

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 OF
 NON-PARTIES FOR
 LEAVE TO INTERVENE
 AND TO MODIFY
 PROTECTIVE ORDER

6 v.

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

8 Defendants.

(Docket No. 2625)

9 _____/
 10 The California Correctional Peace Officers Association

11 (CCPOA) moves for leave to intervene and to modify the June 6,
 12 2016 Stipulated Protective Order Regarding Disclosure of
 13 Defendants' Employees' Personnel Information and Corrective Action
 14 Plans (Docket No. 2625).¹ Plaintiffs John Armstrong et al. and
 15 Defendants Edmund G. Brown, Jr. et al. filed responses, and the
 16 CCPOA filed a reply. Having considered the filings, the Court
 17 GRANTS the motion for leave to intervene and GRANTS the motion to
 18 modify IN PART and DENIES it IN PART.

19 I. Intervention

20 Plaintiffs do not appear to object to the CCPOA intervening
 21 under Federal Rule of Civil Procedure 24(b)(1)(B) for the limited

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 23 ¹ Initially, Correctional Officers 1-13 also moved for leave
 24 to intervene. Because the officers, the CCPOA and Plaintiffs
 25 agree that the CCPOA adequately represents the officers' interests
 26 regarding the protective order, the Court DENIES as moot the
 27 motion of Correctional Officers 1-13. See CCPOA Reply at 1 n.1;
 28 Spangler v. Pasadena City Bd. of Ed., 552 F.2d 1326, 1329 (9th
 Cir. 1977) (listing as Rule 24(b) consideration "whether the
 intervenors' interests are adequately represented by other
 parties").

1 purpose of seeking to modify the June 6 protective order. See
2 Plaintiffs' Opposition at 3. Defendants assert that intervention
3 is unnecessary because of the June 6, 2016 protective order's
4 scope and Defendants' willingness to make some modifications. See
5 Defendants' Response at 4.

6 "On timely motion, the court may permit anyone to intervene
7 who: . . . (B) has a claim or defense that shares with the main
8 action a common question of law or fact." Fed. R. Civ. P.
9 24(b)(1). "In exercising its discretion, the court must consider
10 whether the intervention will unduly delay or prejudice the
11 adjudication of the original parties' rights." Fed. R. Civ. P.
12 24(b)(3). "Rule 24(b) permits limited intervention for the
13 purpose of challenging a protective order." Beckman Indus., Inc.
14 v. Int'l Ins. Co., 966 F.2d 470, 473 (9th Cir. 1992); see also id.
15 at 473-74.

16 The CCPOA may intervene for this limited purpose, and its
17 intervention will not "unduly delay or prejudice the adjudication
18 of the original parties' rights." Fed. R. Civ. P. 24(b); see
19 Beckman Indus., 966 F.2d at 473-75; Blum v. Merrill Lynch Pierce
20 Fenner & Smith Inc., 712 F.3d 1349, 1353-54 (9th Cir. 2013).
21 Because the CCPOA may intervene under Rule 24(b), the Court need
22 not address its alternative argument for intervention as of right
23 to modify the protective order.

24 II. Modification of Protective Order

25 "As a general rule, the public is permitted 'access to
26 litigation documents and information produced during discovery.'" In re Roman Catholic Archbishop of Portland in Oregon, 661 F.3d
27 417, 424 (9th Cir. 2011) (quoting Phillips v. Gen. Motors Corp.,
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1 307 F.3d 1206, 1210 (9th Cir. 2002)). "Under Rule 26, however,
2 '[t]he court may, for good cause, issue an order to protect a
3 party or person from annoyance, embarrassment, oppression, or
4 undue burden or expense.'" Id. (quoting Fed. R. Civ. P.
5 26(c)(1)). "A party asserting good cause bears the burden, for
6 each particular document it seeks to protect, of showing that
7 specific prejudice or harm will result if no protective order is
8 granted." Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122,
9 1130 (9th Cir. 2003).² In re Roman Catholic Archbishop explained
10 that deciding whether to continue a protective order involves
11 three steps or considerations: (1) "whether the party seeking
12 protection has shown particularized harm" from public disclosure,
13 (2) "whether the balance of public and private interests weighs in
14 favor" of a protective order, and (3) "whether redacting portions
15 of the discovery material will nevertheless allow disclosure." In
16 re Roman Catholic Archbishop, 661 F.3d at 425. The Ninth Circuit
17 listed seven factors for balancing the public and private
18 interests at step two. See id. at 424 & n.5.

19 a. Modifications to which No Party Objects

20 Neither Plaintiffs nor Defendants object to the following
21 modifications to the June 6, 2016 protective order:

22 (1) a provision making clear that the receiving party

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24 ² "While courts generally make a finding of good cause before
25 issuing a protective order, a court need not do so where (as here)
26 the parties stipulate to such an order." In re Roman Catholic
27 Archbishop, 661 F.3d at 424. In circumstances involving such a
28 stipulated protective order, "'the burden of proof . . . remain[s]
with the party seeking protection.'" Id. (quoting Phillips, 307
F.3d at 1211 n.1).

1 must store documents with confidential information in a
2 secure manner, (2) a provision requiring the producing
3 party to affix a legend or Bates stamp indicating that
4 the documents are confidential, (3) a provision
accounting for disclosure to outside experts, (4) a
deadline by which documents must be destroyed, and
(5) notice procedures in the event of subpoena.

5 Plaintiffs' Opposition at 2 n.2; see Defendants' Response at 4-5.
6 Accordingly, to the extent the CCPOA seeks an order incorporating
7 these modifications, such request is GRANTED.

8 b. Replacement of Employee Names with Unique Identifiers

9 The CCPOA argues that Defendants will produce material that
10 is protected under federal law, state law and prior orders of this
11 Court, including material from internal investigations that did
12 not result in a finding of misconduct, risking embarrassment and
13 reputational harm to correctional officers. It adds that
14 including identifying information about employees is unnecessary
15 for Plaintiffs to identify potential Armstrong violations.

16 The Court agrees with Plaintiffs and Defendants that a
17 protective order with the modifications to which the parties agree
18 suffices to address the CCPOA's privacy-related concerns. See
19 Soto v. City of Concord, 162 F.R.D. 603, 617 (N.D. Cal. 1995).³

20
21 ³ To the extent the CCPOA seeks application of the federal
22 official information privilege, the CCPOA has not followed the
23 Kelly protocol or explained how the CCPOA or individual
24 correctional officers could assert the official information
25 privilege on behalf of the Department of Corrections and
26 Rehabilitation. See Kelly v. City of San Jose, 114 F.R.D. 653,
27 669-70 (N.D. Cal. 1987). Even assuming the CCPOA could and did do
28 so, it has not described "how disclosure subject to a carefully
crafted protective order would create a substantial risk of harm
to significant governmental or privacy interests," Haddix
v. Burris, 2014 WL 6983287, at *3 (N.D. Cal.) (citing Kelly, 114
F.R.D. at 670).

1 Plaintiffs have no interest in correctional officers' names;
2 rather, they need some consistent way of identifying them for
3 Armstrong accountability purposes. Still, because the modified
4 protective order would limit production to the Court (and its
5 expert and staff) and the attorneys (and their experts and staffs)
6 for use in this litigation, the protective order protects against
7 improper use of the information or its improper dissemination in
8 the prison system.

9 Defendants argue that replacing correctional officer names
10 with unique identifiers in addition to other protective order
11 provisions would be unnecessary and bring significant costs.
12 Defendants explain that they would need the assistance of a third
13 party vendor to complete this process. They add that they are
14 producing material that includes handwriting and audio files,
15 increasing the time needed for redaction. Declaration of Sean
16 Cotulla ¶¶ 5-6.⁴ Defendants initially estimated that this process
17 would require an additional 200 hours and between \$10,137 and
18 \$12,340.⁵

20 ⁴ For audio files, Defendants would need to redact names in
21 audio recordings and replace them with unique identifiers or
22 transcribe audio and complete the redaction and replacement in the
23 transcripts. See Declaration of Sean Cotulla ¶¶ 5-7.

24 ⁵ The CCPOA asserts that these costs are minimal in
25 comparison with CDCR's overall budget, but that assertion does not
26 address the cost of redaction when considered against the minimal
27 benefit to correctional officers, as discussed above. Also, to
28 the extent the CCPOA compares delays in completing this task with
the duration of this litigation, it does not address the goal of
providing information to Plaintiffs in a timely and efficient
manner.

1 In sum, the CCPOA has not shown good cause to require
2 Defendants to replace correctional officer names with unique
3 identifiers in addition to the provisions of the protective order
4 to which Plaintiffs and Defendants agree.

5 This conclusion is not affected by the Court's prior orders
6 regarding different protective orders. Previously, the Court
7 ordered Defendants to replace employee names with unique
8 identifiers when producing to Plaintiffs a spreadsheet tracking
9 certain types of allegations against staff, written reports of
10 investigations of employee non-compliance or determinations of
11 whether to initiate disciplinary proceedings against employees.
12 See Docket No. 2180, August 2012 Order at 21-22. The Court also
13 ordered the parties to negotiate a protective order to protect
14 Defendants' employees' rights. See id. at 24. Recently, the
15 Court permitted the California Office of the Inspector General to
16 redact employee names and replace them with unique identifiers.
17 See Docket No. 2624, June 22, 2016 Order. In those instances, the
18 agencies did not explain that they were producing audio and
19 handwritten materials and the costs of replacing names with unique
20 identifiers. The Office of the Inspector General did not oppose
21 the use of unique identifiers in place of employee names.
22 Defendants' new arguments about the costs of such a process for
23 the material it seeks to produce under the June 6, 2016 protective
24 order persuade the Court.

25 c. Providing Notice to Non-parties of Production and
26 Copies of Documents Produced

27 The CCPOA seeks to include a paragraph from this Court's
28 model protective order for litigation involving highly sensitive

1 confidential information that would require notice to a non-party
2 and an opportunity to object or seek a protective order in the
3 event that non-party's confidential information is to be produced
4 in this litigation. Plaintiffs argue that "as a practical matter,
5 reviewing every record to identify which officers are involved
6 would be highly time consuming for CDCR and would cause undue
7 delays in the document production." Plaintiffs' Opposition at 9.
8 Plaintiffs also explain that there already is a protective order
9 in place and, through this motion, the CCPOA has objected to the
10 terms of production to Plaintiffs; no further objections by
11 individual correctional officers will be necessary. Defendants,
12 however, do not object to incorporating a notice procedure if a
13 non-party's confidential information is to be produced.

14 The Court will not order that the parties incorporate this
15 notice provision with the other modifications addressed above. It
16 appears that Defendants already have provided some form of notice
17 to correctional officers when producing their information. See
18 Declaration of Brent S. Colasurdo, Ex. A, "NOTICE OF PRODUCTION OF
19 EMPLOYEE INFORMATION" ("CDCR is providing notice that you were
20 identified as a subject in case number [redacted]. Therefore, the
21 above-referenced documents will be produced pursuant to Judge
22 Wilken's order."). Further, the Court agrees with Plaintiffs that
23 individualized notice and opportunity to object would delay
24 discovery and duplicate the CCPOA's motion. Accordingly, the
25 Court declines to order that the parties incorporate this notice
26 provision in their protective order.

27 Second, the CCPOA seeks a provision that would allow
28 correctional officers to receive copies of any confidential

1 records CDCR produces in this action.⁶ Defendants and Plaintiffs,
2 however, object. Defendants seek to keep the records confidential
3 in this action and argue that the CCPOA seeks to use this case to
4 gain access to documents that might not otherwise be available to
5 correctional officers in ongoing investigations. The CCPOA and
6 Defendants disagree as to whether correctional officers may access
7 certain materials upon request to Defendants. Compare CCPOA Reply
8 at 9-10 (citing California Peace Officers' Bill of Rights and CDCR
9 Operations Manual) with Defendants' Response at 7-8 (citing CDCR
10 Operations Manual). The Court need not resolve that issue for
11 purposes of this motion, however. The CCPOA does not explain how
12 producing the documents to it could prevent unauthorized
13 disclosure or protect officers' rights in a way the protective
14 order's other provisions do not. Accordingly, the Court declines
15 to require that Defendants produce documents subject to this
16 protective order to the CCPOA when producing them to Plaintiffs.

17 d. Scope of Defendants' Production

18 The CCPOA argues that Plaintiffs and Defendants' protective
19 order would result in Defendants producing material not relevant
20 to Armstrong and requests that the Court narrow the scope of
21 Defendants' production. See Fed. R. Civ. P. 26(b)(2)(C)(iii).
22 The CCPOA also argues that Defendants' production of irrelevant
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24 ⁶ In its reply, the CCPOA alternatively indicates that it "is
25 amenable to a provision requiring [that] the documents be produced
26 to [it], under the agreed upon requirement that documents be
27 stamped 'HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY' and be made
28 available only to CCPOA attorneys who are signatories to the
protective order." CCPOA Reply at 10.

1 information will put private employee information at risk of
2 accidental release.

3 The Court sees no basis to prevent Defendants from providing
4 information they agreed to provide to ensure that they are in
5 compliance with Armstrong and this Court's prior orders.

6 III. Conclusion

7 For the reasons above, the CCPOA's motion is GRANTED to the
8 extent the CCPOA seeks leave to intervene to modify the June 6,
9 2016 protective order, and it is GRANTED IN PART and DENIED IN
10 PART to the extent it seeks a Court order modifying that
11 protective order.

12 The protective order will be modified as follows:
13 Paragraph number 13 on page 5 will be renumbered <18.> and the
14 following provisions will be added after Line 21 on page 4:

15 13. Confidential Information must be stored and maintained
16 at a location and in a secure manner that ensures that access is
17 limited to the persons authorized under this Order. Any
18 electronic confidential information must be stored in password-
19 protected form.

20 14.1 Except as otherwise provided in this Order, or as
21 otherwise stipulated or ordered, disclosure or discovery material
22 that qualifies for protection under this order must be clearly so
23 designated before the material is disclosed or produced.

24 Designation in conformity with this order requires:

25 (a) for information in documentary form (e.g., paper or
26 electronic documents), that the producing party affix the legend
27 "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" and "Armstrong v.
28 Brown (94-cv-02307-CW)" to each page that contains Confidential

1 Information.

2 A party or non-party that makes original documents or
3 materials available for inspection need not designate them for
4 protection until after the inspecting party has indicated which
5 material it would like copied and produced. During the inspection
6 and before the designation, all of the material made available for
7 inspection shall be deemed "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES
8 ONLY." After the inspecting party has identified the documents it
9 wants copied and produced, the producing party must determine
10 which documents, or portions thereof, qualify for protection under
11 this Order. Then, before producing the specified documents, the
12 Producing Party must affix the appropriate legend to each page
13 that contains Confidential Information.

14 (b) for information produced in some form other than
15 documentary and for any other tangible items, that the producing
16 party affix in a prominent place on the exterior of the container
17 or containers in which the information or item is stored the
18 legend "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" and "Armstrong
19 v. Brown (94-cv-02307-CW)."

20 14.2 If timely corrected, an inadvertent failure to
21 designate qualified information or items does not, standing alone,
22 waive the designating party's right to secure protection under
23 this order for such material. Upon timely correction of a
24 designation, the receiving party must make reasonable efforts to
25 assure that the material is treated in accordance with the
26 provisions of this order.

27 15. If a party is served with a subpoena or a court order
28 issued in other litigation that compels disclosure of any

1 Confidential Information that party must:

2 (a) promptly notify in writing the designating party.
3 Such notification shall include a copy of the subpoena or court
4 order;

5 (b) promptly notify in writing the party who caused the
6 subpoena or order to issue in the other litigation that some or
7 all of the material covered by the subpoena or order is subject to
8 this protective order. Such notification shall include a copy of
9 this stipulated protective order; and

10 (c) cooperate with respect to all reasonable procedures
11 sought to be pursued by the designating party whose confidential
12 information may be affected.

13 If the designating party timely seeks a protective order, the
14 party served with the subpoena or court order shall not produce
15 any Confidential Information before a determination by the court
16 from which the subpoena or order issued, unless the party has
17 obtained the designating party's permission. The designating
18 party shall bear the burden and expense of seeking protection in
19 that court of its confidential material - and nothing in these
20 provisions should be construed as authorizing or encouraging a
21 receiving party in this action to disobey a lawful directive from
22 another court.

23 16. Within 60 days after the final disposition of this
24 action, as defined in the subsequent paragraph, each receiving
25 party must return all Confidential Information to the producing
26 party or destroy such material. As used in this subdivision, "all
27 Confidential Information" includes all copies, abstracts,
28 compilations, summaries, and any other format reproducing or

1 capturing any of the Confidential Information. Whether the
2 Confidential Information is returned or destroyed, the receiving
3 party must submit a written certification to the producing party
4 (and, if not the same person or entity, to the designating party)
5 by the 60-day deadline that (1) identifies (by category, where
6 appropriate) all the Confidential Information that was returned or
7 destroyed and (2) affirms that the receiving party has not
8 retained any copies, abstracts, compilations, summaries or any
9 other format reproducing or capturing any of the Confidential
10 Information. Notwithstanding this provision, counsel are entitled
11 to retain an archival copy of all pleadings, motion papers, trial,
12 deposition, and hearing transcripts, legal memoranda,
13 correspondence, deposition and trial exhibits, expert reports,
14 attorney work product, and consultant and expert work product,
15 even if such materials contain protected material. Any such
16 archival copies that contain or constitute protected material
17 remain subject to this protective order as set forth below.

18 Even after final disposition of this litigation, the
19 confidentiality obligations imposed by this Order shall remain in
20 effect until a designating party agrees otherwise in writing or a
21 court order otherwise directs. Final disposition shall be
22 determined by order of the Court.

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17. Unless otherwise ordered by the Court, a party that seeks to disclose to an expert any Confidential Information under this protective order first must provide written notice to the designating party that identifies the expert to whom that disclosure would be made.

IT IS SO ORDERED.

Dated: August 16, 2016



CLAUDIA WILKEN
United States District Judge