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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

I.F. et al.,

 Plaintiffs,

 v.

CITY OF VALLEJO, et al.,

 Defendants.

No. 2:18-cv-00673-JAM-CKD

ORDER

I. INTRODUCTION

Presently pending before the court is plaintiff I.F.’s motion to compel discovery production. (ECF No. 27.) This matter came on regularly for hearing on July 10, 2019. The parties filed a joint statement regarding the discovery dispute on July 3, 2019. (ECF No. 28.) Maya Sorensen appeared on behalf of plaintiff I.F. and Timothy Smyth appeared on behalf of defendants. Plaintiff R.F. was not represented at the hearing, but Ms. Sorensen indicated that plaintiff R.F. joins in the motion to compel.

At the hearing, Lieutenant Steve Cheatham was present with a complete copy of Officer Ryan McMahon’s personnel file from the City of Vallejo Police Department, which the court reviewed in camera. After reviewing the file, carefully considering the parties’ joint statement and the applicable law, and good cause appearing therefor, the court FINDS AS FOLLOWS.

1 II. RELEVANT BACKGROUND

2 Plaintiffs bring this 1983 survivor action against the City of Vallejo and Officer
3 McMahon, relating to the use of lethal force against Ronell Foster, which occurred on February
4 13, 2018. (See generally ECF No. 8.) Plaintiffs bring claims for violations of the Fourth and
5 Fourteenth Amendment, as well as a Monell claim, and several pendant state law claims. (Id.)

6 On August 8, 2018, plaintiff I.F. served her Request for Production of Documents and
7 Things (Set One) (“RFP1”), which included a request for Officer McMahon’s personnel file,
8 including hiring, performance evaluations, background investigations, and his mental and
9 physical condition at the time of the incident. (ECF No 28 at 2, 4.) Defendants produced some
10 responsive information but withheld other information, raising various objections including
11 relevance and asserting the official information privilege. (See ECF No. 28-1.) The parties met
12 and conferred regarding the disputed information on May 30, 2019 and on June 18, 2019. (ECF
13 No. 18 at 2.) The pending motion to compel ensued. (ECF No. 27.)

14 Plaintiffs seek to compel production of “information regarding Defendant McMahon
15 contained in RFP1 Request Nos. 6 (Defendants hiring and background investigations), 8
16 (Defendants’ job performance evaluations and supervision [from seven years prior to the incident
17 to the present]), and 10 (Defendants’ physical and mental condition during the incident).” (ECF
18 No. 28 at 5.) The parties dispute whether the information sought is relevant and, if it is relevant,
19 whether it is subject to the official document privilege. (See generally, ECF No. 28.)

20 III. LEGAL STANDARD

21 Under the Federal Rules of Civil Procedure, “[p]arties may obtain discovery regarding any
22 nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs
23 of the case, considering the importance of the issues at stake in the action, the amount in
24 controversy, the parties’ relative access to relevant information, the parties’ resources, the
25 importance of the discovery in resolving the issues, and whether the burden or expense of the
26 proposed discovery outweighs its likely benefit. Information within this scope of discovery need
27 not be admissible in evidence to be discoverable.” Fed. R. Civ. P. 26(b)(1).

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1 A. Relevance

2 Before determining whether the information plaintiffs seek is privileged, the court must
3 first determine if it is relevant.

4 Although in general the party seeking to compel discovery bears the
5 burden of showing that his request satisfies the relevance
6 requirement of Rule 26, the court in Kelly v. City of San Jose, 114
7 F.R.D. 653, 667-68 (N.D.Cal.1987), concluded that in the context of
8 civil rights excessive force cases against police departments,
9 plaintiffs may suffer great difficulties if courts impose demanding
relevancy standards on them. Because it is unlikely that such a
plaintiff would know the contents of confidential police files, the
court suggests that it should be “sufficient for a plaintiff to show how
information of the kind that is likely to be in the files could lead to
admissible evidence.” Id. at 667-68.

10 Soto v. City of Concord, 162 F.R.D. 603, 610 (N.D. Cal. 1995).

11 B. Official Information Privilege

12 A disclosing party may seek to withhold relevant discovery if such information is
13 privileged. “The scope of an evidentiary privilege in a 42 U.S.C. [§] 1983 civil rights action is a
14 question of federal law. State law may provide a useful referent, but it is not controlling.” Breed
15 v. U.S. Dist. Court for N. Dist. of California, 542 F.2d 1114, 1115 (9th Cir. 1976); see also Kelly
16 v. City of San Jose, 114 F.R.D. 653, 655 (N.D. Cal. 1987) (“in a civil rights case brought under
17 federal statutes questions of privilege are resolved by federal law”).

18 Under federal common law, there is a privilege for official information. See Kerr v. U.S.
19 Dist. Ct. for the Northern Dist., 511 F.2d 192, 198 (9th Cir.1975).

20 In determining what level of protection should be afforded by this
21 privilege, courts conduct a case by case balancing analysis, in which
22 the interests of the party seeking discovery are weighed against the
23 interests of the governmental entity asserting the privilege. In the
context of civil rights suits against police departments, this balancing
approach should be “moderately pre-weighted in favor of
disclosure.”

24 Soto, 162 F.R.D. at 613 (internal citations omitted).

25 A party raising this objection must first make a substantial threshold showing, in the form
26 of “a declaration or affidavit from a responsible official with personal knowledge of the matters to
27 be attested to in the affidavit.” Id. A so-called Kelly affidavit must include:

28 (1) an affirmation that the agency generated or collected the material

1 in issue and has maintained its confidentiality; (2) a statement
2 that the official has personally reviewed the material in question;
3 (3) a specific identification of the governmental or privacy
4 interests that would be threatened by disclosure of the material to
5 plaintiff and/or his lawyer; (4) a description of how disclosure
6 subject to a carefully crafted protective order would create a
7 substantial risk of harm to significant governmental or privacy
8 interests, and (5) a projection of how much harm would be done
9 to the threatened interests if disclosure were made.

10 Soto, 162 F.R.D. at 613 (citing Kelly 114 F.R.D. at 670). If a party has submitted a sufficient
11 Kelly affidavit, then the court will review the disputed information in camera and balance the
12 parties' interests. Id.

13 IV. DISCUSSION

14 A. Relevance

15 According to defendants, they “have already produced all relevant, responsive documents
16 in [their] possession under protective order related to any disciplinary action, internal affairs
17 investigations, confidential citizen complaints, training records and commendations in [their]
18 possession and control.” (ECF No. 28 at 12.) Defendants assert that they have only objected “to
19 the Requests for personnel records which seek production of more sensitive background
20 investigation and hiring documents.” (ECF No. 28 at 12.) The California law requires that police
21 officers be subjected to rigorous background screening which consists of the following:

- 22 • Background Narrative Report (CR 1953(g));
- 23 • Personal History Statement (CR 1953(c));
- 24 • DOJ/FBI Fingerprint Returns and Firearms Clearance (CR
25 1953(e)(3));
- 26 • Driving Record Check (CR 1953(e)(4));
- 27 • Local Law Enforcement Agency Record Checks (CR 1953(e)(3));
- 28 • Credit Records Check (CR 1953(e)(11));
- Education Verification (CR 1953(e)(5));
- Citizenship/Age Verification (CR 1953(e)(1 and 2));
- Military History Check (CR 1953(e)(10));
- Dissolution of Marriage Check (CR 1953(e)(8));
- Employment History Checks (CR 1953(e)(6));
- Relatives/Personal References Checks (CR 1953(e)(7));
- Neighborhood Checks (CR 1953(e)(9)); and
- Medical/Psychological Clearances (CR 1954(e) and 1955(f)).

(ECF No. 28 at 13.)

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1 The withheld files include this pre-hiring information collected pursuant to California law.
2 Defendants persuasively argue that this information is not relevant because “[p]laintiffs . . . do not
3 allege inadequate screening as a basis of Monell liability in their First Amended Complaint.”
4 (ECF No. 28 at 15.)

5 The only mention of hiring in the First Amended Complaint is found in the section
6 entitled “Parties,” where plaintiffs state “one or more DOE defendants was at all material times
7 responsible for the hiring, training, supervision, and discipline of other defendants, including Doe
8 Defendants.” (ECF No. 8 at 5.) This does not state a claim of inadequate screening or negligent
9 hiring, but is merely an uncontroversial assertion of fact—someone was responsible for hiring
10 Officer McMahon.

11 However, plaintiffs claims that their oblique reference to Officer McMahon’s hiring
12 sufficiently raised inadequate screening as a basis of their Monell claim. (ECF No. 28 at 8.) In
13 support of this proposition, plaintiffs rely on T.D.P. v. City of Oakland, where the court ordered
14 the production of the defendant officers’ hiring file because “[i]n a Monell claim, the plaintiff
15 alleges that the municipal defendants ‘failed to properly hire’ the defendant officers.” No. 16-
16 CV-04132-LB, 2017 WL 3026925, at *3 (N.D. Cal. July 17, 2017). Contrary to plaintiffs’
17 argument, the court in T.D.P. was not suggesting that *any* Monell claim alleges failure to properly
18 hire. Rather, the court was citing to specific language in the complaint in that case. See Id., n.17
19 (citing to “Compl.—ECF No. 1 at 10–11 (¶ 39)”).

20 Here, there is no mention of improper screening or negligent hiring under plaintiffs’
21 Monell claim. Instead, the First Amended Complaint clearly alleges, “Defendants City of Vallejo
22 and Does 26-50 **failed to properly train, instruct, monitor, supervise, evaluate, investigate,**
23 **and discipline** Defendants McMahon, and DOES 1-25, and other VPD personnel, with deliberate
24 indifference to Plaintiffs’ and Decedent’s constitutional rights, which were thereby violated as
25 described above.” (ECF No. 8 at 14 (emphasis added).) Additionally, none of plaintiffs’ state
26 law claims implicate improper screening or negligent hiring.

27 Therefore, relevance of the withheld information cannot be established in relation to
28 failure to screen or negligent hiring because plaintiffs have not stated such a claim. Nonetheless,

1 plaintiffs raise other various grounds for relevance.

2 Based on the joint statement alone, however, the court was unable to ascertain whether the
3 withheld information was relevant under any of the alternative theories proposed by plaintiffs.
4 This is due, in large part, to the lack of clarity from defendants as to what was being withheld.
5 Indeed, while defendants referred to the Officer McMahon's hiring file, it was unclear if other
6 post-hiring personnel documents were being withheld.

7 As a result, the court reviewed the withheld information in camera. After the review, the
8 court concludes that the majority of the documents are not relevant to the matter at hand, even
9 under the liberal standard for excessive force cases, because such documents are not likely to lead
10 to admissible evidence under the claims in the First Amended Complaint. See Soto, 162 F.R.D.
11 at 610 (N.D. Cal. 1995). However, three of the withheld documents are relevant to plaintiffs'
12 claims—the Field Training Manual; the SB 719 Pursuit Policy Training Attestation; and the
13 Internal Investigation from 2019.

14 B. Official Information Privilege

15 The parties also dispute whether or not defendants submitted a sufficient Kelly affidavit
16 necessary to trigger a consideration of the official document privilege. (See EFC No. 28 at 8-18.)
17 This is a moot issue because the court was required to review the documents in camera to
18 determine their relevancy.

19 Moreover, even assuming that defendants' Kelly affidavit was sufficient, plaintiffs'
20 interest in disclosure of the relevant information outweighs the defendants' governmental or
21 privacy interests. The identified relevant information pertains to the training of Officer
22 McMahon and an internal investigation of conduct by Officer McMahon, all of which may lead to
23 the discovery of admissible information in this case. Indeed, there is no indication that the
24 disclosure of this information will harm the governmental or privacy interests of defendants
25 because (1) there is a protective order in place in this matter and (2) defendants have already
26 disclosed other information related to the training and internal investigations of Officer
27 McMahon. See Soto, 162 F.R.D. at 613; Kelly 114 F.R.D. at 670.

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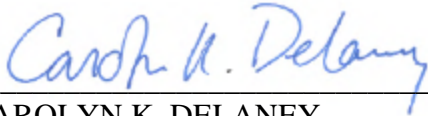
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V. CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiffs' motion to compel discovery production (ECF No. 27) is GRANTED IN PART AND DENIED IN PART on the terms of this order.
2. Within seven (7) days of this order, defendants shall produce the following documents in Officer Ryan McMahon's personnel file, in accordance with the protective order (ECF No. 21): the Field Training Manual; the SB 719 Pursuit Policy Training Attestation; and the Internal Investigation from 2019.

Dated: July 12, 2019



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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