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

AZHAR LAL,

Plaintiff,

No. CIV S-07-2060 GEB EFB P

vs.

T. FELKER, et. al.,

Defendants.

ORDER

_____/

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. On February 11, 2010, the court ordered defendants’ counsel to inquire with the Department of Corrections and Rehabilitation to ascertain the whereabouts of defendants Barter, Cooper, and Florez, and to produce certain documents responsive to plaintiff’s discovery requests or prepare a privilege log for withheld documents and submit them to the court for *in camera* review. Defendants have complied with that order and have filed the allegedly privileged documents under seal for in camera review. *See* Dckt. No. 87, 91, 92.

Also pending are plaintiff’s motions for appointment of counsel, for sanctions, and for filing and serving pleadings. *See* dckt. Nos. 89, 99, 100. He has also filed documents titled “notice of submission of pleading” and “case status.” Dckt. Nos. 102, 107. Defendants have opposed his motions. Dckt. Nos. 93, 105.

1 **I. Allegedly Privileged Documents**

2 Defendants have submitted eleven sets of documents that they claim are privileged¹ in
3 response to the court’s February 11, 2010 order, as well as a privilege log and declarations from
4 a CDCR inmate appeals coordinator and a CDCR staff services manager.

5 Defendants argue that they do not have to provide plaintiff with any of the documents
6 because they are protected by the official information privilege. Federal common law recognizes
7 a qualified privilege for official information. *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033
8 (9th Cir. 1990). Personnel files of government employees are considered official information.
9 *Id.* To determine whether the information sought is privileged, courts must weigh the potential
10 benefits of disclosure against the potential disadvantages. *Id.* at 1033-34. That is, the privilege
11 should ensure disclosure of discoverable information without compromising the state’s interest
12 in protecting the privacy of law enforcement officials and in ensuring the efficacy of its law
13 enforcement system. *Kelly v. City of San Jose*, 114 F.R.D. 653, 662-63 (N.D. Cal. 1987). “In the
14 context of civil rights suits against [corrections officials], this balancing approach should be
15 ‘moderately pre-weighted in favor of disclosure.’” *Soto v. City of Concord*, 162 F.R.D. 603, 613
16 (N.D. Cal. 1995) (quoting *Kelly*, 114 F.R.D. at 661).

17 Because “privileges operate in derogation of the truth finding process the law places the
18 burden of proving all elements essential to invoking any privilege on the party seeking its
19 benefits.” *Kelly*, 114 F.R.D. at 662; Fed. R. Civ. P. 26(b)(5).

20 The court has reviewed the submitted documents and finds that the following sets of
21 documents should be provided to plaintiff: Staff complaint package, Log No. HDSP 05-349, and
22 staff complaint package, Log No. HDSP-06-568. These documents detail inmates’ claims
23 against MTA Callison for his alleged failure to provide inmates their insulin injections in a
24 proper manner. This is exactly plaintiff’s claim against MTA Callison in this case. The

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26 ¹Defendants have provided both redacted and unredacted versions of these documents.

1 information revealed by the documents may be highly probative as to MTA Callison's motive,
2 intent, plan, or absence of mistake or accident regarding the facts alleged in this case. The
3 documents may also lead to admissible evidence that may be used to challenge MTA Callison's
4 credibility.

5 Defendants have submitted a declaration attesting to the harm that the disclosure of the
6 documents would cause.² T. Robertson, the Inmate Appeals Coordinator at High Desert State
7 Prison, declares that prisoners who provided information regarding the staff complaints might be
8 at risk of physical harm if the documents were disclosed, as they might have provided
9 information adverse to the complaining prisoner's interests. He declares that disclosure of
10 confidential medical information could be detrimental to the prisoners' health and medical
11 treatment. Finally, he states that disclosure of policies regarding pepper spray would allow
12 inmates to defeat the use of pepper spray to control violence and disruptive behavior. None of
13 these concerns weigh heavily against the release of the records listed above. These records do
14 not contain any interviews with non-complaining inmates or concern pepper spray. Defendants
15 do not explain how the disclosure of these inmates' medical information—that they have diabetes,
16 and that one of them uses a wheelchair—is detrimental to their treatment. Thus, defendants have
17 not identified any specific harms that will result from the release of these particular documents.

18 Defendants make several additional arguments against the production of the records.
19 They argue that as none of the staff complaints were sustained, they are not reasonably
20 calculated to lead to the discovery of admissible evidence. Defendants have cited no controlling
21 authorities on this point, nor is it persuasive. Prison officials may or may not adequately
22 investigate or accurately sustain inmate complaints against correctional officers. The court
23 declines to adopt a blanket policy of deferring to the judgment of prison officials regarding the
24

25 ² Defendants have also submitted another declaration regarding the eleventh set of
26 documents, the letter of instruction to MTA Cullison. As the court finds that this letter need not
be disclosed, it does not address this declaration.

1 truthfulness of inmates' complaints. The complaints against Callison may lead to the discovery
2 of admissible evidence even though they were not sustained.

3 Defendants also argue that because some of the documents contain medical records,
4 HIPAA requires a protective order before health care information of persons who are not parties
5 to the litigation are disclosed.³ But the statute expressly provides that health information may be
6 disclosed in a judicial proceeding in response to a court order. 45 C.F.R. 164.512(e)(1)(I). This
7 order for production satisfies that requirement.

8 The other nine sets of documents include complaints against MTA Callison for failing to
9 medically treat an inmate who had been pepper sprayed; for failure to provide proper care to an
10 inmate for seizures; for performing an unclothed body search of an inmate; for preventing a
11 nurse from passing out medication and for putting a booger on an inmate's cell window; and for
12 making racial slurs, tampering with food, and assaulting an inmate; and complaints against MTA
13 Cullison for yelling racial slurs, for being rude and throwing an inmate's medications on the
14 floor, and for making sexual advances towards an inmate. The final document is a confidential
15 letter of instruction to MTA Cullison regarding empty oxygen canisters and incomplete
16 inventory of a van. After reviewing these documents and applying the balancing test, the court
17 finds that these documents need not be produced to plaintiff. Although it is possible that these
18 documents might lead to the discovery of admissible evidence, the claims at issue in these
19 complaints are different from the claims in plaintiff's action here and the documents are
20 therefore less probative in this lawsuit.

21 Accordingly, defendants are ordered to provide to plaintiff copies of staff complaint
22 package, Log No. HDSP 05-349, and staff complaint package, Log No. HDSP-06-568 within
23 seven days of the date of this order.

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26 ³ Although defendants may properly seek such an order, they have not filed a motion for
a protective order.

1 **II. Plaintiff's Motions**

2 Plaintiff asks that the court appoint counsel to conduct discovery in this case. District
3 courts lack authority to require counsel to represent indigent prisoners in section 1983 cases.
4 *Mallard v. United States Dist. Court*, 490 U.S. 296, 298 (1989). In exceptional circumstances,
5 the court may request counsel voluntarily to represent such a plaintiff. 28 U.S.C. § 1915(e)(1);
6 *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); *Wood v. Housewright*, 900 F.2d 1332,
7 1335-36 (9th Cir. 1990). The court finds that there are no exceptional circumstances in this case.
8 Plaintiff's request is denied.

9 Plaintiff also asks that the court compel defendants to give him defendant Florez' social
10 security number. On February 10, 2010, the court ordered defendants' counsel to query CDCR
11 to obtain information regarding the whereabouts of several defendants. Defendants' counsel
12 complied with this order. With respect to defendant Florez, defendants stated that he is no
13 longer employed by CDCR, that they do not have a business address for him, and that mail sent
14 to his last-known residential address was returned. Plaintiff now asks that the court compel
15 defendants to give him defendant Florez' social security number. Defendants argue that this
16 information is not in their custody or control, and that the number is confidential and not subject
17 to disclosure to them.

18 Although plaintiff did not originally request Florez' social security number through
19 discovery, plaintiff's goal to get information needed to complete service is apparent from his
20 request. This case was filed more than three years ago, and service has still not been effected on
21 several defendants. Accordingly, the court orders defendants to show cause within 14 days why
22 defendant Florez should not be served by publication. Defense counsel should feel free to
23 contact defendant Florez, if counsel is able to do so, to determine whether he will authorize
24 defense counsel to accept service on his behalf.

25 Plaintiff further requests that defendants be compelled to give him a copy of the third
26 watch roster for Facility D medical clinic for the time of the incidents that are the subject of his

1 complaint so that he can identify the title of defendant Cooper, whom he has been unable to
2 serve. Defendants claim that they have now provided records with the names of each MTA and
3 the days that they worked during the relevant time period. However, plaintiff claims that
4 defendants have redacted information on the roster so that only one employee name out of three
5 is visible on each record. Plaintiff states that he now believes that defendant Cooper may not be
6 an MTA but a nurse. Defendants reply that they have provided the information that the court
7 ordered, which was limited to names of MTAs. Although plaintiff's discovery request was
8 limited to the names of MTAs, again, plaintiff's goal to get information needed to complete
9 service is apparent from the request. In the interests of justice and judicial economy, the court
10 orders defendants to provide the information requested, that is, an unredacted copy of the third
11 watch roster for Facility D medical clinic for the time of the incidents in question.

12 Plaintiff states that he has learned through defendants' discovery responses that defendant
13 Barter is actually "C. Bartor." Dckt. No. 99 at 3. He asks that he be allowed to serve this
14 defendant. *Id.* Defendants respond that plaintiff has misread the handwritten signature, and that
15 the employee's name is "C. Barton," but do not oppose plaintiff's request to serve the defendant.
16 Dckt. No. 105 at 3. Accordingly, plaintiff's request to serve this defendant is granted. Although
17 Local Rule 220 requires that every pleading to which an amendment is permitted shall be
18 retyped and filed so that it is complete in itself, the court excuses plaintiff from this requirement
19 in the interests of judicial economy. The Clerk will send plaintiff service documents, and the
20 action will proceed on the May 5, 2008 amended complaint, with the understanding that the
21 defendant previously identified as "Barter" is actually named Barton. *See* Dckt. No. 14 at 5.

22 Plaintiff further states that defendants responded to his document requests for medical
23 policies and procedures by saying that the documents were available for inspection and copying
24 on request to the litigation coordinator at his prison. Dckt. 99 at 5-6. He states that on May 12,
25 May 13, and May 14, he was summoned to the library to inspect the documents. On the last day,
26 plaintiff asked to copy the documents, but the librarian, Nappi, told him that the litigation

1 coordinator, Young, had limited the number of copies to 20 pages. Plaintiff filed an internal
2 appeal. He was then again summoned to the library and Nappi told plaintiff that he was now
3 allowed 100 pages of copies. He accepted all of the copies that were provided, but states that
4 “the documents that were provided are not adequate.” *Id.* at 6. Nappi called plaintiff into his
5 office and asked him sign a document attesting that he had been afforded adequate time and
6 resources to review the documents at issue, which he refused to sign. *Id.* at 7. He requests that
7 he be provided copies of the documents at issue. *Id.*

8 Additionally, plaintiff states that defendants responded to another document request by
9 listing a number of court cases in which they were named as defendants, and stating that “copies
10 of complaints or court documents regarding the claims at issue in those cases are available for
11 inspection and copying” at the prison. *Id.*, Ex. D at 3-4. He claims that he requested copies of
12 the documents, but did not receive them. *Id.* at 8. Further, he requested a copy of his central file
13 and copies of all of his internal appeals at High Desert State Prison, but did not receive those
14 either. *Id.* at 8-9. Plaintiff has attached copies of his requests for all of these items.

15 Defendants respond that they were not ordered to provide the documents at issue to
16 plaintiff, and that he can review his central and medical files on request and obtain copies at his
17 own expense. Dckt. No. 105 at 4-5. They state that “[t]here is no record that Lal has made such
18 a request since his arrival at CSP-Sacramento.” *Id.* at 5. Defendants argue that they should not
19 be required to pay for his copies. *Id.* Defendants have attached a declaration by litigation
20 coordinator Young stating that she was told by the law librarian that plaintiff came to the library
21 to review “documents provided in response to discovery requests and court orders” on six days
22 for a total of 12.75 hours. Dckt. No. 105-1 at 2-3. She states that plaintiff was told that the
23 prison would provide up to 100 pages of copies without charge, but not a complete copy. *Id.* at
24 3. She states that plaintiff may request copies of his central and medical files at ten cents a page,
25 but that he has not asked to review them “since arriving at CSP–Sacramento.” *Id.* She further
26 declares that plaintiff has a zero balance in his trust account. *Id.*

1 Plaintiff has also attached a declaration stating that when he was at High Desert State
2 Prison he had three large envelopes containing a copy of his medical file, but after he transferred
3 to CSP-Sac, the envelopes were not returned to him with the rest of his property. Dckt. No. 99,
4 Ex. G. Defendants acknowledge plaintiff's complaint but do not suggest a resolution of this
5 issue. See Dckt. No. 105 at 4.

6 Plaintiff seeks sanctions for defendants' conduct, stating "this court should not allow
7 [defendants] to keep taking advantage of plaintiff because of his pro se status as . . . plaintiff
8 cannot receive attorney fees for [defendants' failure to] comply[] with the discovery order."
9 Dckt. No. 99 at 10. He asks that the court order defendants to make copies of his central and
10 medical files; all of the internal appeals he filed at High Desert State Prison and to the Director
11 of Corrections; copies of the complaints in the § 1983 actions defendants listed in their discovery
12 responses; and copies of the medical policies and procedures which the court has already held he
13 is entitled to. As plaintiff is indigent, he can not pay for copies of these documents himself.
14 Given that it took plaintiff 12.75 hours to review the documents in question—which he contends
15 do not even include the documents contained in his medical or central file—it seems likely that
16 there may well be more than 100 pages of relevant documents.

17 On February 11, 2010, the court partially granted plaintiff's motion to compel. Under
18 Fed. R. Civ. P. 37(b), the court may apportion the reasonable expenses for the motion. In a case
19 where plaintiff had counsel, the court might award plaintiff partial attorney fees for bringing the
20 motion to compel. As plaintiff proceeds pro se in this action, he has no attorney fees. However,
21 under Fed. R. Civ. P. 37(c)(1)(C), and in lieu of awarding monetary sanctions for the partial
22 grant of the previous motion to compel, the court orders defendant to provide complete copies of
23 plaintiff's central and medical files; all of the internal appeals he filed at High Desert State
24 Prison and to the Director of Corrections; the complaints in the § 1983 actions defendants listed
25 in their discovery responses; and the medical policies and procedures which the court has already

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1 held he is entitled to.⁴

2 Plaintiff further requests that Nappi, the law librarian, and Young, the litigation
3 coordinator, be joined as defendants in this action for violating his First, Eighth and Fourteenth
4 Amendment rights. *Id.* at 8. The Civil Rights Act provides:

5 Every person who, under color of [state law] . . . subjects, or causes to be
6 subjected, any citizen of the United States . . . to the deprivation of any rights,
7 privileges, or immunities secured by the Constitution and laws, shall be liable to
the party injured in an action at law, suit in equity, or other proper proceeding for
redress

8 42 U.S.C. § 1983. Plaintiff does not explain how Nappi and Young violated his constitutional
9 rights by refusing to let him copy documents without paying for them. As he has not stated a
10 claim against these defendants, his request to add them as defendants is denied.

11 Finally, plaintiff’s motion for filing and serving pleadings states that he filed three
12 documents, and included with each document self-addressed stamped envelopes so that the first
13 page of the document could be stamped “filed” and returned to him. *See* Dckt. No. 100. The
14 documents that plaintiff refers to have been filed.⁵

15 **III. Conclusion**

16 Accordingly, it is hereby ORDERED that:

17 1. Plaintiff’s motion for appointment of counsel is denied;

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19 ////

21 ⁴ Although defendants contend “[f]ederal courts may not require a party or a third party
22 to bear a prisoner’s litigation expenses,” the only controlling authority they cite actually does not
23 hold or lend substantial support to that proposition. *See Penk v. Oregon State Bd. Of Higher*
24 *Educ.*, 813 F.2d 458, 468 (9th Cir. 1987) (in class action sex discrimination case where plaintiffs
25 obtained databases of employment information through discovery, requiring them to share the
26 cost of correcting the database was not reversible error because “the district court had [no]
obligation to require the defendant to subsidize the plaintiffs’ costs of litigation.”). Regardless,
the court is not ordering defendants to bear plaintiff’s litigation costs; instead, it awards the copy
costs against defendants as sanctions under Fed. R. Civ. P. 37(c)(1)(C).

⁵ Plaintiff asks to be informed what happened to his envelopes. Unfortunately, the court
has no information regarding the envelopes.

1 2. Plaintiff's motion for sanctions is partially granted and partially denied, as explained
2 above;

3 3. Plaintiff's motion for filing and serving pleadings is denied as moot as the documents
4 have been filed;

5 4. Defendants are ordered to give copies of staff complaint package, Log No. HDSP 05-
6 349, and staff complaint package, Log No. HDSP-06-568 to plaintiff within seven days of the
7 date of this order;

8 5. Defendants are ordered to provide plaintiff with an unredacted copy of the third watch
9 roster for Facility D medical clinic for the time of the incidents described in the complaint within
10 seven days of the date of this order;

11 6. Defendants are ordered to show cause within fourteen days why defendant Florez
12 should not be served by publication;

13 7. Plaintiff's request to serve defendant Barton is granted. The Clerk of the court shall
14 send plaintiff a blank summons, one USM-285 form, an instruction sheet, and a copy of the May
15 5, 2008 amended complaint. Within 21 days of the date of this order, plaintiff shall return the
16 attached Notice of Submission of Documents with the completed summons, the completed
17 USM-285 forms, and two copies of the May 5, 2008 amended complaint. The court will transmit
18 them to the United States Marshal for service of process pursuant to Fed. R. Civ. P. 4. Defendant
19 Barton will be required to respond to plaintiff's allegations within the deadlines stated in Fed. R.
20 Civ. P. 12(a)(1);

21 8. Within twenty-one days of the date of this order, defendant shall provide plaintiff
22 complete copies of his central and medical files; all of the internal appeals he filed at High
23 Desert State Prison and to the Director of Corrections; the complaints in the § 1983 actions
24 defendants listed in their discovery responses; and the medical policies and procedures which the
25 court has already held plaintiff is entitled to;

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1 9. Plaintiff's request to add Nappi and Young as defendants in this action is denied; and

2 10. The Clerk of the court is directed to terminate docket entries 89, 99, and 100.

3 DATED: March 2, 2011.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AZHAR LAL,

Plaintiff,

No. CIV S-07-2060 GEB EFB P

vs.

T. FELKER, et al.,

Defendants.

NOTICE OF SUBMISSION OF DOCUMENTS

Plaintiff hereby submits the following documents in compliance with the court's order
filed _____:

- 1 completed summons form
- 1 completed forms USM-285
- 2 copies of the May 5, 2008 Amended Complaint

Dated:

Plaintiff