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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FREDERICK MARC COOLEY,
Plaintiff,
v.
CITY OF VALLEJO, et al.,
Defendants.

No. 2:12-cv-0591 LKK AC P

ORDER ON DISCOVERY &
PROTECTIVE ORDER

Plaintiff filed this 42 U.S.C. § 1983 action in pro se while a Solano County Jail inmate. The case proceeds on plaintiff’s first amended complaint¹ against defendants City of Vallejo and Vallejo Police Officers Sean Kenney and Eric Jensen on plaintiff’s allegations of excessive force subsequent to his arrest on November 5, 2011. ECF No. 7. Defendants answered the first amended complaint (ECF No. 15), and the previously assigned magistrate judge issued a Discovery and Scheduling Order setting March 29, 2013 as the discovery deadline and July 26, 2013 as the pretrial dispositive motion filing deadline. ECF No. 20. This case was reassigned to the undersigned on November 19, 2012. ECF No. 21.

The following motions are pending before the court: (1) plaintiff’s timely-filed motion to

¹ Although plaintiff submitted a proposed second amended complaint (ECF No. 27), he subsequently voluntarily withdrew it. ECF No. 32.

1 compel discovery (ECF No. 33)²; (2) defendants' motion for summary judgment (ECF Nos. 37-
2 40); and (3) plaintiff's motion to amend discovery plan/scheduling order (ECF No. 52). For the
3 reasons set forth below, further discovery is appropriate and adjudication of the summary
4 judgment motion therefore is premature.

5 I. Allegations of the Complaint

6 The First Amended Complaint alleges that plaintiff was arrested by Vallejo Police
7 Officers Kenney and Jensen on November 5, 2011. While plaintiff was lying face down in a
8 prone position and in handcuffs, Jensen beat him with a flashlight. Plaintiff suffered a broken
9 hand, concussion, and other injuries as the result of the beating. Officer Kenney then pulled
10 plaintiff to his feet and slammed him head-first into the patrol car, causing a laceration to his chin
11 that required stitches. Kenney cursed at plaintiff and deliberately tightened his handcuffs, causing
12 extreme pain. When plaintiff was getting into the patrol car, Kenney slammed the car door on his
13 ankles. The officers took plaintiff to the emergency room, where Jensen falsely told medical
14 personnel that plaintiff's injuries had been sustained in a car crash.

15 The complaint alleges that the City of Vallejo has a formal policy or longstanding practice
16 of allowing excessive force by its police officers.

17 II. Plaintiff's Motion to Compel & Motion to Amend the Discovery Order

18 The scope of discovery under Fed. R. Civ. P. 26(b)(1) is broad. Discovery may be
19 obtained as to "any nonprivileged matter that is relevant to any party's claim or defense -
20 including the existence, description, nature, custody, condition and location of any documents or
21 other tangible things and the identity and location of persons who know of any discoverable
22 matter." Id. Discovery may be sought of relevant information not admissible at trial "if the
23 discovery appears reasonably calculated to lead to the discovery of admissible evidence." Id.

24 _____
25 ² Although plaintiff's motion to compel discovery is file-stamped three days beyond the March
26 29, 2013 discovery deadline, the certificate of service indicates it was served on March 28, 2013.
27 Thus, by application of the mailbox rule, the motion is timely. See Houston v. Lack, 487 U.S.
28 266, 275-76 (1988) (pro se prisoner filing is dated from the date prisoner delivers it to prison
authorities); Douglas v. Noelle, 567 F.3d 1103, 1109 (9th Cir. 2009) (holding that "the Houston
mailbox rule applies to § 1983 complaints filed by pro se prisoners").

1 The court, however, may limit discovery if it is “unreasonably cumulative or duplicative,” or can
2 be obtained from another source “that is more convenient, less burdensome, or less expensive”; or
3 if the party who seeks discovery “has had ample opportunity to obtain the information by
4 discovery”; or if the proposed discovery is overly burdensome. Fed. R. Civ. P. 26(b)(2)(C)(i), (ii)
5 and (iii).

6 Plaintiff moves for an order compelling responses from defendants pursuant to Fed. R.
7 Civ. P. 37. ECF No. 33. He seeks responses to the following discovery requests, to which
8 defendants have objected:

- 9 • “Requests for Disclosure” (RFD) Nos. 1 & 2 directed to defendants Jensen and
10 Kenney;
- 11 • “Request for Disclosure” (RFD) No. 2 directed to defendant City of Vallejo;
- 12 • Request for Production of Documents (RFP) Nos. 1, 2, and 4 directed to defendant
13 City;
- 14 • Interrogatory (INT) Nos. 1-4 propounded upon defendant Jensen.

15 A. Requests for Disclosure and for Production

16 1. *“Requests for Disclosure”*

17 In his so-called Request for Disclosure (RFD) No. 1, directed separately to defendants
18 Jensen and Kenney, plaintiff stated:

19 RFD No. 1 Produce and all disclosures reflecting or relating to any
20 reports, memoranda, letters, notes, audio and/or video recordings or
21 summaries of any oral statements relating to Departmental
22 Complaints and/or Civil Complaints made against Vallejo Police
Officer [Eric Jensen] [Sean Kenney] concerning Bad Acts,
Dishonesty, Planting [] Evidence, Falsifying Evidence, Deadly
and/or Excessive Use of Force that has occurred within the last ten
(10) years.

23 His RFD No. 2 directed to defendant City of Vallejo was identical:

24 Produce any and all disclosures reflecting or relating to any reports,
25 memoranda, letter, notes, audio and/or video recordings or
26 summaries of any oral statements relating to Departmental
27 Complaints and/or Civil Complaints made against defendants
Vallejo Police Officer Sean Kenney #620 and Eric Jensen 620 and
28 Eric Jensen #574 concerning Bad Acts, Dishonesty, Planting
Evidence, Falsifying Reports, Deadly and/or Excessive Use of
Force that has occurred within the last ten (10) years.

1 ECF No. 33 at 10-11, 54-55; ECF No. 36 at 25.

2 Both RFDs produced almost identical objections:

3 Defendants' Response:

4 Objection; This request is vague and ambiguous as to whether
5 responding [sic] party has issued Interrogatories pursuant to FRCP
6 33 or Request for Production of Documents pursuant to FRCP 34.
7 The instant requests call for "disclosures" and thus it is unclear
8 whether plaintiff seeks documents or written responses.

9 Objection is further made as this request is overbroad and unduly
10 burdensome. It seeks complaints from the last 10 years. Any
11 complaints from the last ten years would have little to no probative
12 value and would cause undue expense to gather and produce.
13 Further, complaints regarding deadly force are simply irrelevant to
14 the instant case, as plaintiff makes no claim for improper use of
15 deadly force.

16 Further objection is made as this request seeks information that is
17 subject to the attorney-client privilege and work product doctrine.
18 The requested information is also subject to the official information
19 privilege, as it seeks personnel records and complaints and/or
20 claims made against police officers for excessive force and/or
21 deadly force pursuant to Kelly v. City of San Jose, 14 F.R.D. 653
22 (N.D. Cal. 1987) and followed by Martinez v. City of Stockton, 132
23 F.R.D. 677 (E.D. Cal. 1990), and California Government Code §
24 6254, California Penal Code § 832.7, and California Evidence Code
25 § 1043 et seq. See also Declaration of Chief of Police Joseph
26 Kreins served herewith.

27 The City next objects to this Request to the extent that it seeks
28 private information of third parties. Further objection is made that
plaintiff seeks information protected by the self-critical analysis
privilege as it pertains to any internal affairs investigations or
reports.

Finally, the City objects to this demand because disclosure of the
information could potentially prejudice and conflict with the
pending state court criminal prosecution of the Plaintiff [People v.
Cooley Solano County Superior Court Case No. 214659]. A
Motion to Stay the Instant Case Pending the Criminal Proceeding
will be filed with the court forthwith.

24 ECF No. 33 at 28-29, 33-34; ECF No. 36 at 2-3, 5-6; see also ECF No. 33 at 11.

25 The following request was directed individually to both defendants Kenney and Jensen:

26 RFD No. 2: Produce any and all disclosures reflecting or relating to
27 any reports, memoranda, letters, notes, audio and/or video
28 recordings or summaries of any oral statements relating to the
November 5, 2012, arrest of plaintiff Frederick Marc Cooley by
defendants Vallejo Police Officers Sean Kenney and Eric Jensen.

1 ECF No. 33 at 7, 29; ECF No. 36 at 10.

2 Defendants' objections to RFD No. 2 were substantially similar to their objections to RFD
3 No. 1.

4 2. *Request for Production*

5 Plaintiff's Requests for Production of Documents (RFP) to defendant City of Vallejo
6 included the following:

7 RFP No. 1: Produce any and all documents, electronically stored
8 information or tangible thing reflecting or relating to any reports,
9 memoranda, letters, notes, audio and/or video recordings or
10 summaries of an oral statements [sic] relating to Citizen Complaints
and/or Civil lawsuits against any and all Vallejo Police Officers
concerning Deadly and/or Excessive Use of Force that has occurred
within the last ten (ten) years.

11 RFP No. 2: Produce any and all documents, electronically stored
12 information or tangible thing reflecting or relating to any reports,
13 memoranda, letters, notes, audio and/or video recordings or
14 summaries of any oral statements relating to Citizen Complaints
and/or Civil lawsuits against defendants concerning Deadly and/or
Excessive Use of Force, Dishonesty, and Falsifying Police Reports
that has occurred within the last ten (ten) years.

15 RFP No. 4: Produce any and all documents, electronically stored
16 information or tangible thing relating to circumstances of the
November 5, 2011, arrest of the Plaintiff.

17 ECF No. 33 at 8-10; 53-56; ECF No. 36 at 14, 18, 22.

18 Defendant City objected on the same grounds as it objected to the RFDs.

19 3. *Discussion*

20 a. Form of Discovery Requests

21 Defendants object to plaintiff's unconventionally self-styled "requests for disclosure," in
22 part due to their ambiguity. While the "requests for disclosure" are not entirely in conformity
23 with the requests for production of documents contemplated by Fed. R. Civ. P. 34, and even
24 though plaintiff separately propounded requests for documents, this is essentially an objection to
25 form rather than substance. The RFDs can be responded to if they are construed as additional
26 RFPs, which is the most logical construction. Accordingly, the undersigned construes the RFDs
27 as RFPs, and overrules the objection.

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1 b. Relevance

2 What is at issue in this case are plaintiff's allegations of excessive force by officers
3 Kenney and Jensen during or immediately following plaintiff's November 5, 2011 arrest, and the
4 City of Vallejo's alleged longstanding practice of permitting the use of excessive force by its
5 police officers. ECF No. 7. Plaintiff has also alleged that defendant Jensen misinformed hospital
6 personnel that the injuries for which he had been transported to the emergency room for treatment
7 arose from a car crash, i.e., not as a result of defendant Jensen's having allegedly beaten plaintiff
8 with a flashlight as he lay prone. Id.

9 Defendants contend that other complaints against the defendant officers regarding the use
10 of force would necessarily differ so significantly in kind or type from plaintiff's allegations that
11 they would be wholly irrelevant to this case. The undersigned rejects this argument. To the
12 extent that any other excessive force incidents are so factually distinguishable as to have little
13 probative value regarding plaintiff's claims, defendants may certainly object to their use at trial.
14 Discoverability is another matter, however. Past incidents or complaints of excessive force by the
15 defendant officers are potentially relevant, or reasonably calculated to lead to the discovery of
16 admissible evidence, and therefore presumptively discoverable. See Gibbs v. City of New York,
17 243 F.R.D. 95, 96 (S.D.N.Y. 2007) (officer disciplinary records discoverable); Frails v. City of
18 New York, 236 F.R.D. 116, (E.D.N.Y. 2006) (internal affairs records and unsubstantiated
19 complaints discoverable).

20 Defendants are correct, however, that other instances involving the use of *deadly* force are
21 not necessarily relevant, as the excessive force alleged in this case was not deadly force.
22 Defendants will not be ordered to produce documents regarding the use of deadly force by
23 defendants Kenney and Jensen, such as documentation related to officer-involved shootings,
24 unless such incidents gave rise to complaints that the force used was excessive. Discoverability
25 turns on the existence of a question regarding the reasonableness of the force used by the
26 defendants, not on the type of force used.

27 Evidence of dishonesty by the defendant officers is also relevant and therefore
28 discoverable. If this case goes to trial, both individual officers will be required to testify and their

1 credibility will be subject to challenge. Officer Jensen’s truthfulness is specifically at issue
2 because of plaintiff’s allegation that he lied to hospital personnel about the cause of plaintiff’s
3 injuries.

4 Records of incidents involving the use of excessive force by officers other than the
5 individual defendants are relevant to plaintiff’s municipal liability claim under Monell v. Dept. of
6 Social Services, 436 U.S. 658 (1978), and therefore discoverable. See Floren v. Whittington,
7 217 F.R.D. 389, 391-92 (S.D.W.V. 2003). As with the request for documentation related to
8 defendants Kenney and Jensen, discovery will be limited to complaints of excessive force and
9 will not extend to the use of deadly force in the absence of such complaint.

10 Scope and Overbreadth

11 Defendants contend that it would be unduly burdensome to produce records going back
12 ten years, and that ten year old records would not be relevant. The court disagrees. Plaintiff has
13 alleged a long-standing policy and/or practice by the City of Vallejo of permitting the use
14 excessive force by its police officers. Records covering a ten-year span of time are relevant in
15 this context. See Frails, 236 F.R.D. at 118 (rejecting defendant’s request to limit production of
16 records to the last ten years, finding even older records relevant).

17 c. Asserted Privileges and Related Protections from Disclosure

18 Defendants contend that the information sought is protected by the attorney-client and
19 official information privileges as well as the work-product doctrine. The court is mindful that
20 privileges are narrowly construed because they impede the full and fair discovery of the truth,
21 Eureka Financial Corp. v. Hartford Acc. and Indemnity Co., 136 F.R.D. 179, 183 (E.D. Cal.
22 1991), and that the party asserting the privilege has the burden to establish its applicability is an
23 undisputed proposition, see, e.g., United States v. O’Neill, 619 F.2d 222, 227 (3rd Cir. 1980).
24 The Supreme Court has long emphasized that privileges are not favored, “being. . . derogations
25 from a positive general rule.”³ Jaffee v. Redmond, 518 U.S. 1, 9 (1996). “[P]rivileges are to be

26 _____
27 ³ “The common-law principles underlying the recognition of testimonial privileges can be stated
28 simply. ‘For more than three centuries it has now been recognized as a fundamental maxim that
the public . . . has a right to every man’s evidence. When we come to examine the various claims
(continued...)”

1 construed especially narrowly when asserted by officers or cities in federal civil rights actions.”
2 Mason v. Stock, 869 F. Supp. 828, 834 (D. Kan.1994).

3 Under Fed. R. Civ. P. 26 (b)(5):

4 When a party withholds information otherwise discoverable by
5 claiming that the information is privileged or subject to protection
6 as trial-preparation material, the party must: (i) expressly make the
7 claim; and (ii) describe the nature of the documents,
8 communications, or tangible things not produced or disclosed—and
9 do so in a manner that, without revealing information itself
10 privileged or protected, will enable other parties to assess the claim.

11 In this case, defendants have failed to provide a privilege log or any exhibit identifying the
12 specific documents they deem to be work product or privileged. All of defendants’ assertions of
13 privilege and work-product protection are therefore inadequately supported and must be overruled
14 for that reason. See Mason, 869 F. Supp. at 834 (“Blanket assertions of privilege will not do.”).
15 Moreover, as explained below, none of the claimed privileges and protections bar disclosure of
16 the materials that plaintiff seeks.

17 Attorney-Client Privilege

18 “The attorney-client privilege applies when (1) legal advice is sought (2) from a
19 professional legal advisor in his capacity as such, and (3) the communications relating to that
20 purpose (4) are made in confidence (5) by the client.” Griffith v. Davis, 161 F.R.D. 687, 694
21 (C.D. Cal. 1995) (citing Admiral Ins. v. U.S. Dist. Court, 881 F.2d 1486, 1492 (9th Cir.1989)).

22 “Where applicable, the privilege protects a communication from discovery so long as the
23 privilege has not been waived.” Id. Of course, the party asserting the privilege has the burden to
24 establish the attorney client privilege. Newport Pac. Inc. v. City of San Diego, 200 F.R.D. 628,
25 633 (S.D. Cal. 2001).

26 “The attorney-client privilege does not apply to communications that are intended to be
27 disclosed to third parties or that in fact are so disclosed.” Griffith, 161 F.R.D. at 695 (citing

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of exemption, we start with the primary assumption that there is a general duty to give what
testimony one is capable of giving, and that any exemptions which may exist are distinctly
exceptional, being so many derogations from a positive general rule.” Jaffee, 518 U.S. at 9
(citing United States v. Bryan, 339 U.S. 323, 331 (1950) (quoting 8 J. Wigmore, Evidence §
2192, p. 64 (3d ed.1940)).

1 United States v. Rockwell International, 897 F.2d 1255, 1265 (3rd Cir.1990)). For example,
2 where an arrestee makes a complaint of excessive force against an arresting officer and that
3 arresting officer then becomes the subject of an internal affairs investigation, the officer cannot
4 subsequently withhold from discovery his statements to internal affairs investigators on the basis
5 of attorney-client privilege. Id. (summarizing Gonzales v. Municipal Court, 67 Cal.App.3d 111,
6 116 (1977)). This is so because, although the investigation’s primary purpose was gathering
7 evidence for the city attorney to use to defend any civil action brought against the police officer
8 or the city concerning the incident, there was a secondary purpose which sought to discover
9 whether there was any grounds for disciplining the officer. Id. “[I]f a client communicates with
10 his attorney with the intention that the communication be conveyed to another, that
11 communication is not confidential and, therefore not privileged.” Id. (citing Gonzales, 67 Cal.
12 App.3d at 118-119.

13 Defendants have identified no particular materials responsive to plaintiff’s discovery
14 requests that constitute confidential communications between an attorney and client. Under the
15 authorities here discussed, the attorney-client privilege does not protect from disclosure the
16 “departmental complaints” that plaintiff seeks, or any statements regarding plaintiff’s arrest that
17 may have been made in the course of internal affairs investigation(s) or disciplinary inquiries.

18 Work-Product Doctrine

19 The work-product doctrine “is not a privilege, but a qualified immunity protecting from
20 discovery documents and tangible things prepared by a party or his representative *in anticipation*
21 *of litigation.*” Admiral Insurance Co. v. United States District Court, 881 F.2d 1486, 1494 (9th
22 Cir.1989) (emphasis added). Defendants have identified no responsive documents that were
23 prepared by a party or his representative for purposes of litigation. The discovery requests at
24 issue seek documents and other materials that are routinely created and maintained by law
25 enforcement agencies for purposes independent of litigation. Accordingly, the objection is not
26 well-taken.

27 Official Information Privilege

28 Privileges asserted by a government agency based on official information or other

1 governmental privileges have long been subject to procedural prerequisites: “There must be a
2 formal claim of privilege, lodged by the head of the department which has control over the
3 matter, after actual personal consideration by that officer. The court itself must determine
4 whether the circumstances are appropriate for a claim of privilege . . .” United States v. O’Neill,
5 619 F.2d 222, 225 (3d Cir. 1980) (quoting United States v. Reynolds, 345 U.S. 1, 7-8 (1953)).
6 The claim should be made by a person in an executive policy position. See Reynolds, 345 U.S. at
7 8 n. 20 (“The essential matter is that the decision to object should be taken by the minister who is
8 the political head of the department, and that he or she should have seen and considered the
9 contents of the documents and himself have formed the view that on grounds of public interest
10 they ought not to be produced . . .”) “[T]he information for which the privilege is claimed must
11 be specified, with an explanation why it properly falls within the scope of the privilege.” In re
12 Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988). An official cannot invoke a privilege without
13 personally considering the material for which the privilege is sought. Yang v. Reno, 157 F.R.D.
14 625, 634 (M.D. Pa. 1994).

15 Defendants provided plaintiff with a declaration from the Vallejo Chief of Police Joseph
16 Kreins. ECF No. 33 at 37-38. Chief Kreins declares that he has reviewed departmental
17 complaints and civil complaints related to excessive and/or deadly force against officers, and
18 states that they are collected and maintained by the city’s police department. He avers that the
19 confidentiality of the documents sought has been maintained “except for review within the
20 confines of the Vallejo Police Department”; he states that the police department will not permit
21 them to copied except to provide them “to the public entity’s attorneys.” Id. He further maintains
22 that police officers have a privacy interest in protecting official information such as personnel
23 records, civil complaints, disciplinary actions and Internal Affairs reviews/findings and that the
24 state constitution guarantees certain privacy rights “that would be impugned by disclosure to the
25 plaintiff.” Id. He asserts that maintaining the confidentiality of Internal Affairs material allows
26 for open discussion and criticism of the conduct of officers and suggestions of ways to improve
27 without fear of being subjected to civil liability. The police chief believes that there is a strong
28 governmental interest in preserving the confidentiality of the documents plaintiff has requested

1 and that releasing the documents with “[e]ven a carefully crafted Protective Order” would
2 adversely impact the police department. Id.

3 Federal law governs the existence and scope of an asserted privilege in federal question
4 cases. Kerr v. U.S. Dist. Court for N. Dist. of California, 511 F.2d 192, 197 (9th Cir. 1975),
5 aff’d, 426 U.S. 394 (1976).⁴ “Federal common law recognizes a qualified privilege for official
6 information.” Sanchez v. City of Santa Ana, 936 F.2d 1027, 1033 (9th Cir. 1990) (“[g]overnment
7 personnel files are considered official information.”). The case relied on by defendants, Kelly v.
8 City of San Jose, 114 F.R.D. 653, 655 (N.D. Cal. 1987), states plainly that “it is important to
9 emphasize that in a civil rights case brought under federal statutes questions of privilege are
10 resolved by federal law.” See also, id. at 655-56 (“State privilege doctrine, whether derived from
11 statutes or court decisions, is not binding on federal courts in these kinds of cases.”).

12 Nevertheless,

13 federal courts generally should give some weight to privacy rights. .
14 protected by state constitutions or state statutes. Of course, ultimate
15 responsibility for deciding how much weight to ascribe to such
16 interests, and how that weight compares with the significance of
17 competing interests, must reside with the federal courts.

18 Id.

19 “To determine whether the information sought is privileged, courts must weigh the
20 potential benefits of the disclosure against the potential disadvantages. If the latter is greater, the
21 privilege bars discovery.” Sanchez, 936 F.2d at 1033-34; see also Martinez v. City of Stockton,
22 132 F.R.D. 677 (E.D.Cal. 1990).⁵ “The balancing approach of the Ninth Circuit is mirrored in
23 this and other courts’ previous determinations that a balancing test is appropriate when the
24 disclosure of law enforcement files in a civil action is at issue.” Doubleday v. Ruh, 149 F.R.D.
25 601, 609 (E.D. Cal. 1993); cf. Crawford v. Dominic, 469 F. Supp. 260, 263 (E.D. Pa. 1979)

26 ⁴ Defendants also cite the California Constitution and state statutes in asserting the confidentiality
27 of police officer records, and assert the privacy rights of third parties. However, federal law
28 governs here.

⁵ This case has been recognized as overruled only to the extent that it found that the law of the
forum state, California, informed federal privilege law. Jackson v. County of Sacramento, 175
F.R.D. 653, 654 (E.D. Cal. 1997).

1 (finding “the importance of the information to the plaintiff’s case” to be “the weightiest” of ten
2 factors to be considered in determining whether police files should be discovered in a civil rights
3 action).⁶

4 Here, the benefits of disclosure outweigh the disadvantages. The requested information is
5 of significant importance to plaintiff’s case. The countervailing institutional and privacy
6 considerations can be adequately addressed by narrowly tailoring the compelled production,
7 providing for redaction of documents, and issuing a protective order to limit use of the materials.

8 Self-Critical Analysis Privilege

9 Defendants maintain that the self-critical analysis privilege protects internal affairs
10 investigations and reports. However, “[t]he Ninth Circuit does not recognize the privilege of
11 ‘self-critical analysis.’” Griffith v. Davis, 161 F.R.D. 687, 701 (1995) (citing Dowling v.
12 American Hawaii Cruises, Inc., 971 F.2d 423 (9th Cir.1992)); see also Mason v. Stock, 869
13 F.Supp. 828, 834 (D.Kan.1994) (even if a “self-critical analysis privilege” exists, it would not
14 apply in the context of internal investigations of police officer defendants in a §1983 case).

15 d. Objection Based On Pending Criminal Proceeding

16 Defendants objected to discovery on grounds that disclosure could potentially prejudice
17 and conflict with a state court prosecution of plaintiff that was pending at the time of the initial
18 objections. Defendants represented that a motion to stay this case pending resolution of the
19 criminal case would be filed “forthwith.” See ECF No. 33 at 29. No motion to stay was ever

20
21 ⁶ The ten factors include:“(1) the extent to which disclosure will thwart governmental processes
22 by discouraging citizens from giving the government information; (2) the impact upon persons
23 who have given information of having their identities disclosed; (3) the degree to which
24 governmental self-evaluation and consequent program improvement will be chilled by disclosure;
25 (4) whether the information sought is factual data or evaluative summary; (5) whether the party
26 seeking the discovery is an actual or potential defendant in any criminal proceeding either
27 pending or reasonably likely to follow from the incident in question; (6) whether the police
28 investigation has been completed; (7) whether any intradepartmental disciplinary proceedings
have arisen or may arise from the investigation; (8) whether the plaintiff’s suit is non-frivolous
and brought in good faith; (9) whether the information sought is available through other discovery
or from other sources; and (10) the importance of the information sought to the plaintiff’s case.”
Crawford v. Dominic, 469 F. Supp. at 263) (citing Frankenhauser v. Rizzo, 59 F.R.D. 339, 344
(E.D.Pa.1973)).

1 filed, nor has defendant briefed the matter or provided any information about the status of the
2 criminal case in opposition to the motion to compel. The court's docket indicates that plaintiff is
3 now out of custody. This objection is overruled as unsubstantiated.

4 e. Conclusion Regarding Requests for Documents

5 Although defendants have a legitimate concern about releasing law enforcement officers'
6 personnel information, plaintiff is entitled to discovery of information related to (1) the past use
7 of excessive force by defendants Kenney and/or Jensen, (2) the truthfulness of defendants Kenney
8 and/or Jensen, and (3) the City's knowledge of and responses to the use of excessive force by its
9 police officers. In order to properly balance the competing interests of the parties, the court will
10 order the production of certain categories of documents in redacted form and subject to protective
11 order. Specifically, defendants shall produce the following to plaintiff:

- 12 • Any and all documents related to (1) complaints or reports of the use of excessive
13 force, or inquiries into the use of force, and/or (2) complaints or reports of
14 dishonesty (including but not limited to false statements and falsification of
15 evidence), or inquiries into possible dishonesty, from the personnel files of
16 defendant Officers Sean Kenney and Eric Jensen;
- 17 • Any and all Internal Affairs investigations and reports related to allegations of (1)
18 excessive force, and/or (2) dishonesty (including but not limited to false statements
19 and falsification of evidence) involving defendant Officers Sean Kenney and Eric
20 Jensen;
- 21 • Any and all civil and/or departmental complaints or grievances alleging the use of
22 excessive force by defendants Kenney and Jensen that are not otherwise referenced
23 in this order;
- 24 • Internal Affairs investigations and reports, civil and departmental complaints or
25 grievances arising from or involving claims of excessive force of any other
26 defendant City of Vallejo police officers for a period of ten years prior to the filing
27 of this action, and documentation of the disposition of such complaints or
28 grievances.

1 Personal data such as social security numbers, birth dates and home addresses shall be
2 redacted from all documents produced under this order. Moreover, the full names of officers
3 other than defendants Kenney and Jensen may be redacted from documents involving excessive
4 force complaints arising from incidents other than plaintiff's November 5, 2011 arrest; officers
5 who were the subjects of such complaints may be identified by initials only. The documents shall
6 be produced under protective order limiting their use to litigation of the instant case only;
7 providing that the documents shall not be shared with anyone other than attorneys, expert
8 consultants and expert witnesses involved in the preparation and litigation of this case; and
9 providing that all documents disclosed and any copies must be returned to counsel for the City at
10 the conclusion of these proceedings.

11 B. Interrogatories

12 Defendant Jensen objects to the following interrogatories:

13 INT. No. 1: Please describe with specificity and in "I" narrative
14 form, whether you were involved in the September 12, 2012, police
15 involved shooting that left "Joseph Johnson[,] seriously injured
16 and "Mario Romero" mortally wounded in the City of Vallejo? If
17 yes, detail all your observations and actions concerning your
18 encounter with Mr. Johnson and Mr. Romero and whether a citizen
19 complaint was filed including the disposition.

17 Defendant's Response: Objection. This interrogatory seeks
18 information that is not relevant and not reasonably calculated to
19 lead to the discovery of admissible evidence. Further, this request
20 seeks information that is a part of an ongoing investigation by the
21 Solano County District Attorney's Office and any inquiries about
22 this matter should be addressed to that office. Furthermore,
23 defendant will not release any information that might be protected
24 under the Fifth Amendment of the U.S. Constitution.

22 INT. No. 2: Please describe with specificity and in "I" narrative
23 form, whether a section 1983 civil action was filed against you in
24 the United States District Court, Eastern District of California on or
25 about October 27, 2003, entitled Kaumbulu v. City of Vallejo, et[]
26 al., 2:03-cv-002235-PAW, claiming that while Mr. Kaumbulu was
27 in a prone position on the ground, you put your foot on his shoulder
28 and then jammed your knee against the base of Mr. Kaumbulu's
skull nest to his spine resulting in a broke [sic] jaw? If yes, detail
all your observations and actions concerning your encounter with
Mr. Kaumbulu and whether you were disciplined by your
employers.

INT No. 3: Please describe with specificity and in "I" narrative
form, whether a section 1983 civil action was filed against you in

1 the U.S. District Court, Eastern District of California on or about
2 April 7, 2006, entitled Deocampo v. City of Vallejo, 2:06-cv-
3 01283-NBS-GGH claiming that without justification or cause, you
4 hit Deocampo with a baton in his legs and back resulting in a
5 fractured kneecap, pain, swelling and bruising to his legs and back?
6 If yes, detail all your observations and actions concerning your
7 encounter with Mr. Deocampo and whether you were disciplined by
8 your employers.

9 INT No. 4: Please describe with specificity and in “I” narrative
10 form, whether a section 1983 civil action was filed against you in
11 the U.S. District Court, Eastern District of California on December
12 6, 2006, entitled Roe v. City of Vallejo, 2:06-cv-02769-GFB-EFB,
13 was filed against you, claiming that after Ms. Doe’s boyfriend was
14 arrested for Driving Under the Influence, you offered to give Ms.
15 Doe a ride to Mr. Roe’s apartment and ordered Mr. Roe to give you
16 the keys. After arriving at Mr. Roe’s apartment you walked Ms.
17 Doe to the apartment but Ms. Doe was unable to open the door
18 because it was the wrong key from Mr. Roe’s belongings. You
19 drove Ms. Doe back to the Vallejo Police Department and retrieved
20 the correct key from Mr. Roe. On the way back to the apartment
21 you made several inappropriate comments including but not limited
22 to “You’re a porno star, huh?” Once again you walked Ms. Doe
23 back to Mr. Roe’s apartment and opened the door. Almost
24 immediately after the door opened, you proceeded to sexually
25 harass and assault Ms. Doe by stalking her as she quickly moved
26 from room to room, fondling her genitals and exposing your penis.
27 If yes, detail all your observations and actions concerning your
28 encounter with Ms. Roe and whether you were disciplined by your
employer.

ECF No. 33 at 12-15, 46-50; ECF No. 36 at 30-36.

Defendant Jensen objected to INT Nos. 2-4 on grounds of relevance, privacy, attorney-client privilege, official information privilege and the work-product doctrine. Defendant also objected on grounds that the information is part of the public record and equally available to plaintiff. Id.

The objections based on relevance, privilege and work-product protection are rejected for the same reasons explained above in relation to the document requests. The only objection that is unique to the interrogatories is the objection that the information sought is available from other sources and already known to plaintiff.

The court takes judicial notice of the cases referenced by plaintiff in INT Nos. 2-4:⁷

⁷ A court may take judicial notice of court records. See Barron v. Reich, 13 F.3d 1370, 1377 (9th (continued...))

- 1 • Kaumbulu v. City of Vallejo, et al., 2:03-cv-02235 MCE PAN. The case ended in
2 a stipulated dismissal with prejudice prior to trial as to the two defendants,
3 including E. Jensen, under Fed. R. Civ. P. 41(a)(1) on October 10, 2005.
- 4 • Deocampo v. City of Vallejo, 2:06-cv-01283-WBS CMK, in which the City of
5 Vallejo and Officer Jensen are among the named defendants, is currently
6 proceeding.
- 7 • Roe, et al. v. City of Vallejo, et al., 2:06-cv-02769 GEB EFB, proceeded against a
8 number of defendants including the City of Vallejo and Eric Jensen but was
9 voluntarily dismissed by plaintiffs on March 28, 2008.

10 It is evident that plaintiff is familiar with the claims against Officer Jensen in each of the
11 above-described cases. Defendant is correct that the information about these cases is publicly
12 available. Moreover, it is apparent from the interrogatories themselves that plaintiff has
13 independently obtained information about these cases. Because further information regarding
14 these incidents will be produced to plaintiff by way of document production, these interrogatories
15 are largely duplicative. Accordingly, the court will not require further discovery from defendant
16 Jensen in the form of responses to interrogatories.

17 Defendant's objection to INT No. 1 based on relevance, which is overruled, also refers to
18 an on-going, possibly criminal investigation into the Johnson and Romero shooting. Defendant
19 Jensen has plausibly asserted his Fifth Amendment privilege insofar as plaintiff seeks a first-
20 person narrative account from Jensen regarding that shooting.⁸ No such protection attaches to the
21 existence and disposition of related citizen complaints or previously memorialized statements,
22 however, which have been addressed above regarding document production.

23 For all these reasons, plaintiff's motion to compel responses from defendant Jensen to
24 plaintiff's Interrogatories 1 through 4 will be denied.

25 Cir. 1994); MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986); United States v.
26 Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

27 ⁸ The court's ruling does not turn on Jensen's invocation of the Fifth Amendment. The motion to
28 compel is denied as to the interrogatories on grounds that they (1) are duplicative of the document
requests, and (2) seek information that is available by other means.

1 III. Defendants' Motion for Summary Judgment

2 The court notes that defendants have failed to provide adequate notice to plaintiff with
3 their dispositive motion regarding the requirements for opposing a Rule 56 motion. See Woods v.
4 Carey, 684 F.3d 934 (9th Cir. 2012) (requiring contemporaneous notice per Rand v. Rowland,
5 154 F.3d 952, 957 (9th Cir. 1998)) of the requirements to oppose a motion for summary
6 judgment). Defendants will have the opportunity to correct their oversight, as the motion will be
7 vacated to be re-noticed following production of the discovery ordered herein. Should defendants
8 elect to supplement or modify the vacated summary judgment motion, they may re-file and re-
9 serve it at that time. Plaintiff will then have an opportunity to file his full opposition within thirty
10 days, after which defendants will have fourteen days to file any reply.

11 Accordingly, IT IS ORDERED that:

12 1. Plaintiff's motion to compel discovery (ECF No. 33) is GRANTED IN PART as
13 follows, and in all other respects is denied:

14 Defendants are directed to produce to plaintiff, within thirty days and with personal data
15 redacted pursuant to the terms of the accompanying Protective Order:

16 a) Any and all documents related to (1) complaints or reports of the use of excessive force,
17 or inquiries into the use of force, and/or (2) complaints or reports of dishonesty (including but not
18 limited to false statements and falsification of evidence), or inquiries into possible dishonesty,
19 from the personnel files of defendant Officers Sean Kenney and Eric Jensen;

20 b) Any and all Internal Affairs investigations and reports related to allegations of (1)
21 excessive force, and/or (2) dishonesty (including but not limited to false statements and
22 falsification of evidence) involving defendant Officers Sean Kenney and Eric Jensen;

23 c) Any and all civil and/or departmental complaints or grievances alleging the use of
24 excessive force by defendants Kenney and Jensen that are not otherwise referenced in this order;

25 d) Internal Affairs investigations and reports, civil and departmental complaints or
26 grievances arising from or involving claims of excessive force of any other defendant City of
27 Vallejo police officers for a period of ten years prior to the filing of this action, and
28 documentation of the disposition of such complaints or grievances. The names and badge

1 numbers of officers other than defendants Kenney and Jensen who have been accused of using
2 excessive force may be redacted, and such officer identified by initials.

3 2. The discovery produced pursuant to this order shall be subject to the following
4 PROTECTIVE ORDER:

5 a) Prior to the release of the above-described documentation, personal information
6 regarding defendant Officers Sean Kenney and Eric Jensen or any other police officer or other
7 personnel employed, formerly or currently, by defendant City of Vallejo shall be redacted.
8 Personal information to be redacted includes birth dates, social security numbers, driver's license
9 numbers, home addresses, and the names of any immediate family members;

10 b) Any documents disclosed are to be used in the litigation of the instant case only, and
11 not for any other purpose;

12 c) Any documents disclosed are to be shared only with attorneys, expert consultants and
13 expert witnesses involved in the preparation and litigation of this case, and may not be shown to
14 any other individual except to the extent that they are admitted at trial or filed as exhibits in
15 relation to a dispositive motion;

16 d) Should a party intend to file with the court documents subject to this order, that party
17 must, prior to filing any such material, notify all other parties (defendants through their attorneys
18 or plaintiff pro se) of an intent to file, giving any such party reasonable notice and an opportunity
19 to apply to the court for an order to file the material under seal;

20 e) No document shall be filed under seal unless counsel or any pro se party secures a
21 court order allowing the filing of a document under seal in accordance with the provisions of E.D.
22 Local Rule 141;

23 f) Any documents disclosed and all copies made must be returned to counsel for the City
24 at the conclusion of these proceedings;

25 g) Violation of the terms of this Protective Order may subject a party to sanctions
26 including dismissal;

27 3. Plaintiff's "motion to amend discovery plan/scheduling order" (ECF No. 52) is now
28 moot and is VACATED from the court's calendar.

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4. Defendants' motion for summary judgment is hereby VACATED as premature, subject to re-filing or re-notice in accordance with Woods v. Carey, supra, no later than thirty days following service of discovery responses. Plaintiff's opposition shall be due thirty days thereafter, and defendants have shall fourteen days to reply.

DATED: October 29, 2013



ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

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