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

WILLIAM YOUNG SUTHERLAND,

Plaintiff,

No. CIV S-09-2391 WBS DAD P

vs.

S. HERRMANN, et al.,

Defendants.

ORDER

_____ /

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Several discovery motions are pending before the court.

On October 8, 2010, plaintiff filed a motion for leave to depose plaintiff's incarcerated witnesses. Plaintiff, who is incarcerated at Pleasant Valley State Prison in Coalinga, California, seeks permission to take the deposition of two inmates incarcerated at California State Prison-Sacramento.¹ Plaintiff alleges that these inmates were incarcerated with him at the time of the events alleged in his complaint and were first hand witnesses thereto. By order filed November 15, 2010, defendants were directed to respond to plaintiff's motion. On November 18, 2010, defendants filed a response. Therein, defendants represent that they have no objection

_____ ¹ Plaintiff requests leave to depose three inmate witnesses, but he has only identified two inmates in the motion.

1 to plaintiff deposing inmate witnesses but they argue that plaintiff must bear the costs associated
2 with such depositions and that the motion should be denied unless plaintiff can do so.

3 Section 3139 of Title 15 of the California Code of Regulations requires an inmate
4 to obtain written authorization from the Warden or designee to correspond with another inmate.
5 See tit. 15 § 3139. Even assuming arguendo that plaintiff, who is proceeding with this action in
6 forma pauperis, can bear the costs associated with conducting the two depositions he desires, he
7 has not demonstrated that he has obtained the required permission to communicate with either or
8 both of the inmates he seeks to depose.² For that reason, plaintiff's motion will be denied at this
9 time without prejudice.

10 On December 2, 2010, plaintiff filed a motion for a fifty-day extension of time to
11 resolve a discovery dispute with defendants including, as necessary, to file a motion to compel.
12 On December 7, 2010, defendants filed a response to the request in which they represent, inter
13 alia, that they have no opposition to extending the time for plaintiff to file a motion to compel.
14 On December 10, 2010, plaintiff filed a motion to compel further responses to the discovery
15 described in his motion for extension of time. Pursuant to the scheduling order filed in this
16 action on August 30, 2010, the deadline for filing discovery motions was December 17, 2010.
17 Plaintiff's December 10, 2010 motion to compel was timely filed. Accordingly, his December 2,
18 2010 motion for extension of time will be denied.

19 By his December 10, 2010 motion to compel, plaintiff seeks to compel further
20 responses to six requests contained in a request for production of documents served on
21 defendants on or about September 28, 2010. Specifically, plaintiff seeks a further response to his
22 requests for production of documents nos. 1, 3, 8, 9, 12 and 13.

23 ² Should plaintiff obtain the required permission, it is not clear to this court that a
24 deposition would be the only means by which plaintiff might obtain and preserve the inmates'
25 testimony. Affidavits based on personal knowledge and signed under penalty of perjury may also
26 constitute evidence admissible in opposition to a motion for summary judgment, see Fed. R. Civ.
P. 56(e), and would likely present similar admissibility issues thereafter should this action
proceed to trial. See, e.g., Fed. R. Evid. 801.

1 By Request No. 1, plaintiff sought

2 Records, Documents, Logs or any and all other information with
3 the names of inmates that were present in R and R (Receiving and
4 Release) at the time that the Plaintiff was being restrained to be
5 transported to U.C. Davis Medical Facility on March 3, 2008
6 between the hours of 7:00 a.m. and 12:30 p.m. as there is a vital
7 witness that asked to testify as to what he saw but Plaintiff could
8 not acquire the name therefore this request is relevant to acquire
9 the name of this vital witness, this witness was held in a single
10 holding tank that was approximately two (2) feet in front of where
11 the restraints were placed on Plaintiff and was there, in the same
12 holding tank, upon the return of Plaintiff when his restraints were
13 removed.

14 Ex. A to Plaintiff's Motion to Compel, filed December 10, 2010 (Doc. No. 41), at 1-2.

15 Defendants responded to this discovery request as follows:

16 Defendants object to this request on the grounds that it is
17 compound and not likely to lead to the discovery of admissible
18 evidence. Defendants further object to the extent that the
19 information Plaintiff seeks violates other inmates' privacy rights.
20 Without waiving these objections, Defendants respond as follows:
21 Defendants have conducted a diligent search of their records and
22 have provided, as Attachment 1, all documents in their possession,
23 custody or control.

24 Ex. B to Plaintiff's Motion to Compel, at 2. The Attachment 1 referred to by defendants includes
25 a California State Prison-Sacramento Transportation Summary that lists four transportation
26 officers and four inmates transported to U.C. Davis Medical Center. The form appears to list the
date of transport as "2/2/08", but does identify plaintiff as one of the inmates transported. See
Attachment 1 to Ex. B to Declaration of J. Devencenzi in Support of Defendants' Opposition to
Plaintiff's Motion to Compel, filed December 21, 2010. Attachment 1 also includes a
memorandum dated June 11, 2009 concerning unscheduled stops during transport of inmates
from California State Prison-Sacramento to medical appointments.

A party from whom production of documents is sought is only required to produce
those documents which are "in the responding party's possession, custody, or control." Fed. R.
Civ. P. 34(a). Here, defendants represent that they have produced to plaintiff all documents in

1 their possession, custody or control responsive to Request No. 1. Defendants cannot be
2 compelled to produce documents they do not have. Accordingly, no further response to this
3 discovery request will be required.

4 By Request No. 3, plaintiff sought

5 A copy of a map with the transportation route to U.C. Davis that
6 was taken March 03, 2008, and the Detoured route taken to 34th
7 and C Street, to the restaurant named "Roxie's" or "Roxy's"
(spelling of restaurant not relevant to discovery).

8 Ex. A to Motion to Compel, at 2.

9 Defendants responded to this request as follows:

10 Defendants object to this request on the ground that it is compound
11 and not likely to lead to the discovery of admissible evidence.
12 Defendants further object that this request seeks information that
13 could jeopardize the safety and security of the institution—that is,
14 Defendants cannot provide plaintiff with a map showing the route
15 they take when transporting inmates to medical appointments.
That disclosure would put the transportation teams, as well as the
inmates they are transporting, at risk. Without waiving these
objections, Defendants respond as follows: Defendants have
conducted a diligent search of their records and have no maps in
their possession, custody and control.

16 Ex. B to Motion to Compel, at 3.

17 As noted above, defendants cannot be compelled to produce documents they do
18 not have. No further response to this request will be required.

19 By Request No. 8, plaintiff sought

20 All information on Officer training with regards to the use of the
21 BLACK BOX when restraining inmates and the procedures to
22 follow if said inmates complain about the restraints being too tight.
23 Plaintiff will be requesting that an Expert Witness trained in these
procedures be called to show the proper procedures on restraining
inmates to be transported [sic] to U.C. Davis or any other outside
Medical facility.

24 Ex. A to Motion to Compel, at 3.

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1 Defendants responded to this request as follows:

2 Defendants object to this request on the grounds that it is
3 compound and not likely to lead to the discovery of admissible
4 evidence. Additionally, the information plaintiff requests,
5 procedures relating to the transportation of inmates, could
6 jeopardize the safety and security of the institution. Without
7 waiving these objections, Defendants respond as follows:
8 Defendants have conducted a diligent search of their records and
9 have no documents in their possession, custody or control relating
10 to training materials. However, all policies and procedures relating
11 to the use of restraints are in Title 15, section 3268.2.

12 Ex. B to Motion to Compel, at 5-6.

13 As noted above, defendants cannot be compelled to produce documents they do
14 not have. No further response to this request will be required.

15 By Request No. 9, plaintiff sought

16 All testimonies by Officers, Inmate Witnesses, Investigators, and
17 any, and all other persons that made such statements or gave
18 testimony concerning the Inmate/Parolee Appeal[sic] process,
19 Appeal Log Number: SAC-C-08-0705, eather [sic] written,
20 recorded or any and all other ways taken and recorded.

21 Ex. A to Motion to Compel, at 3.

22 Defendants responded to this request as follows:

23 Defendants object to this request on the grounds that it is
24 compound and not likely to lead to the discovery of admissible
25 evidence. Defendants further object to the extent plaintiff seeks
26 confidential documents. Without waiving these objections,
27 Defendants respond as follows: All non-confidential documents in
28 Defendants' possession, custody [sic] and control pertaining to
29 Plaintiff's administrative grievance would be in Plaintiff's central
30 file, which is available to him for copying under institutional
31 policies and procedures.

32 Ex. B to Motion to Compel, at 6. Good cause appearing, defendants will be directed to provide
33 to the court for in camera review all confidential documents responsive to this request.

34 Thereafter, the court will determine whether further production in response to plaintiff's
35 discovery request is required.

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1 By Request No. 12, plaintiff sought:

2 All personal records of the following Correctional Officers: S.
3 Herrmann, M. Spinks, A. Parmar and R. Sicculuna pertaining to,
4 but not limited to, inmate complaints, staff complaints, citizen
5 complaints, or any other disciplinary actions involving, but not
6 limited to, inmates, failure to follow instructions, rules violations
7 and abuses.

8 Ex. A to Motion to Compel, at 4.

9 Defendants responded to this request as follows:

10 Defendants object to this request on the grounds that it is
11 compound, overly burdensome, overbroad, irrelevant and not
12 reasonably calculated to lead to the discovery of admissible
13 evidence, as Plaintiff seeks mere complaints that are not admissible
14 in this case for any purpose. Defendants further object to this
15 request on the grounds that disclosure of the documents requested
16 would violate Defendants' right to privacy because peace officer
17 personnel records are protected by state and federal privileges and
18 California statutes, including California Penal Code sections 832.7
19 and 6126.3. Defendants object on the grounds that government
20 personnel files are protected by the official information privilege.
21 Without waiving these objections, Defendants respond as follows:
22 Defendants have no documents in their possession, custody or
23 control, as they have no sustained complaints in their personnel
24 files.

25 Ex. B to Motion to Compel, at 7.

26 As noted above, defendants cannot be compelled to produce documents they do
not have. No further response to this request will be required.

By Request No. 13, plaintiff sought:

Names and if know [sic], addresses, phone numbers and any and
all contact information of persons "Likely to have discoverable
information relevant to disputed facts alleged with particularity in
pleadings."

Ex. A to Motion to Compel, at 4.

Defendants responded to this request as follows:

Defendants object that this is not a request for a document. If this
request was intended to be an interrogatory, Plaintiff has failed to
specify which Defendant it is directed to. Given that this is not a

1 request for a document and is not an interrogatory directed at a
2 specific party, Defendants will not respond to this request.

3 Ex. B to Motion to Compel, at 8.

4 Defendants' objection that this request is not a request for production of
5 documents is well-taken. No further response to this request will be required.

6 For all of the foregoing reasons, defendants will be required to tender to the court
7 within ten days for in camera review all confidential documents responsive to Request Number 9.
8 In all other respects, plaintiff's December 10, 2010 motion to compel will be denied.

9 On December 20, 2010, plaintiff filed three subpoenas directed to Deputy
10 Attorney General Jessica R. Devencenzi. By these subpoenas, plaintiff seeks production of
11 documents that are the subject of his December 10, 2010 motion to compel. Plaintiff's
12 subpoenas will be placed in the court file and disregarded.³

13 On December 30, 2010, plaintiff filed another motion to compel. By that motion,
14 plaintiff seeks an order compelling disclosure of information requested with regard to his inmate
15 appeal dated March 12, 2008. Specifically, plaintiff seeks "any and all documents or files"
16 pertaining to all testimony given during the investigation of that appeal. Plaintiff relies on a
17 statement in the response to his appeal by Associate Warden J. Lizarraga that four officers, a
18 doctor, and two inmates were question concerning plaintiff's appeal. Defendants oppose the
19 motion on the grounds that in response to Requests No. 9 and 12 of his first request for
20 production of documents, plaintiff has been informed that (1) defendants have no sustained
21 allegations of staff misconduct in their personnel files; and (2) plaintiff's administrative
22 grievance is in his central file, which is available for his review through institutional procedures.

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24 ³ In his December 2, 2010 motion for a fifty day extension of time to resolve discovery
25 disputes, plaintiff states that he sent two subpoenas to the court on November 7, 2010. The
26 record before this court contains no evidence those subpoenas were ever received. In any event,
assuming plaintiff did send them on November 7, 2010, they were untimely under the deadline
set in the August 30, 2010 scheduling order.

1 The motion seeks the same information sought by Request No. 9 of plaintiff's first
2 request for production of documents. Plaintiff's motion in this regard is redundant and will
3 therefore be denied.

4 On January 3, 2011, plaintiff filed a response to defendants' opposition to
5 plaintiff's December 10, 2010 motion to compel, in which he requests imposition of sanctions
6 against defendants. For the reasons set forth above, plaintiff's motion to compel will be denied
7 with the exception of the requirement that defendants tender certain documents for in camera
8 review. Plaintiff's request for sanctions will therefore be denied.

9 On January 26, 2011, plaintiff filed a motion for an order requiring the Clerk of
10 the Court to process and file several subpoenas attached to the motion together with a motion for
11 an order directing the United States Marshal to personally serve those subpoenas. By the
12 subpoenas, plaintiff seeks information concerning statements made to Associate Warden
13 Lizagarra during the investigation of plaintiff's inmate appeal, information concerning the
14 identity of an inmate in Receiving and Release on the morning of the incident at issue, and
15 information on officer training concerning the use of the black box in restraining inmates. All of
16 this information was sought by plaintiff during discovery. Moreover, as noted above, all
17 discovery requests were to be served sixty days prior to December 17, 2010. On March 28, 2011
18 and June 2, 2011, plaintiff filed additional requests for issuance of subpoenas duces tecum. To
19 the extent that these subpoenas are not duplicative of earlier discovery requests, they are
20 untimely. All of these motions and requests by plaintiff will be denied.

21 In accordance with the above, IT IS HEREBY ORDERED that:

22 1. Plaintiff's October 8, 2010 motion to depose inmate witnesses (Doc. No. 35) is
23 denied without prejudice;

24 2. Plaintiff's December 2, 2010 motion for extension of time (Doc. No. 38) is
25 denied;

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