

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

3
4 JOHN ARMSTRONG et al.,

No. C 94-2307 CW

5 Plaintiffs,

ORDER ON MOTION TO
COMPEL

6 v.

(Docket No. 2600)

7 EDMUND G. BROWN, JR. et al.,

8 Defendants.

9 _____/

10 Plaintiffs John Armstrong et al. move for an order to compel
11 the California Office of the Inspector General (OIG) to respond to
12 Plaintiffs' subpoena of documents and provide information
13 Plaintiffs seek (Docket No. 2600). The OIG filed a response, and
14 the California Correctional Peace Officers Association, with leave
15 from the Court, filed an amicus curiae brief. Having considered
16 the filings and the amicus curiae brief, the Court GRANTS
17 Plaintiffs' motion to compel to the extent Plaintiffs demonstrate
18 that materials they seek are related to this case. As discussed
19 below, a protective order will be entered, and the OIG may replace
20 employee names with unique identifiers in documents produced. The
21 Court DENIES Plaintiffs' motion to the extent it seeks material
22 that does not appear to be sufficiently related to this case,
23 without prejudice to issuance of a narrower subpoena.

24 In January 2016, counsel for Plaintiffs sought information
25 from the OIG related to the OIG's recent report: "2015 Special
26 Review: High Desert State Prison Susanville, CA" (OIG High Desert
27 Report). Docket No. 2567-4. Later that month, Plaintiffs served
28 document and deposition subpoenas on the OIG. On February 19, the

1 OIG provided "certain responsive documents," objections, a
2 declaration from the Chief Deputy Inspector General and a
3 privilege log identifying documents and grounds for not producing
4 them. Motion to Compel at 8; see Declaration of Corene Kendrick,
5 Ex. 2; Declaration of James C. Spurling, Ex. B.

6 An assertion of privilege in federal question cases brought
7 under 42 U.S.C. § 1983 is governed by federal law. See Kerr v.
8 U.S. Dist. Court for N. Dist. of California, 511 F.2d 192, 197
9 (9th Cir. 1975); Kelly v. City of San Jose, 114 F.R.D. 653, 655-56
10 (N.D. Cal. 1987). "Federal common law recognizes a qualified
11 privilege for official information." Soto v. City of Concord, 162
12 F.R.D. 603, 613 (N.D. Cal. 1995) (citing Kerr, 511 F.3d at 198).
13 The official information privilege requires a balancing of "the
14 policies underlying our civil rights laws, public confidence in
15 the court system, and doing justice in individual cases" against
16 interests of law enforcement and "the privacy rights of officers
17 or citizen complainants." Kelly, 114 F.R.D. at 661; id. at 669-
18 71.

19 Plaintiffs seek documents related to statements in the OIG
20 High Desert Report about (a) a code of silence among correctional
21 officers, (b) the California Correctional Peace Officers
22 Association's responses to the OIG's interviews of California
23 Department of Corrections and Rehabilitation (CDCR) employees,
24 (c) treatment of inmates in the Disability Placement Program,
25 (d) specific allegations of High Desert staff misconduct, and
26 (e) agent and investigation assignment practices by the CDCR
27 Office of Internal Affairs. See Declaration of Corene Kendrick,
28

1 Ex. 1 at Appendix A.¹ Plaintiffs have withdrawn their motion to
2 the extent it sought case files from the CDCR Office of Internal
3 Affairs. See Reply at 6.²

4 The OIG asserts that the majority of the documents Plaintiffs
5 seek are not relevant to this case.

6 Based on the text of the OIG High Desert Report, Plaintiffs'
7 subpoena and the OIG's privilege log, material under Plaintiffs'
8 Request 1c and material relating to prisoners with disabilities
9 under Request 1d relate to the issues in this case.

10 The relevance of material sought under Request 1a, Request
11 1b, the remaining incidents appearing in the OIG High Desert
12 Report in relation to Request 1d, and Request 1e, however, is not
13 clear. Thus, the Court DENIES Plaintiffs' motion to compel these
14 materials without prejudice to issuance of a narrower subpoena.

15 The OIG also argues that its mental impressions of the
16 sufficiency of CDCR's work is not relevant to this case. OIG
17 interview materials and analysis of CDCR investigations is
18 relevant to show how CDCR has responded to allegations of staff
19 misconduct involving Armstrong class members. The OIG's privilege
20 log lists interview reports, transcripts and audio as standalone
21 "documents" only in response to Requests 1a and 1b, but the Court
22 considers the OIG's privilege argument regarding interview
23 materials, generally, because its privilege log lists "Interview
24

25 ¹ Plaintiffs' argument that the OIG has waived its objections
is not persuasive.

26 ² Separately, a Stipulation and Protective Order Regarding
27 Disclosure of Defendants' Employees' Personnel Information and
Corrective Action Plans issued on June 6, 2016. See Docket No.
28 2612.

1 Notes" among other materials in response to Requests 1c and 1d.³

2 The OIG's concerns can be accommodated by the entry of a
3 protective order that restricts viewing to attorneys' eyes only
4 and limits use of the information to this action.

5 Moreover, to the extent the OIG will produce materials that
6 contain employee names, the OIG may remove each name and replace
7 it with a unique identifier.

8 The Court GRANTS Plaintiffs' motion to compel with respect to
9 material under Request 1c and part of 1d that is related to
10 inmates with disabilities. Within one week of the date on which
11 this order issues, the OIG shall propose a protective order based
12 on the Court's model order available on its website. See
13 <http://www.cand.uscourts.gov/model-protective-orders>. Plaintiffs
14 shall respond within one week, and shall meet and confer with the
15 OIG within one week of responding. If the parties cannot agree on
16 a protective order, within one week they shall submit their
17 respective versions with differences highlighted, and the Court
18 will select one. The OIG shall produce documents within two weeks

19 _____
20 ³The OIG cites multiple California statutory provisions. The
21 OIG indicates that it conducted interviews pursuant to California
22 Penal Code section 6126.5(d) ("The Inspector General may require
any employee of the Department of Corrections and Rehabilitation
to be interviewed on a confidential basis.").

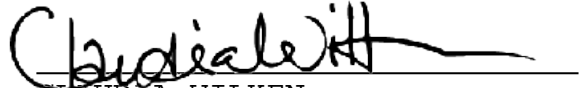
23 California Penal Code section 6126.3(c)(5) provides that
24 "[a]ny papers, correspondence, memoranda, electronic
communications, or other documents pertaining to contemporaneous
public oversight pursuant to Section 6133" are "not public records
25 . . . , nor shall they be subject to discovery pursuant to
[various provisions] in any manner."

26 Also, California Penal Code section 6126.3(c)(3) imposes
27 restrictions with regard to "[a]ny papers, correspondence,
28 memoranda, electronic communications, or other documents
pertaining to internal discussions between the Inspector General
and his or her staff, or between staff members of the Inspector
General, or any personal notes of the Inspector General or his or
her staff."

1 of the date on which the Court signs a protective order. The
2 Court DENIES Plaintiffs' motion with respect to other material
3 that does not appear to be sufficiently related to this case,
4 without prejudice to issuance of a narrower subpoena.

5 IT IS SO ORDERED.

6 Dated: June 22, 2016


7 CLAUDIA WILKEN
8 United States District Judge
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