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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES WATKINS,

 Plaintiff,

 v.

D. MURPHY,

 Defendant.

No. 2:17-cv-1041 JAM AC P

ORDER

I. Introduction

Plaintiff James Watkins is a state prisoner, currently incarcerated at R.J. Donovan Correctional Facility (RJDCF), proceeding pro se and in forma pauperis in this civil rights action filed against sole defendant Correctional Officer Murphy on a claim of excessive force. By order filed September 20, 2018, this court directed defendant to submit for in camera review the privilege log and withheld materials responsive to plaintiff’s Request for Production No. 3 (seeking all documents “concerning any use of force incident involving [sic] the plaintiff on August 18, 2016 or any investigation or action concerning that incident”). See ECF No. 48. Defendant was also directed to lodge a copy of the video containing plaintiff’s post-incident interview. Id. Defendant timely submitted all requested items. See ECF No. 53.

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1 II. Video

2 The court has reviewed the subject video in camera and directed the Clerk of Court to
3 retain it in the court's vault for future reference as needed. Thus, plaintiff's request to lodge the
4 video of his post-incident interview in this action, CF No. 44, is granted. Plaintiff has already
5 viewed the video.

6 III. Privileged Document

7 Review of defendant's privilege log and withheld materials demonstrates that the latter
8 consists of one document responsive to plaintiff's Requests for Production Nos. 3 and 4.¹ The
9 document, entitled "Institutional Executive Review Committee (IERC) Critique and Qualitative
10 Evaluation," was finalized December 2, 2016, and withheld by defendant based on the "official
11 information" or "governmental" privilege. The document was submitted in camera; defendant
12 requests that the court refrain from requiring production of any portion of the document on the
13 ground that plaintiff's subject motion was untimely and procedurally deficient. See ECF No. 53.

14 In federal civil rights cases, questions of privilege are resolved by federal common law.
15 Kerr v. U.S. District Court for the Northern District of California, 511 F.2d 192, 197-98 (9th Cir.
16 1975), aff'd on procedural grounds, 426 U.S. 394 (1976); see also Fed. R. Evid. § 501 (federal
17 privilege law controls in cases involving federal substantive claims).

18 The official information privilege is "only a qualified privilege, contingent upon the
19 competing interests of the requesting litigant and subject to disclosure especially where protective
20 measures are taken[.]" Kerr, 511 F.2d at 198. Once a court finds that the official privilege had
21 been properly asserted, it must balance the parties' competing interests to determine whether the
22 conditional privilege should apply to protect the confidentiality of the subject materials. In
23 balancing these competing interests, the court should consider several factors. See Kelly v. San
24 Jose, 114 F.R.D. 653, 663 (N.D. Cal. 1987).

25 Review of the withheld document demonstrates that defendant properly asserted the
26 official information privilege. See Kerr, 511 F.2d at 198 (privilege "must be formally asserted

27 ¹ Request for Production No. 4 seeks, in pertinent part, the "use of force package" prepared by
28 correctional staff in response to the subject incident.

1 and delineated in order to be raised properly”); accord, Soto v. City of Concord, 162 F.R.D. 603,
2 613 (N.D. Cal. 1995). The subject IERC evaluation contains a comprehensive review and
3 assessment of the challenged incident, with input from several officials and inmates, and reflects
4 the standardized institutional response to prisoner allegations of excessive force.

5 As a threshold matter, the court overrules defendant’s objections to disclosure on
6 procedural grounds. Errors attributable to plaintiff’s pro se status should not, under the present
7 circumstances, be the principal reason to foreclose disclosure of clearly relevant information.
8 Material reflecting internal affairs investigations, including statements, opinions and
9 recommendations, “should be presumptively discoverable when a plaintiff makes a proper
10 showing of relevance.” Kelly v. City of San Jose, 114 F.R.D. 653, 666 (N.D. Cal. 1987). In civil
11 rights suits against law enforcement departments, the balancing approach “should be ‘moderately
12 pre-weighted in favor of disclosure.’” Soto, 162 F.R.D. at 613 (fn. omitted) (quoting Kelly, 114
13 F.R.D. at 661).

14 The next inquiry requires a balancing of the parties’ competing interests in confidentiality
15 and disclosure under the factors identified in Kelly.² Application of these factors to the present

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17 ² The court should consider these nonexhaustive factors:

- 18 (1) The extent to which disclosure will thwart governmental
19 processes by discouraging citizens from giving the government
20 information.
- 21 (2) The impact upon persons who have given information of having
22 their identities disclosed.
- 23 (3) The degree to which government self-evaluation and consequent
24 program improvement will be chilled by disclosure.
- 25 (4) Whether the information sought is factual data or evaluative
26 summary.
- 27 (5) Whether the party seeking the discovery is an actual or potential
28 defendant in any criminal proceeding either pending or reasonably
likely to follow from the incident in question.
- (6) Whether the [official] investigation has been completed.
- (7) Whether any intradepartmental disciplinary proceedings have
arisen or may arise from the investigation.

1 case supports disclosure of the withheld document, provided the names and identities of all
2 nonparties are redacted and plaintiff's review is limited to reading the document without
3 obtaining possession of it.

4 This action is non-frivolous and appears to have been brought in good faith. It is narrow
5 in scope, limited to one alleged incident involving one defendant. The withheld information is
6 clearly relevant, as it involves only the challenged incident. The relevance of the withheld
7 information is underscored by defendant's statement, in response to plaintiff's pending motion for
8 summary judgment, that the parties' disputed versions of the facts precludes summary judgment.
9 See ECF No. 46. Absent significant considerations to the contrary, plaintiff is entitled to know
10 defendant's version of the challenged incident, and how the statements of both parties were
11 officially received and reviewed.

12 Although the document includes both factual data and evaluative statements, the
13 undersigned finds that disclosure would not chill the institution's self-evaluative or program
14 improvement processes as the only finding in this regard is common sense and involved neither
15 party (specifically, that the officers who immobilized plaintiff after the incident should not
16 thereafter have escorted plaintiff). The statements of the reporting officers and inmates are
17 factually based and do not appear to include any confidential information. The disclosure of
18 those statements, with the identities of nonparties redacted, will neither discourage such reporting
19 nor thwart the institution's investigative process. Moreover, the investigation was completed
20 nearly two years ago, and did not result in any disciplinary proceedings; nor is plaintiff an actual
21 or potential defendant in any related criminal proceeding. Finally, the information sought is not
22 available through other discovery or from other sources.

23 _____
24 (8) Whether the plaintiff's suit is non-frivolous and brought in good
25 faith.

26 (9) Whether the information sought is available through other
27 discovery or from other sources.

28 (10) The importance of the information sought to the plaintiff's case.

Kelly, 114 F.R.D. at 663 (citing Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D. Pa. 1973)).

1 For these reasons, plaintiff's motion for injunctive relief, ECF No. 39, construed as a
2 motion to compel, will be granted. Defendant will be directed to redact the names and any other
3 identifying information of all nonparties within the subject document, and to make arrangements
4 with the RJDCF Litigation Coordinator for plaintiff to review the document. The review shall be
5 two hours in length, and plaintiff shall be provided with paper and writing materials and
6 permitted to take notes; plaintiff shall not be permitted to take possession of the reviewed
7 document. These precautions address defendant's institutional security concerns which the court
8 otherwise finds de minimis based on the contents of the subject document.

9 IV. Additional Matters

10 Also outstanding are two further motions filed by plaintiff: a motion for monetary
11 sanctions in the amount of \$7,500, ECF No. 50, and a motion for court order to refer defendant
12 for prosecution, ECF No. 51. Both motions appear to be premised on defendant's alleged perjury,
13 as purportedly demonstrated by defendant's use of a signature block in his declaration that
14 identified his prior, rather than current, place of employment. The court previously rejected this
15 claim, stating, ECF No. 48 at 3:

16 The court finds this conceded error immaterial to the merits of this
17 action. Defendant Murphy was a correctional officer at HDSP at all
18 times relevant to this action, and thus his current assignment does not
19 impact the issues in this case. Moreover, the court finds this error
inadvertent and therefore that it does not reflect on Murphy's
credibility.

20 The court abides by these conclusions and will therefore deny both of plaintiff's recent motions as
21 frivolous.

22 IV. Admonishment & Further Briefing

23 Plaintiff is admonished to refrain from filing further matters in this action until the court
24 rules on the merits of plaintiff's pending motion for summary judgment. See ECF No. 28. The
25 motion is fully briefed with the exception that plaintiff may file and serve a reply to defendant's
26 opposition within 28 days after the filing date of this order; defendants will have the option of
27 filing a surreply. Plaintiff is cautioned that a litigant proceeding pro se and in forma pauperis
28 may suffer restricted access to the court if he files excessive frivolous motions. Such matters

1 strain the limited resources of both the court and defense counsel. Plaintiff is directed to exercise
2 appropriate restraint in the future.

3 V. Conclusion

4 Accordingly, for the foregoing reasons, IT IS HEREBY ORDERED that:

5 1. Plaintiff's request to lodge video evidence, ECF No. 44, is granted. The copy of the
6 video of plaintiff's post-incident interview lodged in this court on October 2, 2018 (ECF No. 52)
7 has been placed in the court's vault; the Clerk of Court is directed to note on the docket the
8 current location of the video.

9 2. Plaintiff's motion for injunctive relief, ECF No. 39, construed as a motion to compel
10 disclosure of defendant's December 2, 2016 document entitled "Institutional Executive Review
11 Committee (IERC) Critique and Qualitative Evaluation," withheld based on the "official
12 information" privilege, is granted in part.

13 3. Defendant shall promptly provide a copy of the subject document, with the names and
14 other identifying information of all nonparties redacted therein, to the RJDCF Litigation
15 Coordinator, and shall arrange for plaintiff's review of the redacted document within fourteen
16 (14) days after the filing date of this order. The review shall be scheduled for a period of two
17 hours; plaintiff shall be provided with paper and writing materials, and allowed to take notes;
18 however, plaintiff shall not be given a copy of the subject document.

19 4. Plaintiff shall, within twenty-eight (28) days after the filing date of this order, file and
20 serve a reply to defendant's opposition (ECF No. 36) to plaintiff's original motion for summary
21 judgment (ECF No. 28); defendant may, but need not, file and serve a surreply within fourteen
22 (14) days after the filing of plaintiff's reply.

23 5. Plaintiff's motion for sanctions, ECF No. 50, and motion for court order, ECF No. 51,
24 are denied as frivolous.

25 6. Plaintiff is admonished to refrain from filing further frivolous motions in this case.

26 SO ORDERED.

27 DATED: October 24, 2018

28 
ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE