 plaintiff and/or his lawyer; (4) a description of how disclosure subject to a carefully crafted

1 protective order would create a substantial risk of harm to significant governmental or privacy
2 interests, and (5) a projection of how much harm would be done to the threatened interests if
3 disclosure were made.” Soto, 162 F.R.D. at 613 (quoting Kelly, 114 F.R.D. at 670.

4 The party resisting discovery must specifically describe how disclosure of the requested
5 information in that particular case would be harmful. Soto, 162 F.R.D. at 613-14. If the opposing
6 party fails to meet the threshold burden requirement of establishing cause to apply the privilege,
7 the privilege will be overruled. Chism v. County of San Bernardino, 159 F.R.D. 531, 533 (C.D.
8 Cal. 1994). Ordinarily, a “party asserting an evidentiary privilege has the burden to demonstrate
9 that the privilege applies to the information in question.” Tornay v. United States, 840 F.2d 1424,
10 1426 (9th Cir.1988) (citing United States v. Hirsch, 803 F.2d 493, 496 (9th Cir. 1986); In re
11 Roman Catholic Archbishop of Portland in Oregon, 661 F.3d 417, 424 (9th Cir. 2011) (explaining
12 that “the party opposing disclosure has the burden of establishing that there is good cause to
13 continue the protection of the discovery material”).

14 “State privilege doctrine, whether derived from statutes or court decisions, is not binding
15 on federal courts in these kinds of cases.” Kelly, 114 F.R.D. at 655.

16 Defendant argues that disclosure of the CDCR Personnel file/records requested by
17 Plaintiff would present a serious threat to the safety and security of the prisons under its
18 management and would hinder CDCR’s ability to conduct accurate and reliable investigations.
19 In support of this argument Defendant refers the court to the declaration of B. Hancock, Litigation
20 Coordinator at Kern Valley State Prison in Delano, California. (Hancock Decl., ECF No. 41 at
21 17.)

22 In relevant part, B. Hancock states,

23 10. Information and documents regarding staff discipline, as well as investigations
24 into such matters, are confidential. Such information is maintained as confidential to encourage
25 witnesses to make truthful statements, and to encourage investigating staff to accurately report
26 their findings. Disclosing this type of information would hinder CDCR’s ability to conduct
27 accurate and reliable investigations, which could jeopardize the safety and security of the prisons
28 under its management.

1 11. An officer’s personnel-related information is also protected by law, including
2 under the California Public Safety Officers Bill of Rights (Cal. Gov. Code §§ 3300-3313),
3 California Penal Code sections 832.7, 832.8, as well as Title 15 of the California Code of
4 Regulations.

5 12. This information may also contain personal information of staff members, which
6 is also protected by the Information Practices Act of 1977, codified by California Civil Code
7 sections 1798 *et seq.* This Act prohibits public agencies from disclosing “any personal
8 information in a manner that would link the information disclosed to the individual to whom it
9 pertains.” Cal. Civ. Code § 1798.24. The term “personal information” is defined by section
10 1798.3(a) of the California Civil Code to mean:

11 [A]ny information that is maintained by an agency that identifies or describes an
12 individual, including, but not limited to, his or her name, social security number,
13 education, financial matters, and medical or employment history. It includes
14 statements made by, or attributed to, the individual.
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16 13. Moreover, as a practical matter, staff members’ personal information is kept
17 confidential from inmates because there is a danger that the information will be distributed
18 throughout the prison population, and that some inmates may use this information to cause harm
19 to staff members, their families, or their property. If correctional staff members’ personal
20 information were routinely disclosed in inmate civil-rights suits – which are exceedingly
21 numerous – it would make it far more difficult for CDCR to recruit and retain qualified staff to
22 work in California’s prisons.

23 14. Disclosure of such personal information would also educate inmates on the
24 methods by which staff are evaluated and investigated. Armed with this information, inmates
25 could falsely accuse staff members or otherwise manipulate the investigation process, thereby
26 hampering further investigations.

27 15. Additionally, releasing private, personal information of correctional staff would
28 undermine their authority, and interfere with their ability to do an already difficult job.

1 16. Because the disclosure of such personal information would endanger the safety of
2 inmates and CDCR employees, would jeopardize the security of correctional facilities, and would
3 violate the privacy rights of the employees whose personal information is being sought, the
4 information should not be disclosed.

5 17. Given the very sensitive nature of the information sought by Washington, a
6 protective order, even if carefully crafted, would not lessen the danger posed to correctional staff
7 and to the prison as a whole if this information is provided to him. Washington should not have
8 access to such information. Furthermore, Washington has little incentive not to provide this
9 information to other inmates, or former inmates, particularly because such information could be
10 very valuable and traded for money or favors. Therefore, the disciplinary reports and
11 investigations concerning Hicks and Rocha, that are not related to the allegations or claims in
12 this action, should not be produced to Washington. (Hancock Decl., ECF No. 41 at 18-20.)

13 In reply to Defendant Rocha’s opposition Plaintiff first asserts that when he made an
14 informal request for production of the records he seeks, Defendant Rocha responded and objected
15 on grounds of relevance and privilege. Plaintiff saw no need to confer or meet with Defendant.

16 Next, Plaintiff argues that Defendants are not entitled to any privilege or privacy in light
17 of California’s Senate Bill 1421 and the California Public Records Act, which revised the state’s
18 law on privilege and confidentiality of peace officer personnel records. Plaintiff also contends
19 that he is entitled to information available to the public under the same circumstances, and
20 denying him access to the records would deny him a fair trial and presentation of his case.

21 The Court finds that the privilege log and supporting declaration produced by Defendant
22 Rocha are adequate to invoke the official information privilege. To invoke the privilege, the
23 government must provide a declaration establishing the five elements of the Kelly test. See
24 Kelly, 114 F.R.D. at 669–70. Here, the declarant, B. Hancock, declares that he or she personally
25 reviewed the material in question, as required by element 2 of the Kelly test. The court also finds
26 that Defendant has satisfied the other elements of the Kelly test in B. Hancock’s declaration.
27 Accordingly, the Court finds that Defendant has made a “substantial threshold showing” as a

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1 basis for withholding documents under the official information privilege. Responsive documents
2 may, of course, be produced pursuant to a protective order.

3 However, even if Defendant has made a substantial threshold showing, this does not
4 overcome the pre-weighted balancing test in favor of disclosure. The potential for harm does not
5 outweigh the strong public policy in favor of uncovering civil rights violations. Notably, Plaintiff
6 is unable to acquire records from Defendant’s personnel records by any other means. The sought-
7 after information has a high degree of potential significance to Plaintiff’s case. In an excessive
8 force case such as this, the relevance and discoverability of officers’ disciplinary records,
9 including unfounded complaints and allegations of misconduct, are widely recognized. See, e.g.,
10 Gibbs v. City of New York, 243 F.R.D. 95 (S.D.N.Y.2007); Frails v. City of New York, 236
11 F.R.D. 116 (E.D.N.Y.2006); Floren v. Whittington, 217 F.R.D. 389 (S.D.W.Va. 2003); Hampton
12 v. City of San Diego, 147 F.R.D. 227 (S.D.Cal.1993). Nevertheless, “[f]ederal courts are not
13 insensitive to privacy [rights] that arise in discovery matters. . . but these rights must be balanced
14 against the great weight afforded to federal law in civil rights cases against corrections officials.”
15 Ibanez v. Miller, 2009 WL 1706665, at *3 (E.D.Cal. June 17, 2009) (citing Soto, 162 F.R.D. at
16 613).

17 Here, the Court finds the following records, if they exist, should be produced: past
18 records of using excessive force against inmates (see, below); past and current records of perjury,
19 falsifying evidence, false statements, tampering with evidence and/or destroying evidence, as all
20 are relevant to the case at hand. However, Plaintiff has not shown, and the court does not find,
21 that claims of excessive force against Defendant Rocha for incidents occurring *after* the alleged
22 excessive force incident at issue in this case, nor records of criminal convictions, admonishments,
23 suspensions or drug abuse are relevant to Plaintiff’s excessive force claim in this case.

24 Defendant Rocha shall be required to provide Plaintiff with Defendant Rocha’s CDCR
25 personnel records of prior claims of excessive force during the five-year period *before* February
26 6, 2018, the date that Defendants Hicks and Rocha allegedly used excessive force against
27 Plaintiff. Recognizing the privacy rights of witnesses in the reports, as well as the potential for
28 harm to these witnesses, the Court finds it appropriate to permit Defendant Rocha to redact the

1 names, prisoner identification numbers, and any other identifying information for persons who
2 are not a party to this action. Defendant Rocha shall be required to provide Plaintiff with the
3 above information within 45 days.

4 Defendant Rocha is not required to produce records of claims that Defendant Rocha used
5 excessive force *after* February 6, 2018, or criminal convictions, admonishments, suspensions, or
6 drug abuse.

7 Defendant may argue that no documents responsive to Plaintiff's request are in
8 Defendant's possession, custody, or control. Defendants must produce documents which are in
9 their "possession, custody or control." Fed. R. Civ. P. 34(a). Actual possession, custody or
10 control is not required, however. Ochotorena v. Adams, 1:05-cv-05124-LJO-DLB (PC), 2010
11 WL 1035774 at *3 (E.D. Cal. 2010.) "A party may be ordered to produce a document in the
12 possession of a non-party entity if that party has a legal right to obtain the document or has control
13 over the entity who is in possession of the document. Id. (quoting Soto v. City of Concord, 162
14 F.R.D. 603, 620 (N.D.Cal. 1995)). As this Court explained in Allen v. Woodford, 2007, U.S.
15 Dist. LEXIS 11026, *4-6, 2007 WL 309945, *2 (E.D.Cal. Jan.30, 2007) Id. (internal citations
16 and quotations omitted):

17 "Property is deemed within a party's possession, custody, or control if the party
18 has actual possession, custody, or control thereof or the legal right to obtain the
19 property on demand. A party having actual possession of documents must allow
20 discovery even if the documents belong to someone else; legal ownership of the
21 documents is not determinative. Control need not be actual control; courts
22 construe it broadly as the legal right to obtain documents upon demand. Legal
23 right is evaluated in the context of the facts of each case. The determination of
24 control is often fact specific. Central to each case is the relationship between the
25 party and the person or entity having actual possession of the document. The
26 requisite relationship is one where a party can order the person or entity in actual
27 possession of the documents to release them. This position of control is usually

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1 the result of statute, affiliation or employment. Control may be established by the
2 existence of a principal-agent relationship.”

3 Ochotorena, 2010 WL 1035774 at *4 (quoting Allen, 2007, U.S. Dist. LEXIS 11026, *4-6).

4 The specific facts of this action, however, render such an objection unfounded. Id. By
5 virtue of their employment with non-party CDCR, Defendant Rocha is represented by the
6 Attorney General’s Office. Id. It is this Court’s experience that either individual defendants who
7 are employed by CDCR and/or the Attorney General can generally obtain documents, such as
8 the ones at issue here, from CDCR by requesting them. Id. If this is the case, then, based on
9 their relationship with CDCR, they have constructive control over the requested documents and
10 the documents must be produced. Id. (citing see e.g., Mitchell v. Adams, 2009 U.S. Dist. LEXIS
11 24289, * 24-25, 2009 WL 674348, *9 (E.D.Cal. Mar.6, 2009) (even though defendant warden
12 was sued in his individual capacity, he had constructive control over requested documents
13 because he had authority to obtain the requested documents from third party CDCR); see also
14 Gray v. Faulkner, 148 F.R.D. 220, 223-224 (N.D.Ind. 1992) (requiring certification that
15 responding party “have conducted a search for the information reasonably available to them
16 through their agents, attorneys, or others subject to their control and have determined that the
17 information requested either does not exist or that it has been produced.”)

18 **V. CONCLUSION**

19 Based on the foregoing, IT IS HEREBY ORDERED that:

- 20 1. Plaintiff’s motion to compel, filed on April 29, 2021, is granted in part, subject to
21 the limitation that Plaintiff’s Request for Production of Documents, Set One, No.
22 2, is narrowed to include only those items that are listed above;
- 23 2. Within forty-five days from the date of service of this order, Defendant Rocha is
24 required to produce records which are listed above to Plaintiff, pursuant to
25 Plaintiff’s Request for Production of Documents, Set One, No. 2, from Defendant
26 Rocha’s CDCR personnel file, including of any claim that Defendant Rocha used
27 excessive force during the five-year period prior to February 6, 2018;

