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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY ASBERRY,
Plaintiff,
v.
MATTHEW CATE, et al.,
Defendants.

No. 2: 11-cv-2462 KJM KJN P

ORDER

Introduction

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff's motion to compel. (ECF No. 142.)

Plaintiff's Claims

Plaintiff's claims arise from a cell move on January 25, 2010. Plaintiff alleges that he was assaulted by his new cellmate, inmate Wilson, the following day, during which plaintiff suffered injuries to his back and neck. Plaintiff alleges that defendants failed to protect plaintiff from inmate Wilson. Plaintiff alleges that inmate Wilson had mental problems and was improperly classified. Plaintiff alleges that he received inadequate medical care for the injuries he suffered as a result of the alleged attack by inmate Wilson.

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1 Discussion

2 In the motion to compel, plaintiff generally alleges that defendants failed to provide
3 adequate responses to discovery requests. Plaintiff requests that the court review all of
4 defendants' responses to his discovery requests. Plaintiff identifies the following specific
5 responses with which he takes issue: 1) defendant Virga's response to interrogatory no. 4, set
6 one; 2) defendant Phelps's response to interrogatory no. 15, set one; 3) defendant Ali's responses
7 to interrogatories nos. 13 and 14. Plaintiff also contends that he has not been allowed to review
8 his medical records. Plaintiff also argues that he should be allowed to review inmate Wilson's
9 mental health records.

10 In their opposition to plaintiff's motion, defendants first object that plaintiff's motion is
11 procedurally deficient because he generally takes issue with all of the responses provided.
12 Defendants argue that it is plaintiff's burden to identify the specific responses to which he is
13 objecting.

14 In his reply to defendants' opposition, plaintiff argues that he could not prepare a proper
15 motion to compel because he has not had law library access since October 15, 2013. Plaintiff
16 argues that he has not been able to leave his cell since October 15, 2013, when prison officials
17 confiscated his wheelchair.

18 As the moving party, plaintiff bears the burden of informing the court which discovery
19 requests are the subject of his motion to compel and, for each disputed response, why defendants'
20 objection is not justified. Ellis v. Cambra, 2008 WL 860523, at *4 (E.D.Cal. Mar. 27, 2008).
21 Plaintiff may not simply assert that he has served discovery requests, that he is dissatisfied, and
22 that he wants an order compelling further responses.

23 In a separate order addressing defendants' motion for sanctions based on plaintiff's failure
24 to attend his deposition, the undersigned found that plaintiff's claim that he required a wheelchair
25 was not supported by his medical records. For this reason, plaintiff's claim that he could not
26 access the law library is not well supported. The undersigned also observes that in the motion to
27 compel, plaintiff appears quite capable of responding to defendants' objections to his discovery
28 requests. For these reasons, plaintiff's claim of lack of library access does not justify tasking the

1 court with reviewing each of defendants' responses to plaintiff's voluminous discovery requests.¹
2 The court will, however, address the specific discovery responses identified by plaintiff in the
3 motion to compel.

4 The undersigned first considers plaintiff's request to review his medical file. In their
5 opposition, defendants state that prison policies permit inmates to review their medical files
6 through a procedure called an Olsen review. Attached as an exhibit to defendants' motion is a
7 copy of the form inmates requesting Olsen reviews must complete.

8 In his reply to defendants' opposition, plaintiff references his pending motion requesting
9 that the court order prison officials to provide him with access to his medical file. (ECF No. 146.)
10 In this motion, plaintiff alleges that he requested an Olsen review on September 24, 2013, and
11 September 17, 2013, but his efforts were "stonewalled." Attached as exhibits to plaintiff's
12 motion for access to his medical file are requests submitted by plaintiff to review his medical file.
13 Also attached as an exhibit is a memorandum dated November 14, 2013, from Health Care
14 Services rejecting plaintiff's appeal of a denial of his request for an Olsen review. This
15 memorandum states that the Health Care Appeals process is not the appropriate method for
16 requesting an Olsen review.

17 It appears that plaintiff's previous requests for Olsen reviews were denied because
18 plaintiff did not follow the proper procedures for requesting the reviews. Defendants have now
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20 ¹ See ECF No. 142 at 18-26 (request for production of documents, set one, 20 requests); id. at 32-
21 34 (request for production of documents, set two, 4 requests); id. at 37-49 (request for admissions,
22 set one, 43 requests); id. at 52- 59 (interrogatories addressed to defendant Phelps, set two, 29
23 interrogatories); id. at 64-73 (request for production of documents and interrogatories addressed
24 to defendant Virga, set two, 15 requests for production of documents, 13 interrogatories); ECF
25 No. 142-1 at 6-11 (request for production of documents and interrogatories addressed to
26 defendant Ali, set one, 1 request for production of documents, 13 interrogatories); id. at 15-23
27 (interrogatories addressed to defendant Elston, set one, 30 interrogatories); id. at 27-35
28 (interrogatories addressed to defendant Virga, set one, 26 interrogatories); id. at 2-6, 56-59, 241-
243 (interrogatories addressed to defendant Phelps, set one, 34 interrogatories); id. at 239-298
(request for production of documents addressed to defendant Phelps, set one, 4 requests); id. at
244-252 (request for production of documents and interrogatories addressed to defendant Wedell,
set one, 2 requests for production of documents, 20 interrogatories); id. at 256-267
(interrogatories and request for production of documents addressed to defendant Chen, set one, 28
interrogatories, 5 requests for production of documents.)

1 provided plaintiff with the proper forms for requesting an Olsen review. Accordingly, plaintiff's
2 motion for the court to order prison officials to provide him with an Olsen review is denied. The
3 court also denies plaintiff's motion to compel defendants to provide him with an Olsen review.

4 In response to plaintiff's request to review inmate Wilson's mental health records, made
5 in several of his discovery requests, defendants object that these records are protected under the
6 right to privacy and under the Health Insurance Portability and Accountability Act ("HIPAA").
7 Defendants also argue that they do not have possession, custody or control of non-party inmate
8 Wilson's medical file.

9 With regard to defendants' objection based on the right to privacy and HIPAA, there
10 exists a privacy right in one's confidential medical records and certain other records. However,
11 the privacy right is not absolute and discovery may be allowed if a balancing of the privacy right
12 against the need for the information weighs in favor of disclosure. See, e.g., Allen v. Woodford,
13 2007 WL 309485, at *6 (E.D.Cal. Jan. 30, 2007); Sedaghatpour v. State of California, 2007 WL
14 4259214, at *1 (N.D.Cal. Dec. 3, 2007); Holestine v. Terhune, 2003 WL 23281594, at *10
15 (N.D.Cal. Nov. 21, 2003).

16 Here, balancing plaintiff's need for the information he seeks against the privacy rights
17 asserted by defendants, favor tips in favor of plaintiff. Plaintiff alleges that inmate Wilson had
18 mental health issues and should not have been double celled. Based on these allegations, inmate
19 Wilson's mental health records for the year preceding the incident are relevant. However, inmate
20 Wilson's privacy rights dictate that these records be filed under seal with the court.

21 Defendants object that they do not have access to inmate Wilson's medical file. Federal
22 Rule of Civil Procedure 34 empowers a party to serve on any other party a request to produce
23 "any designated documents ... which are in the possession, custody or control of the party upon
24 whom the request is served." Fed. R. Civ. P. 34(a). Documents are in the "possession, custody,
25 or control" of the served party if the party has actual possession, custody, or control, or has "the
26 legal right to obtain the documents on demand." U.S. v. Int'l Union of Petroleum & Indus.
27 Workers, 870 F.2d 1450, 1452 (9th Cir. 1989). The party responding to a request for production
28 of documents has an obligation to conduct a reasonable inquiry into the factual basis of its

1 responses to the request to produce documents. Fed. R. Civ. P. 34.

2 A party must make reasonable efforts to respond, and reasonableness is determined by the
3 size and complexity of the case and the resources that a responding party has available to put to
4 the case. See United States ex rel Englund v. Los Angeles County, 235 F.R.D. 675 (E.D.Cal.
5 2006). Moreover, if the responding party would necessarily have to gather the requested
6 information to prepare its own case, objections that it is too difficult to obtain the information for
7 the requesting party are not honored. Flour Mills, Inc. v. Pace, 75 F.R.D. 676, 680 (D.Okla.
8 1977). See also 8A Wright, Miller & Marcus, Federal Practice and Procedure, § 2174 at 302-05
9 (2nd ed. 1994).

10 Defendants are directed to supplement their objection that they do not have custody or
11 control over inmate Wilson's mental health records for the year prior to the alleged incident.
12 Defendants shall address the location of these records and why they cannot be obtained with
13 reasonable efforts, including whether they have the legal right to obtain the documents. If, upon
14 further inquiry, defendants determine that they are able to access these records, defendants shall
15 file these records under seal with the court. The court will consider these records at the time it
16 considers a dispositive motion or at trial.

17 Interrogatory no. 4 asked defendant Virga, "When did Wilson arrive at CSP/SAC?" (ECF
18 No. 142-1 at 28.) Defendant Virga responded,

19 Responding party objects on the grounds that the interrogatory
20 seeks information that is not relevant to a claim or defense in this
21 lawsuit and infringes on a third party's right to privacy. Without
22 waiving objection, inmate Wilson paroled and therefore his
admission information is no longer available in the CDCR inmate
locator public database.

23 (Id. at 29.)

24 In the motion to compel, plaintiff does not address how the date on which inmate Wilson
25 arrived at CSP-Sac is relevant. While this information may lead to relevant information, it is not
26 directly relevant to this action.

27 The undersigned agrees with defendants that inmate Wilson has a right to privacy
28 regarding the date on which he arrived at CSP-Sac. When the constitutional right of privacy is

1 involved, “the party seeking discovery must demonstrate a compelling need for discovery, and
2 that compelling need must be so strong as to outweigh the privacy right when these two
3 competing interests are carefully balanced.” Artis v. Deere, Co., 276 F.R.D. 348, 352 (N.D. Cal.
4 2011) (quoting Wiegele v. Fedex, 2007 WL 628041, at *2 (S.D. Cal. 2007). “Compelled
5 discovery within the realm of the right of privacy ‘cannot be justified solely on the ground that it
6 may lead to relevant information.” Id. (quoting Wiegele, 2007 WL 628041, at *2.) Because
7 plaintiff has not addressed the relevancy of this information, so that the court may weigh inmate
8 Wilson’s right to privacy, the motion to compel as to this request is denied.

9 Interrogatory no. 15 asked defendant Phelps, “How did you know that Wilson suffered
10 from severe mental illness?” (ECF No. 142-1 at 243.) Defendant responded, “Responding party
11 objects on the grounds that the interrogatory assumes facts not in evidence and lacks foundation.
12 Responding party further objects on the grounds that the interrogatory ... seeks information that
13 is confidential and disclosure would infringe on a third party’s right to privacy.” (Id. at 2.)

14 Defendant’s objections that the interrogatory assumes facts not in evidence and lacks
15 foundation are well taken. The motion to compel as to this interrogatory is denied.

16 Interrogatory no. 13 asked defendant Ali, “Produce any and all x-rays and MRIs before 1-
17 26-10 January, twenty six. The year of twenty ten, that show injuries to the plaintiff’s lower back
18 area specifically the S-1, L-5 areas.” (ECF No. 142-1 at 10.) Defendant Ali responded,
19 “Responding party objects on the ground that the request is unintelligible as framed. Without
20 waiving objections, copies of any MRIs or x-rays plaintiff underwent are located in plaintiff’s
21 medical file, which are available for inspection and copying pursuant to prison policy and
22 procedure.” (Id.)

23 As discussed above, plaintiff may request access to his medical files by way of an Olsen
24 review. Thus, plaintiff’s x-rays and MRIs are equally available to plaintiff. For this reason,
25 plaintiff’s motion to compel as to this interrogatory is denied.

26 Interrogatory no. 14 asked defendant Ali, “Describe in as much detail as possible in
27 ‘laymen’ term, the difference between the x-rays and MRIs of the plaintiff’s lower back prior to
28 January twenty-six, twenty ten, and the x-rays and MRIs of the Plaintiff’s lower back after the

1 date of January twenty-six, twenty ten.” (Id. at 22.) Defendant Ali responded, “Responding party
2 is not in possession, custody or control of any x-rays or MRIs of plaintiff taken prior to January
3 26, 2010, and therefore, cannot respond to the interrogatory.” (Id.)


4 Defendant Ali’s response to this interrogatory is unclear as he did not object that he did
5 not have access to the x-rays and MRIs of plaintiff’s back taken after January 26, 2010, requested
6 in interrogatory no. 13. It is unclear, for example, if defendant Ali is claiming that any x-rays or
7 MRIs taken prior to that time are not in his custody as neither of these tests were performed after
8 plaintiff’s incarceration in the California Department of Corrections and Rehabilitation, or just
9 that Defendant Ali does not have access to them. Accordingly, defendant Ali is directed to file a
10 supplemental response to this interrogatory.

11 Accordingly, IT IS HEREBY ORDERED that:

- 12 1. Within twenty-one days of the date of this order, defendants shall file the further
13 briefing addressing plaintiff’s request for inmate Wilson’s mental health records and
14 defendant Ali’s supplemental response to interrogatory no. 14; following receipt of
15 this further briefing, the court will issue further orders, if appropriate; plaintiff’s
16 motion to compel (ECF No. 142) is denied in all other respects; and
- 17 2. Plaintiff’s motion to review his medical file (ECF No. 146) is denied.

18 Dated: March 31, 2014

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE