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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDWARD TERRAN FURNACE,

Plaintiff,

v.

K. NUCKLES, et al.,

Defendants.

No. C -09-06075 MMC (PR) (EDL)

**ORDER FOLLOWING IN CAMERA  
REVIEW**

On June 27, 2012, the Court issued an Order resolving three motions to compel and three motions for sanctions filed by Plaintiff. As part of that Order, the Court required Defendants to lodge documents in camera that were being withheld under the official information privilege relating to the February 2, 2008 incident, including internal affairs documents, incident reports and witness statements. On July 18, 2012, Defendants timely lodged five compact discs of information in camera.

A review of the documents reveals that Defendants have failed to lodge documents relating only to the February 2, 2008 incident. For example, the compact disc labeled “Furnace, Edward T. v. K. Nuckles, et al; USDC ND SF - C 09-6075 Box 1 (AG-000001-001977) & Box 2 (AG-001978-003825)” contains, among other things, Firing Range Score Sheets from several months from 2008 through 2012. These types of documents do not appear to relate to the February 2, 2008 incident which was the subject of the in camera review. No later than August 16, 2012, Defendants shall resubmit for in camera review documents from this compact disc, if any, relating to the February 2, 2008 incident as stated in the Court’s June 27, 2012 Order.

The disc labeled “N-CVCP-270-08-A Exhibit Facility ‘C’ Visiting” contains pictures of an

1 empty room and there is no explanation as to what relation these pictures have to the February 2,  
2 2008 incident, or why they are privileged. No later than August 16, 2012, Defendants may submit  
3 an explanation to the Court in camera regarding why these pictures were submitted for in camera  
4 review.

5 The remaining three discs contain audio and video files regarding the February 2, 2008  
6 incident. The disc labeled “SVSP-CEN-08-02-0074 10/3/08 Jones, B-71557 pt. 1 & Furnace, H-  
7 33245 pt 2” is a video interview of Plaintiff and inmate Jones from the date of the February 2, 2008  
8 incident. The discs labeled “N-SVSP-270-08-A Exhibit #83 Nuckles, Kristy” and “N-SVSP-270-  
9 08-A Tracy Tomasian 8-22-08” contain audio recordings of interviews with corrections officers  
10 regarding the February 2, 2008 incident. To determine whether this information must be produced  
11 in light of Defendants’ assertion of the official information privilege, the Court must conduct a  
12 balancing test:

13 If a defendant meets the threshold requirements, the court will order an *in camera*  
14 review of the material and balance each party’s interests. Id. at 671; Chism, 159  
15 F.R.D. at 533-34; Hampton, 147 F.R.D. at 231; Miller, 141 F.R.D. at 301. If the party  
16 asserting the privilege meets the threshold requirement, the court will conduct a  
17 balancing analysis that considers, but is not limited to, the following factors: (1) The  
18 extent to which disclosure will thwart governmental processes by discouraging  
19 citizens from giving the government information; (2) the impact upon persons who  
20 have given information of having their identities disclosed; (3) the degree to which  
21 government self-evaluation and consequent program improvement will be chilled by  
22 disclosure; (4) whether the information sought is factual data or evaluative summary;  
23 (5) whether the party seeking discovery is an actual or potential defendant in any  
24 criminal proceeding either pending or reasonably likely to follow from the incident in  
25 question; (6) whether the police investigation has been completed; (7) whether any  
26 intradepartmental disciplinary proceedings have arisen or may arise from the  
27 investigation; (8) whether the plaintiff’s suit is non-frivolous and brought in good  
28 faith; (9) whether the information sought is available through other discovery or from  
other sources; (10) the importance of the information sought to the plaintiff’s case.  
Kelly v. City of San Jose, 114 F.R.D. at 663 (citing Frankenhauser v. Rizzo, 59  
F.R.D. 339, 344 (E.D. Pa.1973)).

23 Soto v. City of Concord, 162 F.R.D. 603, 613 (N.D. Cal. 1995). As described below, on balance, the  
24 official information privilege does not protect the information on these discs.

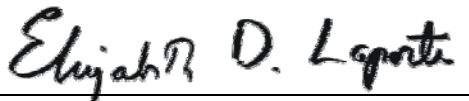
25 The majority of the Kelly factors weigh in favor of disclosure of the audio and video  
26 information. First, disclosure of this information will not discourage citizens from giving the  
27 government information. No information from the general public is contained on these discs. The  
28 video contains statements by Plaintiff and inmate Jones regarding the incident and the audio

1 recordings contain interviews of corrections officers. Second, the identities of the corrections  
2 officers are already known to Plaintiff and many are Defendants in this case, so there would be little  
3 impact upon the corrections officers of having their identities disclosed as part of this discovery.  
4 However, if, in the over fifteen hours of audio recordings, there is any personal identifying  
5 information, such as home address or phone number, disclosure of that information would  
6 negatively impact the corrections officers and should be redacted from the audio. Third, it does not  
7 appear that the government self-evaluation and consequent program improvement would be chilled  
8 by disclosure of this information, which was collected pursuant to an official investigation. Fourth,  
9 the information sought is factual data, not an evaluative summary. Fifth, it appears that the police  
10 investigation of the February 2, 2008 incident has been completed. Sixth, it does not appear that this  
11 discovery is available from any other source as it is part of the official investigation by the prison of  
12 this incident. Finally, Plaintiff's case is based on the February 2, 2008 incident and these statements  
13 by Plaintiff and corrections officers bear on the central issues in Plaintiff's case. Some Kelly factors  
14 are neutral or the Court lacks information to evaluate them, that is, whether there are any  
15 intradepartmental disciplinary proceedings arising out of the investigation, whether Plaintiff's suit is  
16 non-frivolous and brought in good faith, and whether Plaintiff is an actual or potential defendant in a  
17 criminal proceeding involving the February 2, 2008 incident. On balance, however, the factors  
18 favor disclosure of the video and audio recordings, which directly relate to the February 2, 2008  
19 incident.

20 Because the official information privilege does not protect the audio and video recordings in  
21 this case, Defendants shall produce the recordings to Plaintiff, subject to redaction, if any, of  
22 personal identifying information of the corrections officers. If Defendants have any transcriptions of  
23 the interviews, they shall also provide redacted transcriptions. The recordings and transcripts, if  
24 any, shall be provided to Plaintiff no later than August 16, 2012.

25 IT IS SO ORDERED.

26 Dated: August 2, 2012

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28 ELIZABETH D. LAPORTE  
United States Magistrate Judge

**United States District Court**  
For the Northern District of California

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