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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TORY BRATTON,
Plaintiff,
v.
E. SHINETTE, et al.,
Defendants.

No. 2:16-cv-1084-EFB P

ORDER

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. He has filed several motions –two to compel discovery (ECF Nos. 23 & 24), one seeking an extension of time to file his second amended complaint (ECF No. 25), three to exclude relevant evidence (ECF Nos. 29, 33, & 34), and one to appoint counsel (ECF No. 32).

Defendants have filed oppositions to both motions to compel and a statement of non-opposition to plaintiff’s motion for extension of time to file his second amended complaint. ECF Nos. 27 & 28.

For the reasons stated hereafter, plaintiff’s motions to compel are granted, in part, his motion for extension of time is granted, his motions to exclude evidence are denied, and his request for appointment of counsel is denied.

I. Motions to Compel

A. Legal Standards

Parties are obligated to respond to interrogatories to the fullest extent possible under oath, Fed. R. Civ. P. 33(b)(3), and any objections must be stated with specificity, Fed. R. Civ. P.

1 33(b)(4); *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981) (“objections should be plain
2 enough and specific enough so that the court can understand in what way the interrogatories are
3 alleged to be objectionable”). A responding party is typically not required to conduct extensive
4 research in order to answer an interrogatory, but reasonable efforts to respond must be
5 undertaken. *L.H. v. Schwarzenegger*, No. S-06-2042 LKK GGH, 2007 U.S. Dist. LEXIS 73752,
6 2007 WL 2781132, *2 (E.D. Cal. Sep. 21, 2007). Further, the responding party has a duty to
7 supplement any responses if the information sought is later obtained or the response provided
8 needs correction. Fed. R. Civ. P. 26(e)(1)(A).

9 **B. Analysis**

10 Plaintiff’s motions to compel are hand-written, not divided by discovery item, and overall
11 difficult to parse with any reasonable precision. Defendants have interpreted them to seek the
12 following:

- 13 1) Confidential Appeal Inquiry package for Appeal No. SAC-B-15-
14 03262 (including the notes of Lieutenant G. Ellin concerning the
15 interviews of Defendant E. Shinnette, Defendant M. Caudle,
16 Correctional Officers T. Beeby and Z. Wheeler, and inmates
Owens (V-60905), Marquez (AP-5528), Tamayo (H-42205) and
Mack (AV-7162)) (re: RPD.218-246) (ECF No. 23 at 1; *see also*
ECF No. 24 at 1, 5);
- 17 2) Use of Force Critique package for Incident Report No. SAC-FBP-
18 15-09-1013 (re: RPD.247-260) (ECF No. 23 at 1; *see also* ECF
No. 24 at 1-2, 8);
- 19 3) Any and all documents relating to allegations of excessive force
20 by any CSP-SAC staff during September 16, 2014 one year prior
21 to the incident at issue to the present concerning inmate/patients
housed in PSU II/III and every segregated housing unit (ECF No.
23 at 1; *see also* ECF No. 24 at 6);
- 22 4) Any and all formal and informal written complaints (including but
23 not limited to 602 forms against any named defendants alleging
24 excessive use of force that occurred prior to September 16, 2015
(including all written responses, appeals, reports, investigations
25 and/or correspondence regarding the complaints (ECF No. 23 at
1));
- 26 5) CSP-SAC Investigative Services Unit procedural manual for
27 responding and investigating incidents involving staff assaults (ECF
No. 24 at 1; *see also* ECF No. 24 at 2, 6-7));
- 28 6) Digital photographs of Plaintiff’s cell, inside and out, with the cell
door opened and closed (ECF No. 24 at 1, 7-8);

- 1 7) The complete and full report the CSP-SAC ISU prepared and sent
2 to the Sacramento County District Attorney on December 29,
2015 (ECF No. 24 at 1);
- 3 8) CSP-SAC's training and procedural manual on investigating
4 incidents involving "Battery on a Peace Officer" (ECF No. 24 at
1, 8);
- 5 9) Digital pictures taken of Plaintiff Bratton's injuries on the night of
6 the incident at issue (ECF No. 24 at 1-2; *see also id.* at 8);
- 7 10) Any and all equipment logs for Defendants' use of state-issued
pepper spray on September 16, 2015 (ECF No. 24 at 3);
- 8 11) Any and all documents that refer to policies, procedures, and
9 practices in effect on September 16, 2015, at CSP-SAC,
concerning the use of force on Coleman class members in Ad-
10 Seg, PSU, or the SHU (ECF No. 24 at 3);
- 11 12) A full and complete copy of the "Chief Disciplinary Officer
assessment report" of the RVR SAC-FBP-15-09-1013 (ECF No.
12 24 at 8).

13 ECF No. 27 at 3. Plaintiff has not filed a reply disputing this characterization of the items at issue
14 and, consequently, the court accepts it as accurate.

15 **1. Confidential Appeal Inquiry & Force Critique Package (Items 1-2)**

16 Defendants argue that these items, which are concededly available to them, are protected
17 by the official information privilege. They claim that these documents, if disclosed, would
18 jeopardize the safety and privacy rights of non-party inmates and correctional staff and undermine
19 the California Department of Corrections and Rehabilitation's ability to conduct confidential
20 investigations.

21 Defendants acknowledge that, in federal cases, questions of privilege are resolved
22 pursuant to federal law. *Kelly v. City of San Jose*, 114 F.R.D. 653, 660 (N.D. Cal. 1987). They
23 note, however, that federal law recognizes a qualified privilege for official information. *See Kerr*
24 *v. United States Dist. Ct. for N.D. Cal.*, 511 F.2d 192, 198 (9th Cir. 1975). The qualified
25 privilege is "contingent upon the competing interests of the requesting litigant and subject to
26 disclosure especially where protective measures are taken" *Id.* Defendants have provided
27 the declaration of T. Kraemer – a litigation coordinator at California State Prison – Sacramento –
28 who asserts the following:

- 1 (1) The documents contain third-party inmate and correctional staff member's personal
2 information – such as full names and other personally identifying information;
- 3 (2) The Confidential Appeal Inquiry package contains confidential statements made by
4 third-party inmates;
- 5 (3) Both documents contain confidential statements made by defendants and third party
6 staff members;
- 7 (4) Disclosure of any of the foregoing would hinder CDCR's ability to conduct accurate
8 and reliable investigations which, in turn, could jeopardize the safety of its
9 institutions;
- 10 (5) These documents are part of the "deliberative policy-making process" and their
11 disclosure will alert inmates to a precedent that "they can obtain these internal
12 documents at any time;"
- 13 (6) Disclosure of the documents would "educate inmates on the methods by which staff
14 are evaluated," and allow them to falsely accuse staff members or "otherwise
15 manipulate the investigation process;"
- 16 (7) Inmates who receive confidential information may be coerced into disclosing it to
17 other inmates, including gang members; and
- 18 (8) The documents are internal memoranda used in the review and evaluation of staff.
19 They contain several statements which are "pre-decisional and deliberative" as to
20 whether Defendants acted appropriately.

21 ECF No. 27-1 at 267-268.

22 Before balancing of interests of the party seeking discovery against the governmental
23 entity asserting the privilege, the party invoking the privilege must make a "substantial threshold
24 showing" by affidavit or declaration. *Soto v. City of Concord*, 162 F.R.D. 603, 613 (N.D. Cal.
25 1995). The affidavit or declaration must include:

- 26 (1) an affirmation that the agency generated or collected the material
27 at issue and has in fact maintained its confidentiality . . . ; (2) a
28 statement that the official has personally reviewed the material in
question; (3) a specific identification of the governmental or privacy
interests that would be threatened by disclosure of the material to the
plaintiff and/or his lawyer; (4) a description of how disclosure
subject to a carefully crafted protective order would create a
substantial risk of harm to significant governmental or privacy
interests; and (5) a projection of how much harm would be done to
the threatened interests if the disclosure were made.

Kelly, 114 F.R.D. at 670. "A strong affidavit would also describe how the plaintiff could acquire

1 information of equivalent value from other sources without undue economic burden.” *Id.* “If the
2 court concludes that a defendant’s submissions are not sufficient to meet the threshold burden, it
3 will order disclosure of the documents in issue.” *Soto*, 162 F.R.D. at 613.

4 The court concludes that the affidavit provided by defendants fails to make this threshold
5 showing. The harms identified by Kraemer are too vague to pass muster. As noted *supra*, many
6 of Kraemer’s asserted harms focus on the potential disclosure of staff and non-party inmates’
7 confidential or private information. Nothing in the record convinces the court that this concern
8 could not be adequately addressed by redacting sensitive information. Indeed, plaintiff appears to
9 concede that such redaction may be necessary and assent to it. ECF No. 24 at 9 (asking that
10 information that is confidential be redacted). Additionally, Kraemer’s claim that the documents’
11 disclosure could negatively affect the CDCR’s ability to conduct “accurate and reliable
12 investigations” is unpersuasive. Courts have previously rejected similar, broad justifications for
13 invoking privilege. *See, e.g., Chism v. County of San Bernadino*, 159 F.R.D. 531, 534-35 (C.D.
14 Cal. 1994) (“[A] general assertion that a police department's internal investigatory system would
15 be harmed by disclosure of the documents is insufficient; a resisting party must specifically
16 describe how disclosure of the requested documents in the particular case in question would be
17 harmful.”).

18 Nor is the court convinced that inmates’ enhanced ability to make false claims – assuming
19 this to be an accurate consequence of the documents’ disclosure – militates in favor of shielding
20 the documents in this case. First, Kraemer has not actually described how these *particular*
21 documents will have this effect. Second, rigid deference – that is deference without requiring a
22 more specific explanation than the one offered here - to such all-encompassing arguments would
23 allow prison officials to shield any information, no matter how relevant to a case, that is not
24 typically available to inmates.

25 Finally, it is unclear how these documents’ status as “internal memoranda used in the
26 review and evaluation of staff” necessitates withholding them. The court notes that part of the
27 declaration appears to be missing insofar as this paragraph ends midsentence. ECF No. 27-1 at

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1 268 (“These documents contain recommendations and advisory opinions that reflect the personal
2 opinions of the writers rather [the sentence is not completed on the next page]”).

3 Based on the foregoing, the court directs disclosure of these documents subject to any
4 redactions necessary to protect the private information of staff and non-party inmates.

5 **2. Any and all documents relating to allegations of**
6 **excessive force by any CSP-SAC staff during**
7 **September 16, 2014 one year prior to the incident at**
8 **issue to the present concerning inmate/patients**
housed in PSU II/III and every segregated housing
unit (Item 3)

9 Defendants contend that this request is overbroad. The court agrees. It is far from clear
10 how documents concerning other allegations of excessive force, made by and potentially against
11 non-parties, have any relevance to this case. Plaintiff argues that these documents “will show that
12 CSP-SAC nurtured, fostered, and approved an environment where inmates/patients were
13 routinely subjected to excessive force . . .” ECF No. 24 at 6. But this rationale does not save this
14 request from being burdensome and overbroad. The number of items responsive to plaintiff’s
15 request for “any and all documents” would include all staff reports, all inmate grievances, and any
16 other, miscellaneous records that even tangentially mentioned allegations of excessive force – and
17 would almost certainly be voluminous. This request is denied.

18 **3. Any and all formal and informal written complaints**
19 **(including but not limited to 602 forms against any**
20 **named defendants alleging excessive use of force that**
21 **occurred prior to September 16, 2015 (including all**
written responses, appeals, reports, investigations
and/or correspondence regarding the complaints
(Item 4)

22 Defendants argue that this request is overbroad and seeks irrelevant material. The court
23 agrees. Whether defendants had other excessive force claims levied against them has no bearing
24 on whether plaintiff’s current allegations against them are true. The Federal Rules of Evidence
25 render such character evidence inadmissible. Federal Rule of Evidence 404(a)(1). This request is
26 also denied.

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4. Documents related to responding to and investigating incidents involving staff assaults (Item 5)

Defendants argue that, after a diligent search, they were unable to locate any documents in their possession that were responsive to this request. The court was not able to locate a signed verification describing the search for the documents that was conducted and signed under penalty of perjury by the individual(s) that conducted the search. Defendants shall provide plaintiff with such a verification within fourteen days of this order's entry.

5. Digital photographs of Plaintiff's cell, inside and out, with the door opened and closed (Item 6)

This request does not appear to request documents in defendants' possession. Rather, plaintiff is requesting that defendants take the photographs in question and then provide them to him. As defendants point out, they are not required to create evidence that does not currently exist in order to comply with their discovery obligations. *See, e.g., Brown v. Clark*, No. 1:10-cv-124 GSA PC, 2013 U.S. Dist. LEXIS 35669 at *12 (E.D. Cal. Mar. 14, 2013). Consequently, this request is denied.

6. Remaining Requests (Items 7-12)

With respect to each of the remaining requests, defendants contend that they were unable to locate any responsive documents in their possession. As specified in request number five, defendants must provide plaintiff with a proper verification within fourteen days of this order's entry.

II. Motion for Extension of Time

On July 2, 2018, plaintiff filed a motion for a thirty-day extension of time to file his second amended complaint. ECF No. 25. On July 6, 2018, plaintiff filed his second amended complaint. ECF No. 26. Then, on July 18, 2018, defendants filed a statement of non-opposition. ECF No. 28. Consequently, plaintiff's motion for extension of time will be granted and his complaint is deemed timely filed.

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1 **III. Motion to Exclude Evidence**

2 On July 18, 2018, plaintiff filed a motion seeking to exclude documents related to a rules
3 violation hearing which, if allowed into evidence, he believes will prejudice his ongoing
4 administrative appeal and “any other future challenge in court.” ECF No. 29. Then, on August 8,
5 2018, he filed two more motions to exclude: (1) evidence pertaining to rules violation reports
6 issued against him; and (2) evidence of his past criminal history. ECF Nos. 33 & 34. These
7 motions are premature. Defendants have not indicated their intent to introduce any of the
8 evidence in question. A party may bring a motion in limine to address the admissibility of
9 evidence to be introduced at trial. Ruling on such a motion should be deferred until shortly
10 before trial to ensure that the evidence may be weighed in proper context. Thus, plaintiff’s
11 motions are denied without prejudice as premature.

12 **IV. Motion to Appoint Counsel**

13 Finally, plaintiff requests appointment of counsel and argues that his imprisonment and
14 lack of legal knowledge impair his ability to litigate. ECF No. 32 at 1. District courts lack
15 authority to require counsel to represent indigent prisoners in section 1983 cases, however.
16 *Mallard v. United States Dist. Court*, 490 U.S. 296, 298 (1989). In exceptional circumstances,
17 the court may request an attorney to voluntarily represent such a plaintiff. *See* 28 U.S.C.
18 § 1915(e)(1); *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); *Wood v. Housewright*, 900
19 F.2d 1332, 1335-36 (9th Cir. 1990). When determining whether “exceptional circumstances”
20 exist, the court must consider the likelihood of success on the merits as well as the ability of the
21 plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved.
22 *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). Having considered those factors, the court
23 finds there are no exceptional circumstances in this case.

24 **V. Conclusion**

25 Based on the foregoing, it is hereby ORDERED that:

- 26 1. Plaintiff’s Motions to Compel (ECF Nos. 23 & 24) are GRANTED to the extent that:
- 27 a. Defendants shall provide plaintiff with the Confidential Appeal Inquiry and Force
28 Critique Package documents referenced *supra*. These documents may be redacted

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as necessary to protect the confidential information of correctional staff and non-party inmates.

b. Within fourteen days from the date of service of this order, defendants shall provide plaintiff with signed verifications (as specified *supra*) for discovery items five, seven, eight, nine, ten, and twelve.


c. Plaintiff's motions to compel are denied in all other respects.

2. Plaintiff's motion for extension of time (ECF No. 25) is GRANTED and his second amended complaint (ECF No. 26) is deemed timely.

3. Plaintiff's motions to exclude evidence (ECF Nos. 29, 33, & 34) are DENIED without prejudice as premature.

4. Plaintiff's motion to appoint counsel (ECF No. 32) is DENIED without prejudice.

DATED: October 11, 2018.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE