

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DONALD DOWELL,

vs.

W.T. GRIFFIN, et al.,

Plaintiff,

Defendant.

CASE NO. 09cv2576-DMS (MDD)

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF’S
MOTION FOR DISCOVERY OF
PERSONNEL FILES
[DOC. NO. 46]

I. PROCEDURAL HISTORY

On November 10, 2009, Donald Dowell (“Plaintiff”), a state prisoner proceeding *pro se* and *in forma pauperis*, filed a civil rights lawsuit under 42 U.S.C. § 1983 asserting that his Fourth and Fourteenth Amendment Constitutional rights were violated during a search of his person and residence. (Doc. No. 1). On April 25, 2011, Plaintiff filed a Motion for Discovery of Police or Custodial Officer Conduct (*Pitchess* Motion) To Defendants Et. Al...[sic]. (Doc. No. 46). On May 18, 2011, this Court issued an Order requiring Defendants’ response to Plaintiff’s Motion. (Doc. No. 47). Defendants filed their response on May 31, 2011. (Doc. No. 51). On July 18, 2011, this Court issued an order granting in part and denying in part Plaintiff’s Motion for Discovery. (Doc. No. 63). The order required production of a privilege log and a copy of personnel records for *in camera* review. Id. Further, the order limited discovery to the personnel records of Defendants Griffin, Botkin, Zdunich, and Johnson, and to information relating to

1 alleged Fourth and Fourteenth Amendment violations in the context of unlawful search and
2 seizure. Id. On July 26, 2011, Defendants lodged with chambers a privilege log and the
3 documents at issue. The Court has completed its *in camera* review.

4 **II. STANDARD OF REVIEW**

5 Assertions of privilege in federal question cases are governed by federal common law.
6 Fed R. Evid. 501.¹ In Defendants' privilege log they assert the following two privileges: the
7 official information privilege, and privacy rights granted by the California Constitution.

8 **A. Official Information Privilege**

9 Federal common law recognizes a qualified privilege for official information. Sanchez v.
10 City of Santa Ana, 936 F.2d 1027, 1033 (9th Cir. 1990). For the purposes of the privilege,
11 government personnel files are considered official information. Id. In determining when a
12 personnel file falls within the official information privilege, the Ninth Circuit has adopted a
13 balancing test. Id. at 1033-34. "[C]ourts must weigh the potential benefits of disclosure against
14 the potential disadvantages. If the latter is greater, the privilege bars discovery." Id. Some sister
15 courts have stated that the proper operation of the balancing test requires a "balancing approach
16 that is moderately pre-weighted in favor of disclosure." See Kelly v. City of San Jose, 114 F.R.D.
17 653, 661 (N.D.Cal.1987).²

18
19 ¹Plaintiff's only cause of action, violation of the Fourth and Fourteenth Amendments
20 protection against unlawful search and seizure, is alleged as a violation of 42 U.S.C. § 1983. (See
21 Doc. No. 6 at 5-15). Although Defendants "recognize that federal privilege law, not state law, governs
22 this issue," they proceed to cite almost exclusively to state law. (Doc. No. 52). Although this Court
recognizes that "the policy decisions of the States bear on the question whether federal courts should
recognize a new privilege or amend the coverage of an existing one," it is not bound by policy
decisions of any particular State. Jaffee v. Redmond, 518 U.S. 1, 13 (1996).

23
24 ²Kelly reasons that "the public interests in the categories favoring disclosure (the policies
25 underlying our civil rights laws, public confidence in the court system, and doing justice in individual
26 cases) clearly outweigh the public interests in favor of secrecy (e.g., not compromising procedures for
27 self-discipline within police forces or the privacy rights of officers or citizen complainants)"; "there
28 has been substantial exaggeration of the size of the harm that limited disclosure might do to
concededly legitimate law enforcement interests;" and "in the relatively rare case where there is a very
real threat to obviously important law enforcement interests (as there could be, for example, if a
plaintiff were seeking the names of confidential informants in on-going criminal investigations, or
wanted to learn operational plans for imminent police activities), the moderate pre-weighting in favor
of disclosure will not disable courts from protecting those law enforcement interests." Kelly, 114
F.R.D. at 661-62.

1 In order to trigger the Court's balancing of interests, the party opposing disclosure must
2 make a substantial threshold showing. Soto v. City of Concord, 162 F.R.D. 603, 613 (N.D. Cal.
3 1995). The party opposing disclosure "must submit a declaration or affidavit from a responsible
4 official with personal knowledge of the matters to be attested to in the affidavit." Id. Specifically,
5 the party must submit a declaration from a responsible official with personal knowledge of the
6 police department's internal investigatory system. See id.

7 Once the party asserting the privilege meets the threshold burden, the court will review the
8 documents in light of the balancing test articulated by the court in Kelly, which includes, but is not
9 limited to: (1) The extent to which disclosure will thwart the governmental process by
10 discouraging citizens from giving the government information; (2) The impact of having their
11 identities disclosed upon persons who have given information; (3) The degree to which
12 government self-evaluation and consequent program improvement will be chilled by disclosure;
13 (4) Whether the information sought is factual data or evaluative summary; (5) Whether the party
14 seeking discovery is an actual or potential defendant in any criminal proceeding either pending or
15 reasonably likely to follow from the incident in question; (6) Whether the police investigation has
16 been completed; (7) Whether any interdepartmental disciplinary proceedings have arisen or may
17 arise from the investigation; (8) Whether the plaintiff's suit is not frivolous and brought in good
18 faith; (9) Whether the information sought is available from discovery or through other sources; and,
19 (10) The importance of the information sought to the plaintiff's case. See Kelly, 114 F.R.D. at 663
20 (citing Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973.))

21 Here, Defendants have not submitted a declaration or affidavit with their privilege log.
22 Without information identifying the governmental privacy interests at issue, and the risk of harm
23 that would come to such interests were disclosure to be ordered, the Defendants have not met
24 their initial burden and the Court need not conduct the second part of the analysis. See Ramirez v.
25 Los Angeles, 231 F.R.D. 407, 410 (C.D. Cal. 2005.) (*in camera* review not necessary where
26 defendant failed to make initial showing that official information privilege applies). However,
27 despite Defendants' failure to make this threshold showing, the Court has performed an *in camera*
28 review of the requested documents. Application of the official information privilege to the

1 disputed documents will be discussed below.

2 **B. Privacy Rights**

3 Federal Courts ordinarily recognize a constitutionally-based right of privacy that can be
4 raised in response to discovery requests. See Breed v. United States Dist. Ct. for Northern District,
5 542 F.2d 1114, 1116 (9th Cir.1976) (balancing the invasion of minor's privacy rights against the
6 court's need for ward files); Johnson by Johnson v. Thompson, 971 F.2d 1487, 1497 (10th
7 Cir.1992), *cert. denied* 507 U.S. 910 (1993) (denying discovery of names of participants in a
8 medical study due to privacy interests of the individual participants); Cook v. Yellow Freight Sys.,
9 Inc., 132 F.R.D. 548, 550-51 (E.D.Cal.1990) (balancing targeted individual's right of privacy
10 against public's need for discovery in employment discrimination case). The party whose privacy
11 is affected may object or seek a protective order. Laxalt v. McClatchy, 809 F.2d 885, 889 (D.C.
12 Cir. 1987). Resolution of a privacy objection or request for protective order requires a balancing
13 of the need for the particular information against the privacy right asserted. See Cook, 132 F.R.D.
14 at 550-51.

15 Regarding the disclosure of police files, courts have recognized that privacy rights are not
16 inconsequential. Kelly, 114 F.R.D. at 660. However, these privacy rights have to be considered in
17 light of the substantial weight afforded plaintiffs in civil rights cases against police departments.
18 Id. Current case law suggests the privacy interests police officers have in their personnel files do
19 not outweigh plaintiff's interests in civil rights cases. See Soto, 162 F.R.D. at 617; Hampton v.
20 City of San Diego, 147 F.R.D. 227, 230 (S.D.Cal. 1993); Miller v. Pancucci, 141 F.R.D. 292, 301
21 (C.D.Cal. 1992). In addition, Defendants' privacy concerns may be sufficiently protected with the
22 use of a "tightly drawn" protective order which specifies that only the Plaintiff, his counsel, and
23 his experts may have access to the material, and that copies of such material will be returned to
24 Defendants at the conclusion of the case. See Kelly, 114 F.R.D. at 662, 666, 671; Hampton, 147
25 F.R.D. at 231; Miller, 141 F.R.D. at 301.

26 **III. DISCUSSION**

27 Federal Rule of Civil Procedure 26(b)(1) allows discovery regarding any matter that is (1)
28 nonprivileged, and (2) relevant to any party's claim or defense. Before addressing the privilege

1 issue, the Court must address relevance. All documents produced by Defendants on July 26, 2011,
2 except TG-IA-2008-105-0001-256, a Citizen Complaint relating to unlawful search and seizure,
3 are irrelevant to Plaintiff's cause of action and need not be produced. The remaining document
4 must also be found nonprivileged before it needs to be produced.

5 **A. Official Information Privilege**

6 Defendants' make a general claim that all documents provided to the Court should be
7 protected by the official information privilege. As noted above, Defendants did not provide the
8 Court with an affidavit or declaration accompanying their privilege log indicating the specific
9 privileges alleged for any particular document. Further, they do not provide any specific reasons
10 why any particular document should be protected, nor do they indicate what government interests
11 will be affected by the disclosure of any particular document. Despite this lack of guidance, the
12 Court will construe Defendants' assertions to be that important government interests are threatened
13 by disclosure of each document, even if that document might bear some relevance to Plaintiff's
14 claims.

15 Upon consideration of the remaining document in light of the Kelly balancing test, the
16 Court finds that TG-IA-2008-105-0001-256 is not protected by the official information privilege.
17 See Kelly, 114 F.R.D. at 663. The reasoning behind this determination follows below.

18 The first Kelly factor is the extent to which disclosure will thwart the governmental process
19 by discouraging citizens from giving the government information. The Court is not persuaded that
20 this factor weighs in favor of either party. Id. The Court is aware that the document is an internal
21 affairs investigative report, and as such its disclosure would risk compromising the privacy of the
22 citizen complaining, officers named in the complaint, and potential witnesses. However, the Court
23 is not convinced that the privacy risk would dissuade potential witnesses from providing accurate
24 information. Rather, the potential for disclosure likely would have the effect, if any, to encourage
25 the complainant and any witnesses to tell the truth, as they may later be called to testify in a civil
26 action. Further, the officers named in the complaint would likewise be encouraged to tell the truth
27 because officers are generally indemnified from liability in civil actions, and the greater
28 disincentive to veracity is the possibility of discipline or termination. See Estate of Bui v. City of

1 Westminster Police Dept., 244 F.R.D. 591, 596 (C.D.Cal 2007).

2 The second factor, the impact of having their identities disclosed upon persons who have
3 given information, is not relevant in this case. See Kelly, 114 F.R.D. at 663. The identities of the
4 officers in question are known, and the identity of anyone not a party to this case potentially
5 disclosed in the document can be withheld by a protective order. The third factor, the degree to
6 which government self-evaluation and consequent program improvement will be chilled by
7 disclosure, favors applying the privilege. Id. The Court notes that the government may be less
8 inclined to self-evaluate if it knows the information gathered can ultimately be used against it in a
9 civil action. However, this is only one of the factors to be evaluated along with other relevant
10 considerations. In fact, the performance and disciplinary reviews are not so much governmental
11 self-evaluation as they are evaluation of a single officer's conduct. See Bui, 244 F.R.D. at 596
12 (chilling effect on government evaluation not enough to overcome production).

13 The fourth factor, whether the information sought is factual data or evaluative summary, is
14 not instructive here. See Kelly, 114 F.R.D. at 663. While the report includes opinions,
15 conclusions, and evaluative summaries, it is still based on factual investigations. As articulated in
16 Kelly, there is no reason to doubt the veracity of the investigating officers any more than there is to
17 doubt the veracity of the witnesses. Id. at 663-670. The fifth factor, whether the party seeking
18 discovery is an actual, or potential, defendant in any criminal proceeding either pending or
19 reasonably likely to follow from the incident in question, is not relevant in this case. See id. at
20 663. The Plaintiff was prosecuted following the incident from which this suit arises.³ However,
21 that is not the subject of the disputed document. While Plaintiff is named in the report as a witness
22 he was not the subject of the investigation, nor was he prosecuted for the acts which were the
23 subject of the investigation.

24 The sixth factor, whether the police investigation has been completed, weighs toward
25 disclosure. Id. The investigation was completed. The seventh factor, whether any
26 interdepartmental disciplinary proceedings have arisen or may arise from the investigation, is not

27
28 ³The case was dismissed due to the Fourth Amendment violation alleged in the instant suit.
(Doc. No. 52).

1 relevant to this case. Id. The eighth factor, whether the plaintiff’s suit is not frivolous and brought
2 in good faith, weighs in favor of disclosure. Id. Another court has ruled in favor of Plaintiff’s
3 claim that his Fourth Amendment rights were violated. This Court is willing to find that this is
4 sufficient reason to believe that the instant suit was brought in good faith.

5 The ninth and tenth factors weigh most heavily in favor of disclosure. The information
6 sought would not be available from any other source. Id. Further, the information sought may be
7 important to Plaintiff’s case. Id. Information contained in personnel files may be relevant on the
8 issues of credibility and the motive of the officers. Hampton, 147 F.R.D. at 229. “Further,
9 information concerning other instances of misconduct may also be relevant on the issue of punitive
10 damages, in that the information may lead to evidence of a continuing course of conduct reflecting
11 malicious intent.” Id.

12 In summary, four factors weigh in favor of disclosure and only one favors application of
13 the privilege, while five factors are either not instructive or irrelevant. The fear that government
14 self-evaluation will be chilled by disclosure is not sufficient to overcome the broad scope of
15 discovery allowed in federal court. See Kelly, 114 F.R.D. at 663; see also Oppenheimer Fund, Inc.
16 v. Sanders, 437 U.S. 340, 351 (1978).

17 Accordingly, the Court concludes the official information privilege does not preclude
18 discovery of the requested document. (Document TG-IA-2008-105-0001-256).

19 **B. Privacy Rights**

20 Defendants also claim that all documents produced should be protected by constitutional
21 privacy rights held by officers. As one would expect, the privilege log produced with Officer
22 Griffin’s personnel file asserts his privacy rights. In contrast, the privilege logs produced with the
23 personnel files of Defendants Botkin, Zdunich, and Johnson each generally assert the privacy
24 rights of Officer Adams. As stated above, Defendants do not provide any specificity as to the
25 manner in which any document is protected by either privilege they generally assert.⁴ Without
26 further guidance, the Court will construe the privileges asserted to be those of the Officer who is

27
28 ⁴It is difficult to understand how disclosure of Officer Botkin’s college transcript would violate Officer Adams privacy rights.

1 the subject of each personnel file.

2 In the instant case, Plaintiff claims that his Fourth and Fourteenth Amendment right to be
3 free from unlawful search and seizure was violated. (See Doc. No. 1). As discussed above, the
4 majority of Defendants' personnel files are irrelevant to Plaintiff's claim. See Fed. R. Civ. P.
5 26(b)(1). However, a Citizen Complaint, designated TG-IA-2008-105-0001-256, may have some
6 relevance for Plaintiff. See Hampton, 147 F.R.D. at 229 (indicating that previous officer conduct
7 may affect the availability of punitive damages).

8 Regarding the disclosure of police files, courts have recognized that privacy rights are not
9 inconsequential. Kelly, 114 F.R.D. at 660. However, these privacy rights have to be considered in
10 light of the substantial weight afforded plaintiffs in civil rights cases against police departments.
11 Id. As noted in Kelly, the need for disclosure in civil rights cases is especially strong because
12 "public confidence in our system of justice is of comparable significance and is threatened when
13 relevant evidence is not made available and independent of that public perception of the system
14 there are few things more important than doing justice in fact in individual cases." Id. at 661.
15 Because the Court finds that this document may be relevant and important to Plaintiff's claim, and
16 public policy considerations favor disclosure, privacy concerns are not a bar to disclosure.

17 Accordingly, the Court concludes that privacy considerations, as well as the official
18 information privilege, do not preclude discovery of the requested document and orders that the
19 requested document be produced. (Document TG-IA-2008-105-0001-256). However, Plaintiff
20 has no need of sensitive personal information that may be found in the document. Thus, any
21 phone number, address, date of birth, social security number, or credit card number should be
22 redacted. Also the name, arrest or detention record, or photograph of anyone not a party to this
23 suit should be omitted or redacted. Further, only the Plaintiff, his counsel, and his experts may
24 have access to the material, and any copies will be returned to Defendants at the conclusion of the
25 case.

26 ////

27 ////

28 ////

1 ////

2

3 IV. CONCLUSION

4 In accordance with the Court's findings expressed above, Defendants are ordered to
5 produce the properly redacted document, designated TG-IA-2008-105-0001-256, pursuant to the
6 protective order in place in the above entitled matter no later than five (5) court days following the
7 date of this Order.

8 **IT IS SO ORDERED.**

9 DATED: August 17, 2011

10

11


Hon. Mitchell D. Dembin
U.S. Magistrate Judge

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28