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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TOMMY RAY BROWN

Plaintiff,

No. CIV S-07-0956 MCE DAD P

vs.

G. MARSHALL, et al.,

Defendants.

ORDER

_____ /

Plaintiff is state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. This matter is before the court on plaintiff's motion to compel further discovery responses and for sanctions.

This action is proceeding on plaintiff's claim that defendants Gore, Marshall, McDonald, Quezada, Runnels, Statti, Vanderville and Wong violated his Fourteenth Amendment due process rights in connection with a disciplinary conviction that resulted in imposition of a 48-month term in a security housing unit (SHU). See Order filed September 4, 2009.¹ By the instant motion, plaintiff seeks to compel further responses from defendant Marshall to interrogatories 1, 2, 3, 5 and 6 of plaintiff's interrogatories and to requests 1 through 5 of

_____ ¹ Petitioner has dropped all challenges to the 180-day credit loss also imposed as part of the punishment for that disciplinary conviction. See Order filed September 4, 2009.

1 plaintiff's first request for production of documents; from defendant Statti to request 1 of his first
2 request for production of documents; from defendant Vanderville to requests 4 and 5 of his first
3 request for production of documents; from defendant Wong to request 3 of his first request for
4 production of documents; from defendant Runnels to request 1 of his first request for production
5 of documents; and from defendants Marshall, Statti and Vanderville to request 1 of his second
6 request for production of documents. Plaintiff also seeks \$100.00 in monetary sanctions.

7 Rule 37 of the Federal Rules of Civil Procedure provides for motions to compel
8 further responses to discovery requests. Further responses to "an evasive or incomplete
9 disclosure, answer, or response" may be ordered. See Fed. R. Civ. P. 37(a)(3).

10 As noted above, plaintiff seeks further responses to five interrogatories in the first
11 set of interrogatories served on defendant Marshall. The interrogatories and defendant
12 Marshall's responses are as follows:

13 Interrogatory No. 1: List the exact date, time, and place the
14 confidential informant alleged plaintiff conspired with other
alleged co-conspirators to murder peace officers?

15 Response to Interrogatory No. 1: Defendant objects on the grounds
16 that it is vague as to time and institution. Without waiving these
17 objections, and assuming plaintiff is requesting the time and
18 location Plaintiff conspired with other co-conspirators to murder
19 correctional staff in connection with the disciplinary charge for
Log No. C-05-04-005, Defendant responds that Plaintiff conspired
with other co-conspirators at High Desert State Prison, Facility C,
during the month of January 2005.

20 Interrogatory No. 2: List the exact statement that the Confidential
21 Informant alleged plaintiff made when plaintiff supposedly agreed
to part of conspiracy plot to murder peace officers at (H.D.S.P.)

22 Response to Interrogatory No. 2: Defendant objects to this request
23 on the grounds that it is vague and ambiguous as to time, and as to
24 the term "confidential informants," and it calls for information
protected by the official information privilege. Based on these
objections Defendant will not respond to this request.

25 Interrogatory No. 3: List the part of the alleged conspiracy plot
26 that the Confidential Informant stated plaintiff planned. (Which
part of the conspiracy plot did plaintiff plan?)

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1 Response to Interrogatory No. 3: Defendant objects to this request
2 on the grounds that it is vague and ambiguous as to time, and as to
3 the term “confidential informants,” and it calls for information
4 protected by the official information privilege. Based on these
5 objections Defendant will not respond to this request.

6 Interrogatory No. 5: List how many teir notes (kites) that was
7 received by prison officials from confidential informants “that
8 were allegedly written by plaintiff.”

9 Response to Interrogatory No. 5: Defendant objects to this request
10 on the grounds that it is vague and ambiguous as to time, and as to
11 the term “confidential informants,” and it calls for information
12 protected by the official information privilege. Based on these
13 objections Defendant will not respond to this request.

14 Interrogatory No. 6: List how the confidential informant
15 supposedly had first hand information of plaintiff’s alleged
16 involvement in the conspiracy to murder peace officers plot

17 Response to Interrogatory No. 6: Defendant objects to this request
18 on the grounds that it is vague and ambiguous as to time, and as to
19 the term “confidential informants,” and it calls for information
20 protected by the official information privilege. Based on these
21 objections Defendant will not respond to this request.

22 Attachment 2 to Plaintiff’s Motion to Compel, filed April 14, 2010.

23 Plaintiff asserts that the information he seeks by these interrogatories is relevant to
24 his contention that his due process rights were violated in connection with the disciplinary
25 proceedings because (1) the charges did not list the time, date and place of the alleged criminal
26 act; (2) the specific alleged criminal act he committed was not disclosed; (3) the information
sought by interrogatory no. 2 is relevant to whether prison officials had first hand information of
plaintiff’s involvement or whether the charges were arbitrary; (4) the information sought by
interrogatory no. 5 will support plaintiff’s contention that prison officials falsified documents;
and (5) the information sought by interrogatory no. 6 may show whether prison officials relied on
second hand information to convict plaintiff of the disciplinary charges.

In opposition to the motion, defendants contend that defendant Marshall properly
asserted the official information privilege in response to these requests, that disclosing the
confidential information sought by these requests would endanger prison security, and that the

1 information plaintiff seeks is not relevant to his challenge to the disciplinary conviction which
2 need only be supported by “some evidence.”

3 In Wolff v. McDonnell, 418 U.S. 539 (1974), the Supreme Court explained that
4 “[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of
5 rights due a defendant in such proceedings does not apply.” Id. at 556. Under Wolff, the inmate
6 must receive: (1) advance written notice of the disciplinary changes²; (2) an opportunity to call
7 witnesses and present documentary evidence in his defense, where consistent with institutional
8 safety and correctional goals; and (3) a written statement by the factfinder of evidence relied on
9 and the reasons for disciplinary action. Superintendent, Mass. Correctional Ins. v. Hill, 472 U.S.
10 445, 454 (1985) (citing Wolff, 418 U.S. at 563-567). While an inmate has the right to present
11 evidence in his defense, the Supreme Court found that an inmate does not have the right to
12 confidential, irrelevant, or unnecessary information, see Wolff, 418 U.S. at 556, and the
13 opportunity to call witnesses and present documentary evidence is limited by the rule that “prison
14 officials must have the necessary discretion to keep the hearing within reasonable limits and to
15 refuse to call witnesses that may create a risk of reprisal or undermine authority. . . .” Ponte v.
16 Real, 471 U.S. 491, 496 (1984).

17 The information that forms the basis for the prison disciplinary action must
18 possess some indicia of reliability to satisfy due process. Cato v. Rushen, 824 F.2d 703, 705 (9th
19 Cir.1987). In evaluating whether “some evidence” exists, the court inquires “whether there is
20 any evidence in the record that could support the conclusion reached by the disciplinary board,
21 without assessing the witnesses’ credibility or reweighing the evidence. Id. at 455-456.

22 Additional requirements are imposed when a prison disciplinary committee relies on statements

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24 ² Plaintiff contends, in part, that the disciplinary notice issued to him did not list the time,
25 date and place of the alleged criminal act, as required by state law. For purposes of a due process
26 claim, the standards for adequate notice are governed by federal law; in order to satisfy the
requirements of due process written notice must be provided in advance of the hearing in order to
inform the inmate of the charges “and to enable him to marshal the facts and prepare a defense.”
Wolff, 418 U.S. at 564.

1 by an unidentified inmate informant. Due process requires the record to contain some factual
2 information from which the committee could reasonably conclude that the information was
3 reliable and a prison official's affirmative statement that safety considerations precluded
4 disclosure of the informant's identity. Zimmerlee v. Keeney, 831 F.2d 183, 186-87 (9th
5 Cir.1987). Reliability may be established by

6 (1) the oath of the investigating officer appearing before the
7 committee as to the truth of his report that contains confidential
8 information, (2) corroborating testimony, (3) a statement on the
9 record by the chairman of the committee that he had firsthand
10 knowledge of sources of information and considered them reliable
based on the informant's past record, or (4) an in camera review of
the documentation from which credibility was assessed.... Proof
that an informant previously supplied reliable information is
sufficient.

11 Id.

12 Defendants are not required to provide responses to discovery requests that could
13 lead to identification of confidential informants. Moreover, the additional information that
14 plaintiff seeks by the interrogatories at issue here is not relevant to any of the elements of
15 plaintiff's due process claim against defendant Marshall, which turns on whether the
16 requirements of due process, outlined above, were satisfied. Plaintiff's motion to compel further
17 responses to these interrogatories will therefore be denied.

18 Plaintiff also seeks to compel production of documents in response to requests 1
19 through 5 of his first request for production of documents propounded to defendant Marshall.

20 Those requests are:

21 Request for Production No. 1: All documents evidencing the
22 confidential memorandum of (December 30, 2003) authored by E.
Simmerson.

23 Request for Production No. 2: All documents evidencing the
24 confidential memorandum of (February 6, 2004) authored by J.
Ginder.

25 Request for Production No. 3: All documents evidencing the
26 confidential memorandum of (January 26, 2005) authored by M.
Minnick.

1 Request for Production No. 4: All documents evidencing the
2 confidential memorandum of (February 25, 2005) authored by R.
Marquez.

3 Request for Production No. 5: All documents evidencing the
4 confidential memorandum of (May 2, 2005) authored by N.
Dittman.

5 Attachment 3 to Motion to Compel. Defendant Marshall objected to each of these requests as
6 vague and ambiguous and, assuming that plaintiff was seeking each confidential memorandum
7 identified in the request, on the ground that the documents are protected by the official
8 information privilege.

9 In his motion, plaintiff asserts that each requested confidential memorandum is
10 required to show that prison officials had no first hand information implicating plaintiff in the
11 conspiracy that formed the basis for his disciplinary conviction. In opposition to the motion,
12 defendants assert that the documents are privileged and that they provided the required privilege
13 log to plaintiff. Defendants have also presented evidence that the California Department of
14 Corrections and Rehabilitation (CDCR) has labeled each memorandum as confidential and
15 maintained its confidentiality.³ See Attachment 1 to Defendants' Opposition to Plaintiff's
16 Motion to Compel, filed May 3, 2010. In reply, plaintiff requests an in camera review of the
17 documents to determine whether they can be provided to plaintiff in redacted form.

18 Plaintiff is not entitled to the requested confidential information to support his due
19 process claim. See Wolff, 418 U.S. at 556. To the extent that plaintiff's disciplinary conviction
20 was supported by confidential information, resolution of his due process claim in this action will
21 turn on whether that confidential information bears the requisite "indicia of reliability." Cato,
22 824 F.2d at 705. Production of the confidential memoranda to plaintiff is not required in order to

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25 ³ Defendant Marshall also asserts that his objection that the phrase "all documents
26 evidencing" each memorandum was vague and ambiguous, and that plaintiff was provided with all
documents that reference the memoranda.

1 determine whether the requirements of due process were satisfied.⁴ Plaintiff’s motion to compel
2 further responses to these discovery requests will therefore be denied.

3 Plaintiff also seeks to compel a further response to request number 1 of his first
4 request for production of documents directed to defendant Statti. By that discovery request,
5 plaintiff sought “all documents evidencing the (2) page written statement plaintiff submitted at
6 the disciplinary hearing.” Attachment 4 to Motion to Compel. Defendants objected to this
7 request as “vague as to the terms ‘evidencing’ and ‘2 page written statement’, and ‘disciplinary
8 hearing’” and asserted that they could not respond to the request. Id.

9 In his motion to compel, plaintiff asserts that this document is relevant to prove
10 that he requested a postponement of the disciplinary hearing and did not agree to use the first
11 investigative employee’s report. Neither of these arguments either identifies the document in
12 question, nor demonstrates that it is likely to lead to evidence relevant to the due process claim at
13 bar. Plaintiff’s motion to compel a further response to this request will therefore be denied.

14 Plaintiff next seeks to compel further responses to requests number 4 and 5 of his
15 first request for production of documents to defendant Vanderville. By these requests, plaintiff
16 seeks “all documents evidencing the C.V.S.A. test results” of plaintiff and “the confidential
17 informant.” Attachment 5 to Motion to Compel. Defendant Vanderville objected to these
18 requests as vague and ambiguous, calling for production of documents that are irrelevant and not
19 likely to lead to the discovery of admissible evidence, overly broad and burdensome, and calling
20 for documents protected by the official information privilege and by state regulations regarding
21 health records. Id.

22 Defendant Vanderville’s objections are well taken. It is not clear from plaintiff’s
23 motion to compel either what tests plaintiff is referring to, or the relevance of the information to

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25 ⁴ The court makes no findings at this time whether in camera review of documents may
26 be required in connection with any dispositive motion that may be filed in this action.

1 the claim at bar. Plaintiff's motion to compel further responses to this discovery request will
2 therefore be denied.

3 Plaintiff seeks to compel further responses to request number 3 of his first request
4 for production of documents to defendant Wong. By this request, plaintiff sought "[a]ll
5 documents evidencing all complaints filed against you for misconduct and any reprimands due to
6 poor job performances." Attachment 6 to Motion to Compel. Defendant Wong objected to that
7 request as overly burdensome, calling for documents not relevant nor likely to lead to the
8 discovery of admissible evidence, vague and ambiguous as to some of the terms, and potentially
9 calling for privileged documents. Plaintiff seeks to compel the production of documents
10 responsive to identical requests directed to defendants Marshall, Statti and Vanderville in a
11 second request for production of documents. Attachment 8 to Motion to Compel. Defendants
12 assert that the latter discovery requests are new and were not served within the time set for
13 discovery in this action, and plaintiff does not dispute this assertion.

14 Defendant Wong's objections are well taken. Plaintiff's discovery request in this
15 regard is overly broad and would require production of documents neither relevant to the claim at
16 bar nor likely to lead to the discovery of admissible evidence. Accordingly, plaintiff's motion to
17 compel further responses to this request will be denied. Plaintiff's motion to compel responses
18 from defendants Marshall, Statti, and Vanderville will also be denied as improvidently brought.
19 Plaintiff may not move to compel discovery responses absent evidence that defendants have been
20 timely served with the discovery request at issue.

21 Plaintiff seeks to compel a further response to request number one of his first
22 request for production of documents to defendant Runnels. By that request, plaintiff seeks the
23 location of twenty-one inmates, who he identifies and asserts were "either implicated in the
24 conspiracy charges or witnesses." Attachment 7 to Motion to Compel. Defendant Runnels
25 objected to this request as, inter alia, calling for documents not reasonably calculated to lead to
26 the discovery of admissible evidence and protected by privilege.

1 Defendant Runnels' objection of irrelevance is well taken. The request would
2 require production of documents neither relevant to the claim at bar nor likely to lead to the
3 discovery of admissible evidence. Plaintiff's motion to compel further responses to this request
4 will also be denied.

5 CONCLUSION

6 For all of the foregoing reasons, plaintiff's motion to compel will be denied. A
7 fortiori, plaintiff's request for monetary sanctions will also be denied. Cf. Fed. R. Civ. P. 37.

8 In accordance with the above, IT IS HEREBY ORDERED that plaintiff's April
9 14, 2010 motion to compel and for sanctions is denied.

10 DATED: February 28, 2011.

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14 DALE A. DROZD
15 UNITED STATES MAGISTRATE JUDGE

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